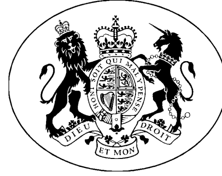

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Oliver	**- V -**	Network Rail Infrastructure Ltd

Heard at: London Central (by CVP) **On**: 26 September – 6 October 2023

Before: Employment Judge Baty
Mrs J Griffiths
Mr S Hearn

Representation:

For the Claimant: In person
For the Respondent: Ms A Ahmad (counsel)

RESERVED JUDGMENT

1. The claimant's complaints of protected interest disclosure detriment pursuant to section 47B Employment Rights Act 1996 ("ERA") where the act or omission relied on is said to have taken place prior to 27 February 2022 were presented out of time and it was reasonably practicable to have presented those complaints in time. The tribunal does not therefore have jurisdiction to hear those complaints and they are struck out. If the tribunal had had jurisdiction to hear those complaints, they would all have failed.

2. The claimant's remaining complaint of protected interest disclosure detriment pursuant to section 47B ERA (where the act or omission relied on is said to have taken place on or after 27 February 2022) fails.

REASONS

The complaints

1. By a claim form presented to the employment tribunal on 6 August 2022, the claimant brought various complaints, including complaints of protected interest disclosure detriment pursuant to section 47B ERA. The respondent defended the complaints. The claimant remains employed by the respondent.

2. At a preliminary hearing on 4 November 2022, Employment Judge Khan discussed the complaints with the parties and identified the issues. In summary, it was confirmed that the only complaints which the claimant was bringing were complaints of protected interest disclosure detriment pursuant to section 47B ERA.

3. A list of issues was agreed between EJ Khan and the parties and incorporated into his note of that preliminary hearing.

4. At the preliminary hearing, EJ Khan listed this final hearing and made orders in relation to preparation for this hearing. The final hearing was listed to deal with issues of liability and, if appropriate, remedy.

5. The final hearing was also listed to take place by video and it did indeed take place by video (Cloud Video Platform ("CVP")).

The issues

6. At the preliminary hearing, EJ Khan also made orders for the claimant to provide a limited number of additional details in relation to certain of the issues. This was duly done.

7. At the start of this hearing, the respondent therefore produced a further version of the list of issues which incorporated these details into it (plus some helpful cross-references to the relevant bundle pages). The judge asked the parties whether there was any change to the list of issues required and both parties confirmed that these remained the issues for the hearing, including the changes set out in the respondent's document which incorporated the additional information provided by the claimant. Those issues were therefore agreed and the judge confirmed that these were the issues which the tribunal would determine and no others.

8. The judge reiterated this, where necessary, on other occasions later in the hearing. He also reminded the parties from time to time, particularly when the claimant appeared to be making allegations of general wrongdoing not contained in the list of issues, that the tribunal did not have jurisdiction to hear allegations of general bad or unreasonable behaviour in the workplace; that in relation to this claim it had jurisdiction only to hear allegations of things that were said to be detriments because of making protected disclosure(s); and that, furthermore, that

was limited to the allegations of detriment because of making protected disclosure(s) set out in the agreed list of issues.

9. A copy of the agreed list of issues is set out at the Annex to these reasons.

10. For the claimant's benefit, the judge also gave a brief summary at the start of the hearing of the law in relation to protected disclosure detriment complaints and time limits in relation to such complaints.

Respondent's concession and retraction

11. In her opening note and at the start of the hearing, Ms Ahmad conceded that the disclosures at paragraphs 2.1(a) and (b) of the list of issues (which are said to be disclosures made by the claimant on 14 and 15 May 2021 respectively) were protected disclosures. She said that the remaining four alleged protected disclosures were, however, repetitions and did not comply with paragraph 2.2(b) of the list of issues (in other words, the respondent maintained that they were not protected disclosures because they did not meet the "public interest" part of the definition of protected disclosure).

12. However, on the morning of the fifth day of the hearing (Monday), after the evidence of the claimant and his witnesses was completed, Ms Ahmad addressed the tribunal again on this issue. She said that the concession was withdrawn because of the evidence given by the claimant himself. In short, the respondent had made the concession in particular because it appeared from an email at page 165 of the bundle (written by the claimant at 13.58 on 15 May 2021) that the claimant at that point had a reasonable belief that *"the health and safety of any individual has been, is being or is likely to be endangered"*; however, in the course of being cross-examined about why, if the claimant had that belief, he did not shut the relevant rail track to trains immediately, the claimant maintained that he did not at that point have in his possession the information which caused him to realise that the track was in a dangerous state such that it should be shut to trains. On the basis of that evidence, therefore, it was questionable whether or not the claimant had at that point any belief at all that the health and safety of individuals was likely to be endangered, let alone a reasonable belief that that was the case.

13. The judge took some time to explain this for the claimant's benefit, acknowledging that the law relating to the definition of protected disclosures was complex and technical. He explained that, as there appeared to be a conflict between what was set out in the claimant's email of 15 May 2021 and what he said in cross-examination, it was possible that the tribunal when making its findings of fact might find that what was set out in the email was the case or might find that what the claimant said in his evidence was the case. If, however, it was the latter, it was unlikely that the first two alleged protected disclosures could indeed be protected disclosures, on the grounds that the claimant did not at the time they were allegedly made have the requisite belief that the health and safety of any individual had been, was being or was likely to be endangered. If that was the case, it was therefore possible that the tribunal might make findings which

were incompatible with the concession made by the respondent that the first two alleged protected disclosures were indeed protected disclosures. That was why it was appropriate that the respondent's original concession should be retracted.

The evidence

14. Witness evidence was heard from the following:

For the claimant:

The claimant himself; and

Mr Wesley Caten, a manager at the respondent;

Mr Jason Ridgley, who is an employee of the respondent and was at the times material to this claim employed as a Section Supervisor at the respondent's Camden Depot;

Mr Daniel Oliver, the claimant's brother; and

Mr Tony Bowers, an RMT member who at times represented the claimant.

For the respondent:

Mr Jamie Lovegrove, who is employed by the respondent and who at the times relevant to this claim was a Section Supervisor at the respondent's Camden Depot;

Mr James Moore, who is employed by the respondent and was at the times relevant to this claim employed as Track Maintenance Engineer for Camden;

Mr Chris O'Connell, who is employed by the respondent and was at the times relevant to this claim employed as Infrastructure Maintenance Engineer; and

Mr Stephen O'Connell, who is employed by the respondent and was at the times relevant to this claim employed as Infrastructure and Maintenance Delivery Manager. Mr Stephen O'Connell is Mr Chris O'Connell's brother.

15. In addition, the claimant produced four further statements which he stated were from Amy Oliver, the claimant's partner; Jacqueline Rendell, the claimant's mother in law; Daniel Stuart, an employee of the respondent; and Tom Winnard, a manager at the respondent. None of them attended the tribunal to give evidence and the tribunal informed the claimant that it may therefore not be able to give weight or as much weight to their evidence, as they were not present at the tribunal to confirm the truth of their evidence and be cross-examined on it. By the time the claimant confirmed that these individuals would not be attending the tribunal to give evidence, the tribunal had already read the witness statements in relation to them.

16. An agreed bundle numbered pages 1-1030 was produced to the tribunal.

17. In addition, the respondent produced the updated list of issues already referred to, a cast list and chronology (which was not agreed but not disputed by the claimant) and, from Ms Ahmad, a brief opening note.

18. The tribunal read in advance the witness statements (including the four statements relating to those witnesses of the claimant who did not in the end attend the tribunal) and any documents in the bundle to which they referred, together with Ms Ahmad's opening note.

Health issues

The claimant

Covid 19

19. Prior to the start of the hearing, the tribunal clerk informed the tribunal that the claimant had informed her that he had just been diagnosed with Covid 19.

20. When the hearing commenced, the judge asked the claimant about this. The claimant confirmed that he had just been diagnosed with Covid 19. The judge said that the tribunal was conscious of course that the extent to which people had symptoms or serious symptoms as a result of Covid 19 varied greatly and asked whether the claimant felt that he was well enough to continue and well enough properly to participate in the proceedings.

21. The claimant said that he felt well enough to continue. He said that he coughed from time to time and apologised if in due course he needed to do so. The judge said that that was obviously quite all right. The judge also explained that, after any preliminary matters had been dealt with, the tribunal would adjourn to read the witness statements and documents and that the hearing would not continue until the middle of the next day, which may be of assistance to the claimant in terms of additional recovery time.

22. The judge also explained for the benefit of the claimant how a typical tribunal day would run (starting at 10 AM, finishing at roughly 4:30 PM, with an hour for lunch from around 1 PM and short comfort breaks mid-morning and, if necessary, mid-afternoon) but said that, if the claimant felt unwell and either felt he needed to adjourn or needed a break, he should say so.

23. When the hearing reconvened on the afternoon of the second day after the tribunal had done its reading, the judge again asked the claimant how he felt health wise. The claimant said that he was feeling much better in comparison with the day before and was fine to continue with the hearing.

24. The judge enquired again at the start of the third day of the hearing and the claimant again said he was much better.

25. Whilst the claimant did cough occasionally, he did not appear to be discomforted to any significant degree and we had no concerns that he could not properly participate in the hearing or properly give his evidence.

Stress

26. By the morning of the fifth day of the hearing, which was a Monday, all of the claimant's witnesses who were due to attend the tribunal bar one had given evidence and the tribunal was due to hear from that remaining witness, Mr Bowers, at the start of that day. It was not anticipated that Mr Bowers' evidence would take very long. After that, the respondent's evidence would commence. Before the hearing commenced that day, the claimant informed the tribunal's clerk that he was feeling stressed and may not be well enough to cross-examine the respondent's witnesses that day; the clerk relayed this information to the tribunal.

27. At the start of the hearing, the judge asked the claimant about this. The claimant explained that he was feeling *"pretty stressed out"* and said that he had reflected to a large extent on the interchange that took place the previous Friday afternoon regarding the provenance of Mr Stuart's witness statement (which we refer to in detail below). He said that he did not feel capable of cross-examining the respondent's witnesses that day but would be able to do so the following day. Ms Ahmad did not object to an adjournment.

28. The claimant confirmed that it would be fine if Mr Bowers' evidence was heard that day with the hearing adjourning for the day after that. That was agreed with the tribunal. Mr Bowers duly gave his evidence, which took only half an hour, and the tribunal then adjourned for the rest of that day.

29. The hearing then continued at the beginning of the following day. The judge asked the claimant how he was. The claimant said that he was feeling much better and was ready to cross-examine the respondent's witnesses. He duly did so. The tribunal did not detect any problem with the claimant's ability to do so; indeed he carried out his cross-examination robustly and in a structured manner.

<u>Mr Stephen O'Connell</u>

30. Prior to Mr Stephen O'Connell his giving his evidence, Ms Ahmad informed the tribunal that he also had Covid 19 and would be giving his evidence from home.

31. When Mr O'Connell came to give his evidence, the judge enquired at one point as to whether he was fine to give his evidence and he confirmed that he was. There was nothing to suggest to the tribunal that Mr O'Connell could not properly give his evidence.

Management of the hearing

Claimant's witness order applications

32. The judge had noted whilst reading into the case that there had been some recent correspondence about whether the claimant might want to apply for witness orders in relation to certain individuals. At the start of the hearing, the judge asked the claimant about this.

33. The claimant identified that he would like to apply for witness orders in relation to 3 people, Mr DC, Mr RM and Ms MP. The judge explained for the claimant's benefit the circumstances in which a tribunal would make a witness order and noted that none of the three individuals were mentioned in the list of issues or were said to be either perpetrators of any of the alleged detriments or witnesses either to those alleged acts of detrimental treatment having taken place or to any of the alleged protected disclosures having taken place.

34. The claimant made some brief submissions about why he thought it might be useful to have the individuals as witnesses. The tribunal decided that it would adjourn any decision in relation to the witness orders until after it had done its pre-reading of the witness statements and of the documents; it would at that point be in a better position to judge whether any of the three individuals were likely to be able to give relevant or necessary evidence.

35. When the hearing reconvened on the afternoon of the second day, after the tribunal and done its pre-reading, the judge again asked the claimant whether he still sought to pursue witness orders for the three individuals. The claimant said that he no longer wished to do so.

36. The judge reassured the claimant that in any case, having done the pre-reading, the tribunal did not think that any of the three individuals were likely to be able to give anything other than background evidence; he said that the tribunal did not think that their presence would be necessary or that their absence would prejudice either party or impact upon the fair hearing the case.

The claimant's witnesses

37. As noted, eight witness statements were provided to the tribunal by the claimant as well as his own witness statement. The judge discussed with the claimant at the start of the hearing when his witnesses were available to attend. The claimant said that he had not thought about what day they should come on and was hoping for some direction from the judge in relation to this.

38. The judge therefore canvassed with Ms Ahmad, in the context of agreeing the timetable for the hearing referred to below, how much time she needed to cross-examine them. Ms Ahmad indicated that it was unlikely that she would need much more than a day for all eight witnesses and that she would have really very few questions for many of them. It was therefore proposed that six of those witnesses should give evidence on the fourth day of the hearing (Friday) with the other two giving their evidence on the fifth day of the hearing (Monday).

The claimant would be giving evidence first and Ms Ahmad indicated that she would probably need around a day and a half to cross-examine him, and it was agreed between the parties and the tribunal that, if the claimant's evidence ran into Friday, the tribunal would interpose the evidence of the other witnesses in between the claimant's evidence.

39. The judge was conscious both that those witnesses may need to get time off work to attend and that the claimant's ability to discuss arrangements with them would be curtailed once he started giving his own evidence because he would be on oath and not able to speak about the case. The judge therefore asked the claimant to liaise with his witnesses and confirm the position on availability when the hearing reconvened the following day. He also made clear to the claimant that the claimant would need to ensure that each of the witnesses had copies of the documents (including the bundle and witness statements) available to them for when they gave their evidence.

40. When the hearing did reconvene the following day, the claimant gave the following information about his proposed witnesses. He said that Mr Ridgley and Mr Caten could attend at 10 AM on Friday; Mr Daniel Oliver could attend at 2 PM on Friday; and Mr Bowers could attend at 10 AM on Monday. However, he said that Mr Winnard was off sick and so would not attend; Mr Stuart did not wish to attend and so would not be attending; and Ms Oliver and Ms Rendell did not want to attend but were happy for their statements to be used.

41. In short, four of the eight individuals in relation to whom statements had been provided by the claimant would not be attending. It was agreed that the four whom the claimant had confirmed would be attending would attend at the times referred to above.

Provenance of witness statements of the claimant's witnesses

42. At this point, Ms Ahmad said that the previous day, Mr Lovegrove had received a call from Mr Stuart; Mr Stuart had told him that he was not happy to give evidence at the tribunal and did not want to get involved; Mr Lovegrove had said that it was up to him whether he attended and noted that Mr Stuart had already provided a witness statement; and that Mr Stuart had then said *"what statement?"*. In the light of that, Ms Ahmad said that she thought that the tribunal ought to seek clarity from the claimant as to how the statements from his witnesses came into existence and that this would be relevant in terms of how much weight could be given to them.

43. The judge agreed and therefore asked the claimant about this.

44. The claimant explained that, in the light of the discussion with the tribunal on the morning of the previous day about when his witnesses should attend the tribunal, he had contacted Mr Stuart amongst others. (It is likely that that contact is what prompted Mr Stuart then to call Mr Lovegrove.)

45. The claimant initially said that Mr Stuart produced his own witness statement and that it was his words and that he, the claimant, did not interfere.

When asked by the judge, he said that it was done in the few weeks leading up to the final hearing. The judge then asked the claimant whether the witnesses typed their own statements. The claimant said that some wrote them, and some gave their statements through phone calls and texts to him and he then put them into writing. The judge then asked if, in these cases, the claimant had then sent the written statement to the witness in question for their approval. The claimant said yes he had and that they confirmed their approval to him. He went on to add that he thought Mr Stuart was fearful to come to the tribunal.

46. The judge then sought to get absolute clarity on what the claimant said happened in terms of how each individual statement was produced. The claimant’s account was as follows.

1. Regarding the statements for Mr Stuart and Mr Daniel Oliver, the claimant wrote those statements based on telephone conversations with the individuals; he then sent the statements to them and they approved the statements.

2. Mr Caten wrote his own statement.

3. Mr Bowers wrote his own statement (in manuscript, as it was set out in the witness statement bundle).

4. Ms Oliver and Ms Rendell wrote their own statements.

5. Mr Winnard had sent the claimant a text message and the claimant wrote his statement based on that message. The claimant thanked him for doing so. The claimant could not recall whether he sent the statement back to Mr Winnard for his approval but said that the statement was exactly what Mr Winnard wrote in his text message and that the claimant still had that text message.

6. Mr Ridgley wrote his own statement.

47. Ms Ahmad subsequently thanked the claimant for clarifying the process of how the witness statements came into existence. She noted that the claimant had said that Mr Stuart and Mr Daniel Oliver had provided details by telephone and asked if the claimant could disclose the confirmation that he had said that they had given confirming that they agreed with the contents of the statements which the claimant had written on their behalf. The claimant again reiterated that the statements were produced as a result of telephone conversations and said that, in the case of Mr Stuart, there were two telephone conversations, one of which happened at the time of the alleged incident in April 2022 in relation to which he gave evidence and one more recently. He said that he thought he had WhatsApp messages which would show confirmation, but that confirmation might have been given over the phone.

48. The judge therefore ordered the claimant to look for the relevant WhatsApp messages and, if he had them, to disclose them to the respondent as soon as possible (including any surrounding WhatsApp messages so as to give

the full context of what was being asked and what was being confirmed) and, if it turned out that there were no WhatsApp messages, to confirm this as soon as possible to the respondent and to confirm (if that was the case) that any confirmation regarding the relevant witness statements was by phone. The claimant said he would do this.

49. The claimant duly sent two screenshots to the respondent in relation to his witnesses' witness statements and the respondent duly forwarded these to the tribunal in advance of the start of the fourth day of the hearing (Friday). It was agreed that there was no need to discuss these at the start of the hearing that day, particularly so as Mr Caten, who was due to be giving evidence first, had informed the tribunal that he needed to be away to attend another meeting by 11 AM, so there was a certain amount of time pressure to hear his evidence without delay (which was duly done so that he was able to get away in plenty of time for his meeting). However, once the remaining witnesses from whom the tribunal was due to hear that day had given their evidence, which was completed by mid-afternoon that day, Ms Ahmad raised the issue of these screenshots.

50. Ms Ahmad was, understandably, concerned to understand the background of if and how Mr Stuart had given approval in relation to the witness statement which had been provided to the tribunal in respect of him. The screenshots did not provide the full picture. There then followed quite a lengthy discussion about the process of how Mr Stuart's witness statement had been obtained, with Ms Ahmad asking various questions and the claimant giving his account. It is not necessary to relate the whole exchange but, despite this taking up almost half an hour of time, the matter remained somewhat confusing and indeed inconclusive. The hearing then adjourned for the day at 3 PM.

51. After the weekend, in advance of the hearing recommencing on the Monday, the claimant sent to the tribunal and the respondent a screenshot of an email purportedly from Mr Stuart and relating to his witness statement. The email stated:

"To confirm, Darren Oliver had previously contacted and asked me to write a witness statement to detail a conversation I overheard during my work shift to which I agreed. Ahead of the tribunal hearing, my witness statement was prepared. To which I can confirm is true. In late September Darren asked me if I would attend the hearing as a witness, at this point I had informed him that I did not feel comfortable attending the hearing as I did not want to be involved in the matter as I felt it would be a conflict of interest as I still had to work with some of the individuals involved in the case. Thanks. Daniel."

52. When asked by the judge, Ms Ahmad confirmed that, in the light of this email, she did not need to take the matter further.

53. As noted, it was the exchange between the claimant and Ms Ahmad in the tribunal on the afternoon of the previous Friday which the claimant said was the primary reason why he felt *"pretty stressed out"* and did not feel that he could cross-examine the respondent's witnesses that Monday. To be clear, however the claimant may have reacted to that, it was entirely understandable that Ms Ahmad should have sought to get clarity on how Mr Stuart's witness statement came into being given that he would not be attending the tribunal himself and that

how the statement came into being was relevant to how much weight the tribunal might or might not give to the statement. In addition, Mt Stuart's evidence was particularly significant because it was directly relevant to the only allegation of detriment in the list of issues which was definitely brought in time. Furthermore, Ms Ahmad's questioning of the claimant about the matter was polite and reasonable.

Evidence of the claimant's witnesses

54. Despite the fact that the judge had asked the claimant to arrange this, the three witnesses of the claimant who gave evidence on the fourth day of the hearing (Friday) had not been provided with copies of the bundle or the witness statement bundle. Fortunately, they had copies of their own witness statements.

55. In most of those cases, Ms Ahmad said that she would be able to conduct her cross-examination without having to refer those witnesses to any other documents apart from their own witness statements. In the case of Mr Ridgley, there were two specific documents which Ms Ahmad wanted to refer him to. As it would have been impracticable to get the large tribunal bundle to him by email (because of its size), it was agreed that the respondent would identify the two documents and send them to Mr Ridgley in a separate (obviously much smaller) email and this was done.

56. The claimant confirmed that he would ensure that Mr Bowers, who was due to give his evidence the following Monday, was provided with a copy of the bundle and the witness statement bundle. This was duly done.

Mr Daniel Oliver's evidence

57. When Mr Daniel Oliver, the claimant's brother, came to give his evidence on the afternoon of the fourth day of the hearing (Friday), it turned out that he was at the time travelling as a passenger in a car and would not have completed that car journey for another 40 minutes or so. The judge explored with Ms Ahmad and the claimant whether they felt that it would be practicable to cross-examine him in the circumstances. Both of them took a pragmatic view. Ms Ahmad said that, as she did not have very many questions for Mr Daniel Oliver and did not need to refer him to any documents other than his own witness statement, she would be able to do this. The tribunal therefore agreed to proceed on this basis.

58. At the start of Mr Daniel Oliver's evidence, the judge reminded him for clarity's sake that the evidence he would give needed to be his own and he could not speak to or take any prompting from whoever was sat next to him driving the car.

59. His evidence only took about 15 minutes and, despite the circumstances, there were no practical difficulties.

Paginated copy of the claimant's statement

60. On the afternoon of the first day of the hearing, whilst the tribunal did its pre-reading, the respondent's solicitors sent an email to the tribunal, copied to the claimant, enclosing two documents. The first of these was a copy of the claimant's witness statement but which inserted paragraph numbering in that statement so that it was easier to read and refer to. The original statement provided by the claimant had no paragraph numbering it.

61. When the hearing reconvened on the afternoon of the second day, the judge explained that this was done to assist the tribunal and would be helpful in terms of finding the relevant section, if witnesses, including the claimant, were referred to the claimant's witness statement. The claimant said that he had no objection if this was helpful to the tribunal and it was agreed that we would use the paragraphed version going forwards and we duly did so.

<u>Additional documents</u>

62. In the same email, the respondent attached an additional one page document which was a table setting out defects handled by the respondent. Ms Ahmad confirmed that it covered the 2023 year up to September and that the respondent had included it, having received the claimant's witness statement, to give the tribunal an idea of the large number of defects which the respondent handled on an annual basis. The claimant said that he did not think that it was relevant but he had no objection to it being included in the documentation before the tribunal. It was therefore agreed that this document could be added to the bundle as page 1031.

63. The claimant did, however, say that, if the information in relation to 2023 was included, there should also be included information in relation to previous years. It was, therefore, agreed that the respondent would produce equivalent information for the years starting at 2019 onwards, which Ms Ahmad said the respondent would be able to produce.

64. The respondent duly produced these the following day and they were by agreement added to the bundle as pages 1032-1035.

65. On the evening of the third day of the hearing, the respondent produced a further document which it said arose out of something in Mr Ridgley's witness statement (Mr Ridgley was due to give evidence the following day). The judge asked the parties about this on the morning of the fourth day of the hearing (Friday). The claimant objected to the inclusion of this email and the tribunal heard brief submissions from both parties in relation to this.

66. Although the claimant said that he did not consider that the document was relevant, it clearly did have relevance to an assertion made by Mr Ridgley in his witness statement about whether or not the claimant had been given the opportunity by Mr Moore to act up in the vacant Section Manager role in mid-2021 (the email disclosed appeared to show Mr Moore offering the opportunity to act up to all three of the Section Supervisors at Camden (the claimant, Mr

Ridgley and Mr Lovegrove)). Although this was not itself an allegation of detrimental treatment in the list of issues, it was in turn relevant to the motivation towards the claimant of Mr Moore, who was one of the individuals named in the list of issues as someone alleged to have subjected the claimant to detrimental treatment as a result of making a protected disclosure. In addition, although it would obviously have been better if the email had been produced earlier, the tribunal noted that the claimant's witness statements had been disclosed well after the deadline in the tribunal's order for exchange of witness statements and indeed only a few days before the hearing was due to commence, so the respondent would only have been aware of its relevance at a relatively late stage. Furthermore, this was a short email which the claimant would previously have seen (because he was a recipient of it) so there was little prejudice to the claimant in it being presented late.

67. The tribunal therefore decided that the document should be added to the bundle and it was duly added as pages 1036-1037.

68. The claimant, however, said that the email chain in question was not complete and that he could supply the complete email chain. The judge said that, if he had that in his possession, he should do that.

69. On the morning of the fifth day of the hearing (Monday), the claimant duly provided an email which included his reply to the email from Mr Moore at pages 1036-1037 and in which the claimant apparently expressed an interest in the acting up role. It was agreed between the parties and the tribunal that this email should be added to the bundle at page 1038.

70. During Mr Moore's evidence on the morning of the sixth day of the hearing (Tuesday), Ms Ahmad indicated that there was a document which the respondent could produce which would provide the answer to a matter Mr Moore was asked about in cross-examination to do with when he was aware that Mr Alistair Grice would cease to be the Section Manager at Camden. This was duly produced over the lunchtime period that day and, by agreement, added to the bundle as pages 1039-1040.

71. Before the hearing recommenced on its seventh day (Wednesday), the respondent forwarded two further email chains to the tribunal and the claimant, which again related to the Section Manager role at Camden and this time the process in early 2022 of appointing a permanent replacement for Mr Grice. The claimant objected to their inclusion as he said that they were not relevant. The judge noted again that there was no allegation in the list of issues that any failure to appoint the claimant to this role was a detriment but explained that, as Ms Ahmad submitted, the reason why the respondent disclosed these documents was because of the line of questions which the claimant had adopted on this subject, and the emails in question simply provided an explanation as to what happened; in summary, that the claimant himself decided not to pursue his application for the permanent role. The judge said that the claimant's line of questioning had concerned a potential conflict between the evidence of Mr Moore and Mr Ridgley as to whether or not Mr Moore did or didn't want the claimant to do the Section Manager role (which could apply to both acting up in that role or,

in due course, the permanent position) and that might potentially be relevant to an assessment of the reliability of their evidence generally. For this reason, the documents were relevant and the tribunal allowed their inclusion. They were included respectively as pages 1041-1044 and 1045-1048.

<u>The claimant's evidence</u>

72. During the claimant's evidence, the judge had to intervene on a number of occasions.

73. This was largely because the claimant often did not answer the question which was put to him, trying often instead to shoehorn into his evidence things which he wanted to tell the tribunal about but which he was not necessarily being asked about. The judge initially let quite a lot of this go, particularly given that the claimant was a litigant in person, but intervened more in due course as this continued to be a regular occurrence.

74. The judge also had to intervene quite often to stop Ms Ahmad and the claimant talking over each other in their questions and answers, which meant that matters were hard to follow and the tribunal could not get clear evidence. The judge reiterated on several occasions that the claimant should wait for the question to be completed before he answered and, similarly, Ms Ahmad should wait for the complete answer from the claimant before going on to the next question. To be clear, whilst the judge picked up both of them on this issue, the claimant was by far the more regular offender in this respect, particularly as his evidence went on, as Ms Ahmad took the direction given earlier by the judge in this respect whereas the claimant continued to cut across Ms Ahmad's questions on an ongoing basis throughout his evidence.

<u>The claimant's cross-examination of the respondent's witnesses</u>

75. As noted, the claimant carried out his cross-examination of the respondent's witnesses robustly and in a structured manner. The judge only had to interject on rare occasions either when the claimant cut across the answer a witness was giving; to rephrase the occasional question which was not clear; to ask the claimant to slow down; or, very occasionally, to ask the claimant to move on when he had asked the witness in question what in effect amounted to the same question a number of times.

<u>Timetabling</u>

76. A timetable for cross-examination and submissions was agreed between the tribunal and the parties at the start of the hearing.

77. Some time was gained when the claimant confirmed that four of his eight witnesses would not in fact be attending the tribunal to give evidence, but subsequently some time was lost when the tribunal adjourned early on the fifth day of the hearing at the claimant's request. In overall terms, therefore, the timetable did slip somewhat, but not drastically.

Submissions

78. When the judge was discussing the timetable with the parties at the start of the hearing, he took some time to explain what submissions were and what the parties needed to do to produce submissions. He explained that submissions took place after the evidence was completed. Ms Ahmad said that she would produce written submissions and supplement these with no more than an hour's oral submissions. The claimant said that he would produce written submissions but probably not make any oral submissions. The judge said that, if he changed his mind and wanted to address the tribunal orally as well, he could do so.

79. At the end of the sixth day of the hearing (Tuesday), the tribunal had heard the evidence of three of the four witnesses of the respondent. There was, therefore, only one witness left to give evidence (Mr S O'Connell). The judge said that the tribunal would, therefore, like to hear the parties' submissions the following afternoon after the evidence was completed. The claimant indicated that he had not yet written his written submissions and would need to do that that evening. The judge explained that, if the parties were allowed the rest of the following day to write their written submissions and their oral submissions were done on the morning of the penultimate day of the hearing, there was an increased risk that the tribunal would not be able to complete its deliberations within the remaining hearing time such that they would have to come back at a later date, which could mean that there could be a long delay (potentially of several months) before the parties received a written decision (the judge said that, even as things stood, it was almost certain that the tribunal's decision would be a reserved decision).

80. Ms Ahmad suggested a compromise. It was hoped that the evidence would be completed by 12 PM the following day and she suggested that the parties could then have until 2 PM to complete their written submissions and send them to each other and the tribunal. The judge asked the claimant about that compromise and the claimant said that that was okay. It was therefore agreed that the tribunal would proceed on that basis.

81. At the start of the next day, the claimant explained that he had not done any written submissions. He said he was not sure what he needed to do but that he had looked this up online and felt that he would not in any case be able to produce something that would be of assistance. The judge reiterated what submissions were for the claimant's benefit. He explained that ordinarily the tribunal would read any written submissions first, Ms Ahmad for the respondent would then give her oral submissions and then the claimant would have the opportunity to make oral submissions if he decided to do so. There was some discussion about whether it would be appropriate to give more time to the claimant to produce written submissions, even if that meant delaying the hearing further. However, the claimant said that he was very keen not to delay matters further and that he had decided that, particularly as he did not think that written submissions from him would add anything, he would not produce any. The judge asked if he would like instead to make any oral submissions after Ms Ahmad's oral submissions. The claimant said that his position remained that he did not wish to do so.

82. Mr S O'Connell's evidence was in fact completed shortly before 1 PM on the seventh day of the hearing (Wednesday). Given that this was an hour later than anticipated, it was agreed that Ms Ahmad could have until 2:30 PM to email her written submissions to the claimant and the tribunal and that the hearing would reconvene at 3:30 PM. The claimant reiterated that he would not be producing written submissions and that he did not wish to make any oral submissions.

83. Ms Ahmad's written submissions were duly provided shortly after 2:30 PM. They were not lengthy. The tribunal read those submissions. When the hearing reconvened at 3:30 PM, the judge asked the claimant whether he had had enough time to read Ms Ahmad's submissions and the claimant confirmed that he had. The judge again said that, if the claimant changed his mind about making oral submissions after Ms Ahmad's oral submissions had been made, he could make them.

84. Ms Ahmad then made her oral submissions. The judge again asked the claimant if he would like to make any oral submissions and he said that he did not wish to do so.

85. The judge explained that the tribunal's decision would be reserved (and what that meant) and the hearing then adjourned for the tribunal to deliberate on its decision.

86. The decision was reserved.

Findings of Fact

87. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

88. We start with an overview and background, before going on to our more detailed findings of fact.

Overview

89. The respondent operates and maintains Britain's rail network and infrastructure.

90. The claimant has been employed by the respondent since 8 September 2003. He remains employed by the respondent.

91. The claimant was employed as a Section Supervisor at the respondent's Camden Depot from 8 August 2016. He remained employed at the Camden Depot until the events which are the subject of this claim in 2021 and 2022.

92. The Camden Depot is part of the Tottenham Delivery Unit, which comprises a number of depots, including Camden and Broxbourne, as well as the site office Tottenham Maintenance Delivery Unit (MDU).

93. Separately, there is also the Shenfield Depot, which sits within the Romford Delivery Unit.

94. Mr Stephen O'Connell is employed by the respondent as Infrastructure and Maintenance Delivery Manager, a role he has held since July 2019, although he joined the respondent approximately 32 years ago. He is responsible for maintaining safe compliant infrastructure so that the public can travel on the trains safely and he is also responsible for around 490 staff including their welfare and health and safety. Within his role, he covers the Tottenham Delivery Unit.

95. Reporting to Mr Stephen O'Connell are Infrastructure Maintenance Engineers. One of the Infrastructure Maintenance Engineers is Mr Chris O'Connell. Mr Chris O'Connell is the brother of Mr Stephen O'Connell. Mr Chris O'Connell has been employed by the respondent for 26 years.

96. Reporting to the Infrastructure Maintenance Engineers are Functional Engineers. In May 2021, which was the point at which the events which are the subject of this claim commenced, Mr Moore was the Track Maintenance Engineer at the Tottenham Delivery Unit (a Track Maintenance Engineer is a type of Functional Engineer). Mr Moore had held this role since 2019, although he joined the respondent some 13 years previously in 2006. Although Mr Moore's office was at Tottenham and he did not have a desk of his own at the Camden Depot, he visited Camden where necessary in order to fulfil his duties. Towards the latter part of 2019 he was tasked to focus on the Camden Depot; he was brought in to support the team as there were lots of improvements that needed to be made in relation to how Camden was run and he was seen as part of the plan to achieve that.

97. In May 2021, the Section Manager at the Camden Depot was Mr Alistair Grice. Mr Grice reported to Mr Moore. Mr Grice was based at the Camden Depot.

98. Reporting to Mr Grice were three Section Supervisors based at the Camden Depot. These were the claimant, Mr Lovegrove and Mr Ridgley.

99. The role of a Section Supervisor is to assist the Section Manager in the inspection, maintenance and renewal of assets, assist with the budget and unit cost measures, supervise the delivery of work, undertake inspections and assist with managing staff.

100. The individuals concerned here are tasked with finding defects, identifying them, and correctly repairing them within the correct timeframes. They identify a repair or a correction to a repair, or an overdue repair, or a faulty part etc. every day of the year. There are precise standards and rules. Everybody works towards them and works as a team to keep the public safe.

101. Employees, including Section Supervisors, obtain certain "competencies" in relation to carrying out certain aspects of the role, for example certain types of inspection of track. Competencies are often awarded following a period of training in relation to the matter in question.

102. One such "competency" is the competency to do a "post 053" inspection. A post 053 inspection is a detailed inspection of a switch carried out by an engineer following a repair to the switch on the track. It is used to determine whether there is a defect with the switch, including if there is a derailment risk associated with the switch. It is a complex inspection and only employees with the "053" competency can carry out this inspection.

103. Mr Lovegrove became an employee of the respondent 14 years ago. He was promoted to Section Supervisor in October 2019 and transferred to the Camden Depot in 2019. As at May 2021, he had the competency to do post 053 inspections, but he had not had that competency for very long.

104. The claimant was considerably more experienced than Mr Lovegrove and Mr Ridgley and indeed than his Section Manager, Mr Grice.

105. On 9 May 2021, Mr Lovegrove carried out a post 053 inspection following a repair to a switch at a set of points ("106 points" - 106 being the unique identification number of the points in question). It is this which formed the main basis of five of the six alleged protected disclosures which are the subject of this claim and we return to the detail of this later.

106. Further to this, there were various interchanges between the claimant, Mr Lovegrove, Mr Grice, Mr Moore and Mr Chris O'Connell, which we return to later.

107. On 3 August 2021, the claimant raised a formal grievance ("the August grievance") to Ms Jackie Hall of the respondent's HR department. The grievance was predominantly about Mr Moore.

108. Ms Hall informed Mr Stephen O'Connell about the August grievance and the claimant met with Mr Stephen O'Connell and Ms Hall on or around 9 August 2021. It was agreed that the claimant would relocate whilst his grievance was ongoing. The claimant relocated to the Shenfield Depot on 11 August 2021.

109. The August grievance was investigated and heard by Mr Luke Boggis. The outcome of the grievance was delivered to the claimant on 10 November 2021. Mr Boggis upheld some but not all of the claimant's grievance. In particular, he did not find that, as the claimant had alleged, the claimant had been bullied and victimised by Mr Moore.

110. On 21 November 2021, the claimant appealed against the grievance outcome, although he did not submit his grounds of appeal at that point.

111. On 30 November 2021, Mr Stephen O'Connell met the claimant to discuss his coming back to Camden. There was then some email

correspondence between them in early December 2021 about this matter. The claimant confirmed that he was happy to remain at Shenfield until the New Year.

112. On 4 January 2022, the claimant attended the Camden Depot and there was a heated conversation between him and Mr Lovegrove, the details of which we will return to.

113. The following day, the claimant met Mr Stephen O'Connell at the Tottenham MDU. That conversation also became heated.

114. On 18 January 2022, the claimant raised a grievance against Mr Stephen O'Connell, which was in due course investigated.

115. The claimant went off sick from 20 January 2022. He remained on long-term sick leave until mid - April 2022.

116. On 16 March 2022, the outcome of the August 2021 grievance appeal was delivered to the claimant. The original findings of that grievance were upheld.

117. On 22 April 2022, the claimant raised a grievance against Mr Lovegrove alleging timesheet fraud and harassment. This was in due course investigated but not upheld.

118. On 23 May 2022, the claimant was provided with the outcome of the January 2022 grievance against Mr Stephen O'Connell. His grievance was not upheld.

119. The claimant relocated to the Broxbourne Depot. This turned out to be a permanent relocation. The claimant is now established at the Broxbourne Depot and remains working at the Broxbourne Depot to this day.

120. The claimant began ACAS early conciliation on 26 May 2022. This concluded when ACAS issued its early conciliation certificate on 7 July 2022.

121. The claimant presented his claim on 6 August 2022.

<u>Assessment of Evidence</u>

122. Before going on to make our more detailed findings of fact, we make some findings regarding the respective reliability of the evidence of the claimant and the respondent's witnesses. We do this because it is relevant to the findings of fact which we have to make in relation to many of the issues of this claim, particularly where it is a question of one person's word against another and where the contemporaneous documentation alone is not enough to provide sufficient clarity as to what in fact actually happened.

The claimant

123. We have significant concerns about the reliability of the evidence given by the claimant.

124. As already noted, the claimant was not a straightforward witness. He often did not answer the question which was put to him and often tried to shoehorn into his evidence things which he wanted to tell the tribunal about but which he was not necessarily being asked about.

125. He was confrontational and combative in his approach to answering questions.

126. He was not prepared to concede even obvious points, for example that he had far more experience than Mr Lovegrove and Mr Grice; when pressed upon this point, he simply replied that they had the "competencies", rather than accept the obvious, that they had only recently acquired those competencies and did not have nearly the level of knowledge and experience which the claimant had. Another example is that he was not prepared to accept that, when Mr Lovegrove called him on the night of 9 May 2021 regarding the switch repair to 106 points, Mr Lovegrove was calling him to ask for his advice; as Ms Ahmad put it, why else would Mr Lovegrove have been calling him.

127. His evidence was often inconsistent with the contemporaneous documents. One obvious example, which we will return to in due course and which is of significance in this case, is the 15 May 2021 email which he wrote to Mr Grice, which is relevant to the extent of his belief at that point as to the health and safety risk posed by the switch repair, and his evidence in cross-examination which contradicted that email.

128. The claimant misrepresented matters. For example, in relation to the issue about whether or not the claimant had called Mr Moore a wanker at a meeting on 24 May 2021, he kept on insisting that what Mr Chris O'Connell said in his witness statement at paragraph 19, that he didn't hear what was said, was inconsistent with what Mr O'Connell said as set out in the minutes of Mr O'Connell's 22 September 2021 grievance interview, where he said *"I think wanker was said"*. It is not inconsistent for Mr O'Connell to have thought that the comment was made, given Mr Moore's subsequent reaction to it, without actually having heard it himself. However although this was pointed out to the claimant, he kept on insisting that Mr O'Connell was inconsistent.

129. A similar example is that, in a grievance interview on 15 September 2022, Mr Lovegrove accepted that after the heated discussion on 4 January 2022, he did say to the claimant *"you better fuck off back to Shenfield then"*; whereas in his witness statement, which was produced at a much later stage shortly in advance of this hearing, he stated at paragraph 32 that he didn't now recall exactly what was said, but could see from the grievance interview that he had agreed that he had made that statement. The claimant kept insisting that this was an inconsistency and that Mr Lovegrove was contradicting himself; however, he clearly was not.

130. Another example is the claimant's insistence that he was being forced to return to the Camden Depot against his will in or around January 2022 (alleged detriment 3.1(l) in the list of issues), when the contemporaneous documentation clearly shows that he was offered other options and was not being forced to return to Camden.

131. In his own evidence, the claimant, who made repeated allegations of timesheet fraud against others, stated that his timesheets said nights but that in reality he was doing both nights and days. He appeared to be giving evidence that what he wrote on his timesheets did not reflect the reality of the times that he was actually working.

132. When it was put to the claimant that Mr Moore genuinely thought that Mr Grice was intimidated by the claimant, he denied it. He was then taken to the minutes of Mr Moore's grievance investigation meeting on 22 September 2021 where Mr Moore said exactly that. However, not only did the claimant refuse to accept the obvious (that Mr Moore did express that opinion) but, instead of answering the question, he deflected matters by instead complaining that the person who asked the question which resulted in Mr Moore's answer was the notetaker in the meeting rather than Mr Boggis the grievance investigator.

133. Furthermore, as we shall see, the claimant's assertions that some of the allegations of detriment in this claim were detrimental acts directed against him are so far removed from the factual reality that they are indicative of a completely unjustified sense of persecution on his part. It is noteworthy that, in several of his answers, the claimant prefaced his answer with words to the effect of *"you may think that I am paranoid and delusional but…"*. That in itself is indicative of his state of mind.

134. We therefore have significant concerns about the reliability of the claimant's evidence. We consider that a lot of this stems from a genuine but unjustified perception on his part, which has led him to misrepresent things and see things through his very own particular lens and, to be clear, we are not making a finding that he has deliberately not told the truth, just that there are many grounds to doubt the reliability of what he says.

135. However, there is another aspect to his approach which is the deceptive and, as Ms Ahmad put it, *"sneaky"* behaviour on his part, of which there are a number of examples set out in our findings of fact below, particularly concerned with his covert recording of meetings with colleagues and his seeming determination to get Mr Lovegrove into trouble, which further causes us to doubt the reliability of the evidence which he gives.

The respondent's witnesses

136. By contrast, the respondent's witnesses were straightforward in answering the questions put to them. They did not go off on tangents. They were consistent in all material respects with both their own evidence, the evidence of the other witnesses of the respondent and with the contemporaneous

documents. They did not deviate from their position when questioned. Both in the internal proceedings and before the tribunal, they readily conceded matters which were not favourable to them, for example the use of bad language by them, which is indicative of honesty and openness. We have no reason to doubt the reliability of their evidence.

Conclusion on reliability of evidence

137. Therefore, where there is a dispute in the evidence of the witnesses which is not evidenced by separate contemporaneous documentation, we tend to prefer the evidence of the respondent's witnesses to that of the claimant.

More detailed findings of fact

Working relationships

138. Mr Lovegrove has known the claimant for almost 14 years and at one time considered him to be a close friend and even invited him to his wedding. Professionally, he began working with the claimant at the point when he transferred to the Camden Depot in 2019. Whilst the claimant did moan at Mr Lovegrove and criticised him from time to time, that did not stop them from having a good working relationship; they joked together and they shared knowledge and experience. As we shall see, the relationship between Mr Lovegrove and the claimant deteriorated seriously in 2021.

139. Mr Moore only knew the claimant from his time working at Tottenham/Camden from 2019 onwards. Mr Moore thought they got on well. He recognised that the claimant was very good at delivering work and that he could count on him and that he was reliable.

140. Mr Chris O'Connell first met the claimant in 2017/2018. The claimant did not report to him, as he was two levels of seniority below Mr Chris O'Connell, so he didn't directly deal with him. However, when they did interact, they had a good working relationship.

141. Mr Stephen O'Connell first met the claimant when he (Mr O'Connell) was a Section Manager at the Camden Depot in or around 2006. However, as the claimant is currently several levels of seniority below Mr Stephen O'Connell in the chain of command, his interaction with the claimant was and remains for the most part minimal. We therefore infer from that and find that the fact that Mr Stephen O'Connell ended up having a number of meetings with and a reasonable amount of email contact with the claimant during the course of the events which are the subject of this case was the exception rather than the rule.

Language used/banter

142. In general terms, there is a lot of joking and banter between employees on the railway on a regular basis.

143. Furthermore, the use of swear words and profanities is commonplace. To be clear, what is commonplace is the use of such vocabulary as part of normal conversation and interaction with, for example, the “F” word used as an adjective in conversations between individuals; what is not commonplace is directing such vocabulary personally at another individual, for example calling someone a “Fucker” to their face or worse.

Mr Moore’s style of management

144. Mr Moore’s style of management is direct and that was acknowledged by a number of the witnesses. We have seen examples in the bundle of his direct communication style in emails. However, these relate to periods both before and after the alleged protected disclosures and it is evident from them that his direct style is applied to all and not just to the claimant.

The claimant’s experience

145. In May 2021, the claimant was an extremely experienced Supervisor, relied on by the team at Camden for his knowledge and expertise. He was more experienced than Mr Ridgley and Mr Lovegrove (and indeed Mr Grice), although he had the same level of competencies.

2019 “DJ incident”

146. In paragraph 1 of his witness statement, the claimant expressed his disgruntlement with Mr Moore because in late 2019 Mr Moore had investigated the claimant in relation to an anonymous complaint about his DJing on a Saturday night when he was meant to be on call (which, if true, might have been timesheet fraud). He indicated in that paragraph that he was very unhappy that Mr Moore had investigated him in this respect.

147. Mr Moore was asked about this. He explained that he had been notified about this and, as a manager, had to investigate. He spoke to the claimant, the claimant explained that this was not the case, Mr Moore accepted this and no further action was taken. We have no reason to doubt Mr Moore’s account and accept it; indeed, the claimant himself accepts that no further action was taken. It was entirely reasonable for Mr Moore, as a manager, to investigate a complaint made to him; he would not have been doing his job properly had he not done so.

148. Mr Lovegrove was also asked about this. He gave evidence that he was aware of the incident because the claimant had covertly recorded his 2019 meeting with Mr Moore and then played that recording to him and to Mr Ridgley; at the time, they had all laughed about it and Mr Lovegrove had thought nothing more of it.

149. This incident is not an allegation in the list of issues and the evidence in relation to it only arose because of the fact that the claimant chose to reference the incident in his witness statement, which was sent to the respondent only shortly before the tribunal hearing. Furthermore, by the time Mr Lovegrove gave his evidence, the claimant had already given his evidence, as had Mr Ridgley, so

there was not an opportunity to put Mr Lovegrove's evidence to them (and Mr Ridgley, who only attended the tribunal on the morning when he gave his evidence, was not present at the hearing any longer). However, it is evident that the claimant now denies that he made such a covert recording, as he put it to Mr Lovegrove in his cross-examination of him that it was not true that he had recorded it or that he had played it to Mr Lovegrove and Mr Ridgley; Mr Lovegrove insisted that he did.

150. We accept Mr Lovegrove's evidence in this respect. We note that at this hearing the claimant has insisted that he only ever made one covert recording (of the 24 May 2021 meeting between himself, Mr Moore, Mr Grice, Mr Ridgley and Mr Chris O'Connell). However, in his own witness statement at paragraph 29, where he is describing the 4 January 2022 incident with Mr Lovegrove (which Mr Lovegrove also thought he might be recording), he stated that Mr Lovegrove *"knew of my recordings even claiming I was recording him now"*; the plural reference to *"recordings"* is significant, and obviously implies that he had made recordings on more than one previous occasion, in other words on at least one previous occasion apart from the 24 May 2021 meeting. Furthermore, the details given by Mr Lovegrove in his evidence about how the claimant is said to have played the recording to Mr Lovegrove and Mr Ridgley and their joking reaction to it had a distinct ring of genuineness and truth about them. For these reasons, and for the reasons of respective reliability of evidence given above, we prefer the evidence of Mr Lovegrove to that of the claimant in relation to this matter. We, therefore, find that the claimant did covertly record his 2019 meeting with Mr Moore and that he played it to Mr Lovegrove and Mr Ridgley.

151. We also find that at least as early as late 2019, well before the alleged protected disclosures in 2021, and regardless of whether Mr Moore himself realised it, the claimant was disgruntled with Mr Moore.

2019 position and organisational change

152. As at 2019, the Camden Depot had overdue repairs and had been non-compliant. There was an 18 month push to bring the situation in hand. In order to achieve this, it was Mr Moore's idea and decision to utilise the team's skills in the best way and assign each Supervisor a specific area to focus on; the claimant focusing on track defects; Mr Lovegrove focusing on track geometry; and Mr Ridgley focusing on delivering the inspections. These work streams were exclusive to the individuals. The teams had more freedom with the budget and a lot of additional contractors were employed to assist in delivering the work. This was necessary in order to ensure the track was maintained to a safe standard and the required works were carried out efficiently. A great deal of overtime was done, including by the claimant. This was an irregular way of working and it was understood amongst the team that it would be temporary.

153. These measures were successful and, after an 18 month push, the situation had been brought in hand.

154. The Camden Depot received a lot of positive recognition for this work, both internally and from the respondent's customer. This included the claimant also specifically receiving a recognition letter for supporting the customer.

155. Whilst this temporary way of working was necessary, it had consequences. The Camden Depot went considerably over budget. Furthermore, the Section Manager and the Supervisors would normally have to maintain competencies as part of their role which means that they would, under normal circumstances, take it in turns to deliver inspections, track defects and track geometry. The siloed way of work adopted in 2019 meant that the Supervisors were not doing all of the jobs that were part of their role and some of their skills in other areas were lapsing. Further, due to individuals working long hours, with limited rest breaks, fatigue reports indicated that improvements to the management of fatigue were required.

156. Therefore, as the Camden Depot had got to a good position by the beginning of 2021, Mr Chris O'Connell and Mr Moore discussed that it was at that point the time to look at improving ways of working within the team and to go back to the traditional structure, which would be the Section Manager and all Supervisors being on rotation, so that they all carried out inspecting, delivering, and supervising.

157. One consequence of the proposed changes would be a reduction in the amount of overtime needed to be done, by Supervisors amongst others, as well as a reduction in the need for use of contractors. The claimant in particular had been doing a considerable amount of overtime. It was put to the claimant in cross-examination that, if there was a detriment to him as a result of the proposed changes, it was that he would get less overtime and consequently less pay. However, the claimant denied this.

158. The discussions about these proposals between Mr Moore and Mr Chris O'Connell were underway weeks before the first of the alleged protected disclosures. However, there were subsequent discussions with staff in May 2021 at around the same time as the first of the alleged protected disclosures. As we shall see, the claimant did not welcome and reacted badly to the proposed changes.

159. Ultimately, however, as Mr Moore confirmed in his evidence, these proposed changes were never implemented.

The switch repair issue

160. On 9 May 2021, Mr Lovegrove was on the night shift carrying out sleeper changing. As noted already, a switch on the track had been identified as requiring repair and Mr Lovegrove was asked by Mr Grice to carry out the post 053 inspection on 106 points after the welder had carried out that repair.

161. Around 3:43 AM, Mr Lovegrove called the claimant, because the claimant had more experience than him in this area, to ask for his advice in

relation to this. The claimant said that he did not have time to deal with the issue as he was on a shift in another area and the call ended.

162. Mr Lovegrove had also sent the claimant photos via WhatsApp so that the claimant could see what he had briefly described in the call. The claimant duly looked at these.

163. On 14 May 2021, at 8:10 AM, the claimant emailed Mr Lovegrove (copying in Mr Grice) to ask if the defect in 106 points had passed inspection following the repair. This was an enquiry; there is no suggestion in the claimant's communication at this point that he had any belief that the health and safety of any individual was likely to be endangered.

164. At 8:15 AM, Mr Lovegrove replied to the claimant (copying in Mr Grice) stating *"It's getting done now, my fault completely forgot about it"*. Mr Lovegrove then put together the documentation straightaway and emailed it to the claimant and the rest of the team and apologised for the delay.

165. Later that day (14 May 2021), the claimant telephoned Mr Lovegrove. The claimant describes this in his witness statement at paragraph 7 as a *"[heated] conversation with some home truths which Jamie didn't like"*. Mr Lovegrove describes the call as the claimant having a go at him, telling him he was a *"shit supervisor"*; that he was *"ruining Camden"*; that he was *"worthless"* and *"useless"* and that he would get him sacked; Mr Lovegrove says that he hung up the phone but that the claimant called him back and continue to verbally assault him.

166. We accept Mr Lovegrove's evidence for the following reasons. Immediately after the conversation (at 10:26 on 14 May 2021), Mr Lovegrove wrote an email to Mr Grice stating that he couldn't work at Camden any more, constantly having his worth questioned, and seeking either a formal transfer or, in the alternative, resignation. In his email he stated *"It has nothing to do with you [Mr Grice] but the working environment is hostile and causing me too much stress and worry the fact that someone on the same level as me thinks he has the right to bully and speak to me that way"*. Although Mr Lovegrove was ultimately persuaded not to resign or transfer, this email is indicative that the call which directly preceded it was of a significantly abusive nature. Secondly, Mr Lovegrove then left his shift that day, because he felt stressed and shaken by the telephone conversation with the claimant. Thirdly, as noted, we refer to our findings in relation to the respective reliability of evidence of the claimant and the respondent's witnesses. We therefore find that the claimant was abusive to Mr Lovegrove in that conversation and that the conversation went way beyond putting certain *"home truths"* to Mr Lovegrove.

167. Subsequently on 14 May 2021, the claimant spoke to Mr Grice. This is the first alleged protected disclosure (issue 2.1(a)). Mr Grice was not at the tribunal to give evidence. However, it is common ground that the claimant spoke to him about the switch repair that day.

168. The only contemporaneous document in relation to that conversation is the email already referred to and which was sent by the claimant to Mr Grice at 13:58 the following day, 15 May 2021, headed *"Declaration of Knowledge regards 106 Points Richmond"*. This is an important email and we therefore quote it in full:

"This email is to document our conversation in regards Jamie Lovegrove and the post 053 Inspection Carried out on 106 Points.

I have made yourself aware of the timescale for the 053 post and defect Raised as not carried out per standard and was only then carried out once I had sent an email after scanning RDMS.

The points in question 106 should actually have a ban to facing movements on them due to Defects Raised from post 053 and not just a 13 week repair 3C as recorded and uploaded 6 days later on RDMS.

Today checking RDMS it still only states 1 defect 710221."

"RDMS" is the respondent's internal system which records defects/repairs etc.

169. The email is predominantly about Mr Lovegrove, a repair not being carried out as per standard (and in particular the timeframe that Mr Lovegrove took, of which the claimant is very critical), the claimant having to chase Mr Lovegrove, the wrong categorisation of the repair and therefore wrong timescales. As we have already seen, and will see elsewhere, the claimant not only has a dismissive view of Mr Lovegrove but also has taken actions to get Mr Lovegrove into trouble on various occasions. We consider that this email is primarily about criticising Mr Lovegrove.

170. However, the email does also state that *"the points in question 106 should actually have a ban to facing movements on them"*. A ban to facing movements means that there should be a ban on trains running on that section of track. That is something which the respondent would do if a defect was such as to constitute a health and safety risk. Taken in isolation, the phrase is indicative that the claimant, when he wrote this email (and by extension in his earlier conversation on 14 May 2021 with Mr Grice) considered that it was likely that the health and safety of individuals was endangered. It is this reference which is likely to have prompted Ms Ahmad's initial concession about that being a protected disclosure. Furthermore, the claimant appears in various subsequent documents to suggest that he considered at this point that there was a danger to health and safety: we do not need to quote them in full but they are his subsequent grievance of 3 August 2021 (at page 236 of the bundle) and paragraph 7 of his witness statement. In addition, it is also obviously the claimant's case at this tribunal that he had a reasonable belief at this point that it was likely that the health and safety of individuals was endangered; without that, the 14 May 2021 conversation with Mr Grice could not be a protected disclosure and no complaint founded upon it could succeed.

171. However, we also need to consider the oral evidence given by the claimant at this tribunal. The claimant's evidence was that the first rule of personal track safety ("PTS") meant that on discovery of anything unsafe with the line which posed a risk to health and safety, you have to block the line first. Only

after that would you make other calls. The first call to be made would be to the signaller in order to block the line. Other managers would then be informed after that. The claimant, in common with others, had the power to call the signaller to block the line and it was incumbent upon him to do so if he thought there was a health and safety risk. The claimant was asked why he did not block the line and he said that he was not on track himself, that he had only seen photographs, that he did not have knowledge that there was a health and safety risk and therefore did not make the call to block the line. He said that if he had thought there was a health and safety risk, he would have blocked the line. This evidence directly contradicts the claimant having at that point a belief (let alone a reasonable belief) that the health and safety of any individual was at risk.

172. We are very conscious that the claimant was asked these questions in the context of the fact that, had he thought there was a health and safety risk and had not blocked the line, he would have been in serious dereliction of his duty (with potentially serious ramifications for him personally in terms of misconduct and professional integrity, as well as the obvious safety risks to the travelling public). It might, therefore, be argued that his response in stating that he did not have knowledge that there was a health and safety risk was to counter this potentially serious allegation. However, we remind ourselves that the claimant was the most experienced supervisor at Camden and that he had competence, knowledge and experience. His work has always been praised and he has commendations. Mr Moore's evidence was that he could rely on the claimant. It is common ground that the claimant was good at doing his job and was very thorough; the evidence we have seen is that he was conscientious about doing his job properly. Furthermore, the oral evidence which the claimant gave in relation to this was one area where we felt his evidence most had a ring of truth and genuineness; if the claimant really thought there was a health and safety risk at this point, he would have taken action and blocked the line.

173. We, therefore, consider that, if the claimant genuinely believed that there was any sort of health and safety risk, he would immediately have taken action to block the line. The fact that he did not do so is indicative that he did not have such a belief.

174. As to the reference in the claimant's email of 15 May 2021 to the *"ban to facing movements"*, we view this in the context of an email which is essentially about criticising Mr Lovegrove rather than as being probative that the claimant himself at that point believed there was a health and safety risk. Similarly, the references in subsequent documents such as the claimant's grievance and his witness statement for this tribunal can also be seen in the context of the claimant, whether consciously or unconsciously, either furthering his criticism of Mr Lovegrove or bolstering his case at this tribunal.

175. In summary, we find that the claimant did not have a belief on 14 or 15 May 2021 that the health and safety of persons was or had been likely to be endangered.

15 May 2021 conversation with Mr Moore

176. On the evening of 15 May 2021, Mr Moore came into Camden on one of the night shifts. This was in part because he had heard that the claimant and Mr Lovegrove had had a heated argument (although he did not at the time know that Mr Lovegrove had emailed Mr Grice threatening to resign).

177. He met the claimant and asked what was going on and whether everything was okay. They discussed some of the changes which were proposed to be implemented at Camden and which we have detailed above. The claimant then went on to complain about a lot of different things: he started raising allegations of timesheet fraud, competence issues within the team, conduct issues, and problems that he was having with Mr Grice.

178. During the course of the conversation about the changes which Mr Moore was looking to implement at Camden, he did say that he did not want any Supervisor (including the claimant) to be a *"one trick pony"*. He used the term with reference to the fact that, under the interim arrangements, Supervisors had only been carrying out one type of job and the fact that, now that matters had improved at Camden, they wanted to revert to the traditional organisational structure where Supervisors, including the claimant, would be involved in all types of Supervisor work, including inspections and planning. In this context, Mr Moore also said that he wanted the claimant and the others to be *"proper supervisors"*, by which he meant carrying out all the different types of jobs that form part of the Supervisor role. This was intended to support the claimant and the other Supervisors because Mr Moore didn't want any of them to be at risk of becoming a *"one trick pony"* if they only did one thing; as noted, if an individual was left to work on one aspect only, that individual risked losing competencies.

179. However the claimant may have interpreted these comments either at the time or subsequently, they were not detrimental comments; furthermore, they were not comments directed at the claimant specifically but were in the context of how Mr Moore wanted to change the roles of Supervisors generally.

180. The claimant has alleged that in this conversation Mr Moore *"belittled his letters of recommendation and award nominations"*. Mr Moore denies that he did so. We accept Mr Moore's evidence for the following reasons. First, there is no reason why he would seek to belittle the claimant in this way and indeed the other evidence we have seen is indicative that Mr Moore was supportive of the recognition which the claimant had received in helping to turn Camden around. Furthermore, at this tribunal, he remained complimentary about the claimant's abilities and competence. Secondly, we refer to our analysis of the respective reliability of the evidence of the claimant and of the respondent's witnesses. For these reasons, we prefer Mr Moore's account and find that he did not belittle the claimant.

181. It was only towards the end of their meeting, after the discussions set out above had taken place, that the claimant brought up the switch repair issue. Mr Moore had not been aware of this up to that point. The claimant told Mr Moore that Mr Lovegrove had carried out a repair that attributed the wrong code to the

defect and not completed paperwork correctly; that he considered Mr Lovegrove’s inspection was insufficient and the switch had been left in a particular state; that there was a defect and that facing moves had not been banned after Mr Lovegrove carried out the inspection. This is the second alleged protected disclosure (at issue 2.1(b)). Nothing had changed at this point in terms of the claimant’s belief or otherwise as to whether the health and safety of individuals was or had been likely to be endangered; in other words, at this point too, he did not have that belief.

182. Mr Moore was shocked when the claimant told him that the issue happened several days previously. He thought that the line should have been blocked and that, regardless of who carried out the inspection and whether there was an error of judgement on the part of Mr Lovegrove, the claimant should have taken action immediately to block the line on becoming aware of the issue. However, he thanked the claimant for bringing the issue to his attention. He was not in any way resentful that the claimant had raised the issue; quite to the contrary, he was grateful that the claimant had done so; if there was any criticism that could have been made, it was only that the claimant had not done so earlier. Mr Moore was concerned that the claimant seemed more focused on the fact that Mr Lovegrove had done something wrong rather than ensuring what Mr Moore considered was the safety critical matter of resolving the issue with the track.

183. Mr Moore immediately called control and stopped the traffic over the line until the repair in question had been sorted out. The claimant accepted in cross-examination that this was the correct action to take and that, once that had been done, there was no further health and safety issue in relation to that switch repair.

184. Mr Moore then spoke to Mr Lovegrove about the switch repair issue and discussed what happened. Mr Lovegrove told him that he felt he needed more training. Mr Moore removed Mr Lovegrove’s competency in relation to post 053 inspections and set up retraining for him and assigned him a mentor.

Conversation on 16 May 2021 with Mr Chris O’Connell

185. The claimant called Mr Chris O’Connell on 16 May 2021. At the time, Mr O’Connell was not at work and was in a park with his children but he nevertheless took the call.

186. The call was essentially about the claimant telling Mr O’Connell that he wished to raise a grievance against Mr Moore. He talked about a number of issues which he had with Mr Moore and which Mr O’Connell interpreted as being a clash of personalities. The fact that this conversation was predominantly about issues which the claimant had with Mr Moore is evidenced by a subsequent email of 18 May 2021 from the claimant to Mr Chris O’Connell in which he references wanting to put in an official complaint about Mr Moore for the way the conversation between the claimant and Mr Moore on the evening of 15 May 2021 was conducted by Mr Moore and the way the claimant said he was made to feel by things said by Mr Moore which he considered inappropriate (presumably the

references to *“one trick pony”* and *“proper supervisor”* which form the basis of part of the claimant’s complaints before this tribunal).

187. In his witness statement at paragraph 6, Mr Chris O’Connell states that he cannot recall whether the claimant mentioned the switch repair issue during that conversation. It was never put to Mr Chris O’Connell in cross-examination that the switch repair issue was raised. Furthermore, taking into account our earlier findings about the respective reliability of the evidence of the claimant and the respondent’s witnesses, we find that the claimant has not proven on the balance of probabilities that he did raise the switch repair issue in this conversation. The conversation, as noted, was primarily about his complaints about Mr Moore.

Mr Moore’s email of 17 May 2021

188. On 17 May 2021, Mr Moore sent an email to the whole team outlining the changes which the respondent was intending to make at Camden and the impact they would have. As noted, these proposed changes had been discussed at management level for several weeks previously. Furthermore, although Mr Moore’s email was sent on 17 May 2021, he had drafted it a week or so before sending it. The email is a lengthy and detailed email outlining the changes, which would have taken considerable thought, time and input to produce. As noted, the changes impacted the whole team and not just the claimant.

24 May 2021 meeting

189. On 24 May 2021, a meeting took place between Mr Moore, Mr Grice, the claimant and Mr Ridgley. The meeting was a standard regular meeting to review and plan for the weeks ahead. For some reason, Mr Lovegrove did not happen to be at that meeting.

190. As noted, the claimant covertly recorded this meeting (and accepts that he did so).

191. At the meeting, there was discussion about the proposed changes at Camden, which Mr Moore led. There was animosity towards the proposed changes, not just from the claimant but also from Mr Ridgley. The claimant reacted badly to the proposed changes. The meeting got heated. The claimant make clear that he did not approve of the changes and said that the plan would not work and called it a *“Mickey Mouse plan”*. The claimant lost his temper during the meeting.

192. The animosity continued to develop to the point that it was close to insubordination. Therefore, as Mr Moore knew that Mr Chris O’Connell was in the office that day, he asked him to join the meeting to calm things down and Mr Chris O’Connell duly did so.

193. The claimant was sitting next to Mr Moore at the meeting. At one point, Mr Moore thought that the claimant muttered something under his breath to him which sounded to him like *“wanker”*. He was shocked by this and he asked the

claimant if he had called him a *"wanker"*. The claimant denied it and laughed. Mr Moore left it there and moved on. Mr O'Connell did not hear the comment *"wanker"* being made although he obviously heard Mr Moore's reaction to it and his question to the claimant as to whether he had indeed called him a wanker. As noted in our findings above about the reliability of the claimant's evidence, there is nothing inconsistent with the fact that Mr O'Connell did not actually hear the comment being made but stated in his subsequent grievance interview that it was his understanding that it had been made.

194. We find on the balance of probabilities that the claimant did indeed call Mr Moore a wanker and did so under his breath in a way that Mr Moore realised what he said to him but others didn't. There is no reason why Mr Moore would make this accusation unless he genuinely thought that the comment had been made. The claimant was recording the meeting covertly and was obviously well aware that he was doing so. We consider that, on the balance of probabilities, the claimant mouthed the word wanker in a way which would not come out on the recording but with the intention that he would get a reaction from Mr Moore which would come out on the recording (Mr Moore's reaction duly did come out on the recording and that was indeed the part of the recording which the claimant in due course disclosed to the respondent).

195. Contrary to the claimant's assertion at allegation 3.1(c) of the list of issues, therefore, Mr Moore did not therefore make a false allegation that the claimant had called him a wanker; nor did Mr Grice or Mr O'Connell falsely claim to have heard the claimant use that language.

196. During the meeting, Mr Moore again used the expression *"proper supervisor"*. Again, as on 15 May 2021, he used it in the context of explaining that under the new changes the Supervisors would do the full range of duties rather than the limited siloed duties which they had been doing under the interim arrangements. It was not a comment targeted against the claimant. It applied to all Supervisors.

WhatsApp group messages on 20 June 2021

197. The team have a WhatsApp group set up which is used for when immediate communication is required. The claimant has alleged that the messages sent on the WhatsApp group on 20 June 2021 were threatening towards him. We have seen these messages (at pages 872-873 of the bundle). The claimant is not a participant in that set of messages. The communication style in them is rough but reflects the way that the individuals on the group generally spoke. They contain some profanities. Looking through them, it could be interpreted that Mr Chris O'Connell is being very direct with Mr Moore. However, the messages are in no way threatening to or even directed at the claimant.

Claimant's grievance of 3 August 2021

198. As noted, the claimant raised a grievance on 3 August 2021. He did so in writing in an email to Ms Hall of HR. The grievance references and describes

the switch repair issue amongst various complaints, including complaining about Mr Moore and Mr Grice. It also references the fact that the claimant contacted Mr Chris O'Connell.

199. Whilst the grievance includes a general reference to the claimant having raised issues on many occasions with Mr Grice in relation to a number of matters including timesheet fraud, it does not contain (as alleged by the claimant at alleged protected disclosure 2.1(e)) an allegation of timesheet fraud that Mr Lovegrove allegedly claimed to have worked a 12 hour shift on 9 May 2021 when he had in fact left work early.

Cakes

200. On 5 August 2021, Mr Moore bought cakes for the team and brought them into the office. The claimant wasn't there at the time as he was working nights. Mr Moore did not want him to miss out. Mr Moore therefore saved some of the cakes and left the box with the remaining cakes on the claimant's desk. He also sent a WhatsApp message to the claimant to let him know that he had left him a present. The claimant thanked Mr Moore.

201. The claimant has since alleged that Mr Moore's leaving the cakes for him was a comment about his weight. However, this was quite clearly not Mr Moore's intention. The cakes were bought for the whole team and he did not want the claimant to miss out. It was a nice gesture.

Meeting with Mr Stephen O'Connell on or around 9 August 2021

202. Ms Hall contacted Mr Stephen O'Connell in relation to the claimant's grievance. She felt she had to escalate it to Mr Stephen O'Connell as the claimant appeared to be raising a number of allegations against the various managers who sat between the claimant and Mr Stephen O'Connell in the chain of command. Mr Stephen O'Connell was initially loath to have any involvement because of the references to his brother, Mr Chris O'Connell, in the grievance. However when he discussed it further with Ms Hall, it became clear that the grievance was actually primarily in relation to Mr Moore and was not against Mr Chris O'Connell.

203. Mr Stephen O'Connell thought it would be helpful to meet the claimant, accompanied by Ms Hall, to hear his concerns and understand what they could do to support him whilst his grievance was being investigated. On or around 9 August 2021 they duly met.

204. During the meeting, it was agreed that the claimant would redeploy to another site pending the investigation of his grievance. As noted, the claimant duly redeployed to Shenfield from 11 August 2021. Redeployment for this period was what the claimant himself wanted.

205. During the meeting, the claimant also brought up the fact that Mr Moore had left the cakes on his desk and complained about that, as well as Mr Moore's allegation in the 24 May 2021 meeting that the claimant called him a wanker. Mr

Stephen O'Connell accepts that he did involuntarily chuckle at these two points, because he found them rather petty, although he did then apologise to the claimant for doing so.

Investigation of grievance

206. The claimant's grievance was then duly investigated by Mr Boggis. This included Mr Boggis meeting the claimant on 20 August 2021. The claimant did discuss the switch repair issue and explained the background to it. Towards the end of the meeting, the claimant said to Mr Boggis:

"Again with fraudulent activity, Jamie was on holiday 26th-30th April yet he booked a 12 hour shift. It was raised to Alistair who said he didn't know if he was working at home. He was on annual leave."

207. Although Mr Lovegrove was not interviewed in relation to the claimant's grievance, an investigation was carried out by Mr Caten into timesheets on the back of the claimant's allegations. Mr Lovegrove showed Mr Caten his timesheets which corroborated his version of events. Mr Caten agreed that Mr Lovegrove was correct and no further action was taken.

208. The claimant had alleged that on 30 April 2021, Mr Lovegrove had falsely claimed on-call allowance whilst being at the beach (this is likely to be the allegation that is referenced by him at his grievance meeting with Mr Boggis which we have quoted above). On 30 April 2021 Mr Lovegrove was on annual leave but he got a call saying that a train driver reported a broken rail. He therefore dealt with the issue over the phone, speaking with the fault control team. He told the claimant what had happened. Mr Lovegrove claimed the on-call allowance as he had to deal with the issue during his annual leave and this was shown on his timesheet. The claimant had then gone through Mr Lovegrove's wife's Facebook profile and found a picture of Mr Lovegrove and his family on the beach, on the basis of which the claimant had made the allegation that Mr Lovegrove had committed the timesheet fraud. Mr Lovegrove found this quite alarming. The picture was from another day (it had just been posted on Facebook on 30 April 2021). This is further evidence of the lengths to which the claimant was prepared to go to get Mr Lovegrove into trouble.

209. Mr Boggis' investigation into the claimant's grievance was thorough. As noted, he upheld parts of the grievance, although he did not find that Mr Moore bullied or victimised the claimant. As regards the switch repair issue, Mr Boggis specifically thanked the claimant for bringing the issue to the respondent's attention. He also arranged for a Level 1 investigation under the respondent's procedures to take place regarding that issue (which duly took place and recommended the same actions which Mr Moore had already taken in the immediate aftermath of the incident in May 2021). Mr Boggis issued his grievance outcome letter on 10 November 2021.

210. As noted, the claimant appealed against the outcome on 21 November 2021 (although did not provide grounds for appeal at that point).

211. On 30 November 2021, Mr Stephen O'Connell then met with the claimant to discuss his reintroduction to Camden.

Claimant's annual leave

212. The claimant has alleged that Mr Lovegrove altered the claimant's annual leave following the end of September 2021 whilst the claimant was away at Shenfield. The background to this is that, although the claimant was redeployed to Shenfield temporarily, his time was still charged to the Camden Depot and records including holiday were still kept at the Camden Depot. Furthermore, Mr Grice had resigned as Section Manager and, during part of the period when the claimant was away, Mr Lovegrove was acting up as Section Manager at Camden and therefore had responsibility for approving annual leave requests.

213. Mr Lovegrove took the initiative to create an unofficial annual leave tracker in order to check the amount of annual leave staff had accrued and what they had remaining. It was a painstaking process as it involved reviewing the weekly timesheets of all 13 members of staff from 2019 to 2022. The tracker was not intended to be an official document but was for Mr Lovegrove's personal use. It was not distributed to the team.

214. As part of the claimant's subsequent grievance raised in April 2022 against Mr Lovegrove, he alleged that Mr Lovegrove had altered his annual leave. The claimant had in fact searched and discovered the annual leave tracker on the system (as this was the only way he could have located it because it was not a document which Mr Lovegrove had circulated amongst the team). The claimant then referred to this document to accuse Mr Lovegrove of altering his timesheet. However, Mr Lovegrove had not in any way altered the claimant's timesheet or holiday records.

Discussions regarding the claimant's return to Camden

215. As noted, the claimant met Mr Stephen O'Connell on 30 November 2021 to discuss his reintroduction to Camden. During the meeting, the claimant was clear that he was not happy about the grievance outcome and was in the process of appealing. He implied that he considered it was best for him to remain at Shenfield owing to annual leave in December 2021 and because of Shenfield work commitments.

216. On 3 December 2021, the claimant email Mr Stephen O'Connell regarding his remaining annual leave and stated that he thought it would be best to look to his returning to Camden at the start of 2022. The claimant and Mr Stephen O'Connell had a conversation about him potentially taking a short-term *"golden assets"* role at Tottenham MDU, which would begin in January 2022. This role had not previously existed, but Mr Stephen O'Connell told the claimant that it was an option that they could explore if he was interested.

217. In an email of 6 December 2021 to the claimant, Mr Stephen O'Connell stated *"Happy for you to remain at Shenfield and return to Tottenham DU in the*

New Year.”. The reference was to Tottenham and not to Camden and it was Mr O’Connell’s expectation that the claimant would return first to Tottenham. Furthermore, Mr O’Connell did not expect the claimant simply to turn up unannounced without further discussion, which is what the claimant duly did – at Camden.

4 January 2022

218. At the beginning of January 2022, Mr Lovegrove was under the impression that the claimant would be returning to work in Tottenham as the claimant had posted about it on LinkedIn. He was not aware of when the claimant would be returning to the Camden Depot.

219. When Mr Lovegrove arrived at the Camden Depot on 4 January 2022 he found to his surprise that the claimant was there sitting at his (the claimant’s) desk. Mr Lovegrove asked how the claimant was; the claimant ignored him. Mr Lovegrove had brought milk for hot drinks and he let the claimant know that he was putting it in the fridge in case the claimant wanted to make a drink; the claimant gave him a very dirty look. This upset Mr Lovegrove as he had been making an effort with the claimant and he thought that it was important that they started afresh. There was a heated conversation between them, which included swearing. The claimant told Mr Lovegrove that he didn’t respect him, that he did not have to talk to him and that Mr Lovegrove would not be his line manager for much longer (Mr Lovegrove had, as noted, been acting up as Section Manager). The claimant also said that Mr Lovegrove had not been investigated for the two grievances he had raised against him (by which he meant the switch repair issue and the timesheet fraud); when Mr Lovegrove said that he had been, the claimant seemed to be thrown off by that.

220. Mr Lovegrove had a suspicion that the claimant was recording the conversation, as the claimant kept pointing to his pocket (and Mr Lovegrove was aware of the claimant’s previous practice of recording meetings from what the claimant had told him about recording Mr Moore in relation to the 2019 “DJ incident”). The claimant was also making rude gestures towards Mr Lovegrove, which Mr Lovegrove kept calling out, but then the claimant would say that he wasn’t making the gestures. In the light of the claimant’s previous practices, we find on the balance of probabilities that he was again recording the meeting and, by making silent gestures, was trying to get a response from Mr Lovegrove which would be captured on the recording.

221. Eventually Mr Lovegrove, in the light of the claimant’s attitude to him, stated words to the effect of *“fuck off back to Shenfield then”*. In the subsequent investigation, Mr Lovegrove openly admitted that he had said this.

222. The claimant then called Mr Stephen O’Connell. It was early on 4 January 2022 and, because Mr Stephen O’Connell had been working late the previous day, he was not yet awake and the call woke him up. Mr O’Connell was taken aback by the claimant’s tone and raised voice, as the claimant was aggravated. The claimant told him that he had gone back to the Camden site and been told by Mr Lovegrove to fuck off back to Shenfield. Mr O’Connell had just

woken up and was surprised to learn that the claimant had gone back to the Camden site as opposed to Tottenham MDU and had done so without any prior discussion. He did say *"who the fuck told you to go back to Camden?"*. He at all stages admitted that he swore, considers that he should not have done, but reacted in that manner due to being woken up by the claimant's heated call and being surprised to hear that the claimant had gone back to Camden.

223. Mr Stephen O'Connell's view is that it was as a result of a misunderstanding that the claimant went to the Camden Depot as opposed to Tottenham MDU. He felt the claimant should have realised that he meant him to go to the Tottenham MDU site from his email of 6 December 2021. Mr O'Connell had not intended him to return to Camden straight away, in particular in light of his outstanding grievance appeal and the fact that that he had not pre-warned anyone at Camden that this was going to happen. His intention was that the claimant should work from Tottenham MDU for the time being whilst they made arrangements for a return to his substantive role at the Camden Depot in due course.

5 January 2022 meeting with Mr Stephen O'Connell

224. On 5 January 2022, Mr Stephen O'Connell met the claimant at Tottenham MDU to attempt to go through the grievance outcome. During the meeting, the claimant kept going off on tangents and talked about issues that did not relate to the purpose of the meeting, including making personal comments in relation to Mr Moore. One outcome of the grievance had been that there was a breakdown in the relationship between the claimant and Mr Moore and mediation had been recommended. The claimant refused to take part in mediation and did not accept any of the findings of the grievance, even though they were broadly in his favour. Mr O'Connell felt that it was clear that the only satisfactory outcome to the claimant would be that Mr Moore should be sacked. It was a very frustrating meeting for Mr Stephen O'Connell and he felt that it was not making any headway and that they were going round in circles. Mr O'Connell also explained to the claimant that he had to return to his substantive role following the grievance outcome.

225. The claimant's demeanour changed during the meeting and he got angry and annoyed very quickly. Mr O'Connell attempted to bring the meeting to an end and stood up. Unfortunately, he did so too quickly and his chair, which was near a wall, collided with the wall behind him and made a loud noise.

226. The claimant also stood up and aggressively walked towards Mr O'Connell whilst swearing at him. Mr O'Connell swore back and told the claimant to fuck off, as he was provoked by his aggressive behaviour. Mr O'Connell was worried that the claimant might be violent as he approached him and he asked him to leave the room. He opened the door for him to leave and the claimant continued to shout profanities at Mr O'Connell and draw attention to them.

227. The claimant has alleged that Mr O'Connell told him *"listen you cunt, you are pissing me off"*. Mr O'Connell is adamant that he did not use those words. Given that Mr O'Connell was, both during contemporaneous investigation

meetings and at this tribunal, prepared consistently to acknowledge when he did use swear words and to express regret for them, and in the light of our findings in relation to the relative reliability of the evidence of the claimant and the respondent's witnesses, we accept that Mr O'Connell did not say these words.

228. Furthermore, the claimant also alleged that Mr O'Connell *"put his hands on him to stop him leaving"*. Mr O'Connell denies this. For the same reasons, we accept Mr O'Connell's account and find that he did not touch the claimant during this exchange. In addition, Mr Connell wanted the claimant to leave at this point so, putting his hands on the claimant "to stop him leaving" (as the claimant has alleged) seems even less likely.

229. The claimant left the room and Mr O'Connell escorted him out of the building towards the car park. The conversation continued and Mr O'Connell again asked what he wanted and the claimant stated that he wanted Mr Moore to be sacked; Mr O'Connell told him that that would not happen. Bizarrely, the conversation then turned football. The claimant also expressed an interest in the *"golden assets"* role which we have referred to previously, and Mr O'Connell said he would explore some options for him to consider. In the end, they shook hands and the encounter ended amicably.

230. The facts found above reflect what Mr O'Connell set out in his witness statement. However, he called Ms Hall after the conversation and, on her advice, wrote down what happened. The note is consistent with his account in his witness statement and for this reason, as well as the respective reliability of the evidence of the claimant and the respondent's witnesses, we prefer Mr O'Connell's account.

Discussions regarding the claimant's role going forwards

231. After the meeting, the claimant emailed Mr Stephen O'Connell requesting that during any future meetings, his trade union representative should be present. He also indicated that he wanted to transfer to the Broxbourne depot instead of going back to Camden. There were then ongoing discussions between Mr O'Connell and claimant regarding what role he should do.

232. Mr O'Connell then had a formal meeting on 11 January 2022 with the claimant and his trade union representative present. As a way of moving forward, Mr O'Connell suggested that the claimant could either remain at the Sheffield site, work at Tottenham MDU track team, or return to the Camden Depot. The claimant rejected all three options. He suggested he could work from the Broxbourne depot as an alternative place of work during the process of his appeal against the original grievance decision. Mr O'Connell told him that there was not a business need at the time for him to work at that site and that he had suggested other viable options instead.

233. On 18 January 2022, Mr O'Connell then emailed the claimant for further information on a temporary arrangement he had suggested whereby the claimant could cover a project interface role at Tottenham MDU. This would not have involved working at Camden. The claimant initially seemed agreeable to this

idea. However he responded that he did not want to work at Tottenham because Mr Stephen O'Connell was working there and stated that he would only be willing to work from Broxbourne. Mr O'Connell reiterated why Broxbourne was not an option.

234. As noted, the claimant on 18 January 2022 raised a grievance against Mr Stephen O'Connell in relation to the events of the 4 January 2022 telephone call and the 5 January 2022 meeting. This was in due course investigated but not upheld.

235. As the claimant had turned down the other alternatives, Mr O'Connell told him that he was to return to a substantive role at Camden on 20 January 2022. However, even then, Mr O'Connell made clear that the offer of carrying out work on behalf of the engineers based out of Tottenham was still available as a temporary working arrangement if he wanted to change his mind on this and he set this out in an email of 19 January 2022 to the claimant. In that email, Mr O'Connell also stated that, if the claimant returned to Camden, he would initially be reporting to Mr Moore who was covering the Section Manager duties at that time for a period whilst Mr Lovegrove was away.

236. The claimant went off sick on 20 January 2022. On 21 January 2022, he emailed Mr Stephen O'Connell to say that he had had time to think about the situation and requested to work at the Shenfield Depot for four weeks from 24 January 2022, while his appeal was conducted. Mr O'Connell agreed to this.

237. However, the claimant then went on long-term sick leave from 21 January 2022 until mid-April 2022.

The claimant's brother

238. The claimant's brother, Mr Daniel Oliver, who gave evidence at this tribunal, was engaged by the respondent as a contractor in April 2022. He was booked to work at the Camden Depot. He gave evidence that, at the usual briefing at the start of the day, a member of the respondent's staff whom he had never met or seen before had asked (having seen his name on the list), who "D Oliver" was and he replied that that was him. He didn't understand what was going on or if it was banter or a joke; however, the individual then went on to say things such as *"Oh no he's back"; "back as a younger version"; "watch this one"; and "watch what you say around him"*. (To be clear, the claimant was not present.)

239. Although he was not present at the tribunal to give evidence, Mr Stuart's witness statement stated that he witnessed this and essentially corroborated the sort of things that were said. He also identified that it was Mr Lovegrove who was the individual who said these things.

240. Mr Lovegrove's evidence was that he did not recall making any of these comments and did not know that the claimant had a brother who did any work for the respondent (as a contractor or otherwise).

241. We consider that, on the balance of probabilities, these comments were made by Mr Lovegrove. First, we had no reason to doubt Mr Daniel Oliver's evidence; he seemed open and honest about what he said. Secondly, notwithstanding that he wasn't present, we know from what is set out in relation to the management of the case above, that Mr Stuart, although he was not prepared to come to the tribunal, had taken ownership of the witness statement which was provided and that witness statement corroborated Mr Daniel Oliver's account and identified Mr Lovegrove as the person who made the alleged comments.

242. We do not find it surprising that Mr Lovegrove cannot recall the comments. First, it was a long time ago. Secondly, as we have found, there is a lot of banter and jokes in interactions between individuals on the railway, so this brief exchange would have been one amongst many. Thirdly, it was a very short exchange. Fourthly, we find it unsurprising that Mr Lovegrove might make those comments in April 2022, given all that had happened to him at the hands of the claimant in the previous months. The nature of the comments is consistent with them having been made by someone who had been on the receiving end of the claimant's attempts consistently to get him into trouble and who repeatedly recorded conversations and then reported things said; it is perhaps unsurprising that Mr Lovegrove might suggest that one needed to be careful about and to watch what one said in front of the claimant.

243. We therefore find, on the balance of probabilities, that Mr Lovegrove did make these comments.

The Law

Protected disclosure detriment complaints

244. The principal relevant law is set out in Part IVA of the ERA.

Protected disclosures

245. For detriment complaints relating to protected disclosures, colloquially referred to as "whistle blowing", an employee must first prove on the balance of probabilities that he or she made a protected disclosure. To do this the employee must first prove that he or she made a qualifying disclosure under s.43B of the ERA. 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 six categories set out at s.43B (a-f). The categories relevant to this case are:

(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.

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

All of the alleged protected disclosures in this case apart from 2.1(e) in the list of issues relate to category (f); alleged protected disclosures 2.1(e) and (f) also relate to categories (a) and (b) above.

246. The case of Cavendish Munro Professional Risks Services Ltd v Geduld [2010] IRLR 38 EAT indicates that there is a distinction between “information” and an “allegation”. The ordinary meaning of “information” is “conveying facts” and that is what is required to fall within s.43B. A mere allegation will not suffice. However, the two are not mutually exclusive; a protected disclosure may contain both information and allegation (see Kilraine v London Borough of Wandsworth [2016] IRLR 422, EAT).

247. Crucially, it is not the happening of a matter within one of the above categories which is relevant to the establishment of the qualifying disclosure but merely whether the employee has a reasonable belief in its having happened, happening or the likelihood of its happening. A belief may still be objectively reasonable even where the belief is wrong or does not on its facts fall within one of the categories outlined about.

248. Ms Ahmad in this context also referred to Darnton v University of Surrey [2003] IRLR 133, on which the respondent relies. This held that (1) a qualifying disclosure was any disclosure of information which in the reasonable belief of the employee making it tended to show a relevant failure, even if the employee was reasonably mistaken and (2) the tribunal in that case had therefore erred in deciding the matter upon the basis of whether the allegations were correct or not as they should have decided it upon the basis of whether D had a reasonable belief in the allegations on the basis of facts as understood by him (our emphasis).

249. The same reasonable belief test applies to the public interest test incorporated into s.43B ERA and referred to above (see Chesterton Global Ltd and another v Nurmohamed [2015] UK EAT/0335/14). Nurmohamed established that the test is whether an individual has a reasonable belief that the disclosure is in the public interest.

250. If the employee establishes that he or she made a qualifying disclosure, he or she must then prove that it was a protected disclosure. This can be done in a number of ways in accordance with s.43C-43H of the ERA. A disclosure made to an employer, as set out in s.43C, is one such way in which a qualifying disclosure can be a protected disclosure as well. There is no dispute in this case that, to the extent that any qualifying disclosure was made, it would fall within s.43C and therefore be a protected disclosure.

251. If the above is established, the employee has made a protected disclosure.

Detriment complaints

252. S.47B(1) ERA provides that:

"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".

253. Following the case of NHS Manchester v Fecitt and others [2011] EWCA Civ 1190, it is established that in terms of causation the disclosure must be a material influence (in the sense of being more than a trivial influence) in the employer's subjecting the claimant to a detriment. Under s.48(2) ERA, it is for the employer to prove on the balance of probabilities the ground on which the act, or deliberate failure, complained of was done.

Time limits

254. The tribunal will not have jurisdiction to consider protected disclosure detriment complaints unless they were presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them; or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

255. The period of three months is adjusted as a result of time spent on ACAS Early Conciliation. In this case, as ACAS Early Conciliation commenced on 26 May 2022, any detriment complaints where the act or failure to act to which the complaint relates took place prior to 27 February 2022 are prima facie out of time. In relation to such complaints, therefore, the tribunal would need to consider whether they are part of a series of similar acts or failures or, if they were not, whether it was reasonably practicable for the complaint to have been presented before the end of the adjusted three-month period and, if it was not, whether they were presented within such further period as was reasonable.

Conclusions on the issues

256. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Protected disclosures

(a) On 14 May 2021, he told Alistair Grice that damage to the track on 9 May 2021 had not been declared by Jamie Lovegrove or repaired (i.e. a switch repair) which had resulted in trains being permitted to travel on the defective track during this period. (Page 141 and 165)

257. As we have found, the claimant did tell Mr Grice on 14 May 2021 about the switch repair. However, for the reasons set out in detail on our findings of fact, the claimant did not have a belief when he made this disclosure that the

health and safety of any individual had been, was being or was likely to be endangered.

258. This cannot, therefore, be a protected disclosure.

(b) On 15 May 2021, he discussed the same issue with James Moore when he stated that it had not been dealt with for a further 24 hours. (Page 180)

259. As we have found, the claimant did discuss the same issue with Mr Moore on 15 May 2021. However, for the reasons set out in detail in our findings of fact above, the claimant did not have a belief when he made this disclosure that the health and safety of any individual had been, was being or was likely to be endangered.

260. This cannot, therefore, be a protected disclosure.

(c) On 16 May 2021, he raised the same issue with Chris O'Connell in a grievance. (Page 193)

261. As we found, the claimant did not raise this issue with Mr Chris O'Connell on 16 May 2021; rather, that conversation was primarily about his complaints about Mr Moore. As the factual basis of this allegation has not been made out, this cannot be a protected disclosure.

262. If we had accepted that the claimant had made the alleged disclosure to Mr O'Connell, we would have accepted that, by this stage, the claimant had a reasonable belief that the health and safety of any individual had been endangered, as by that stage Mr Moore had taken the decision, on health and safety grounds, to block the track and the claimant knew this. It would, therefore, be reasonable to believe at this stage that health and safety had been endangered.

263. Any danger was, however, in the past as Mr Moore had blocked the track. The claimant was well aware of this. As noted, he accepted that the matter had been dealt with and had been dealt with properly by Mr Moore. Any disclosure at this point would be a repetition and, as Ms Ahmad submits, given that the claimant knew that any potential danger was in the past, we do not consider that at this point he had a belief that such a disclosure was in the public interest, let alone a reasonable belief that it was in the public interest. For this reason, even if this disclosure had been made to Mr Chris O'Connell, it could not be a protected disclosure.

(d) On 3 August 2021, he raised the same issue in a further grievance. (Pages 236 - 237)

264. The claimant did raise the same issue in the 3 August 2021 grievance. For the reasons above, by this stage, the claimant had a reasonable belief that the health and safety of individuals had been endangered. However, for the same reasons as set out above, the claimant knew that any potential danger was in the past and we do not consider that at the point that he made this disclosure

he had a belief that such a disclosure was in the public interest let alone a reasonable belief that it was in the public interest.

265. For this reason, this disclosure is not a protected disclosure.

(e) On 3 August 2021, in the same grievance he also raised an issue of alleged timesheet fraud in that Mr Lovegrove had claimed to have worked a 12-hour shift on 9 May 2021 when he had in fact left work early. (Pages 236 - 237)

266. As we have found in our findings of fact, the claimant did not raise this issue in his 3 August 2021 grievance. He made only a generalised reference to timesheet fraud without any of this detail about Mr Lovegrove or the allegation in question. As the factual basis of this allegation has not been made out, this cannot be a protected disclosure.

267. Even if the claimant had made this disclosure in his 3 August 2021 grievance, we do not consider that the claimant had a reasonable belief that there was any timesheet fraud on Mr Lovegrove's part. He may have had a genuine belief, born out of his desire to get Mr Lovegrove into trouble, but he had no reasonable evidence to substantiate such a belief and for those reasons we do not consider that such a belief could be a reasonable one. Furthermore, we do not consider that the claimant had a belief that this was in the public interest (let alone a reasonable belief that it was in the public interest); it is a narrow issue relating to a specific colleague's timesheets on a particular occasion and not something that the claimant could have believed at all, let alone reasonably believed, was in the public interest.

(f) On 20 August 2021, he discussed the switch repair and timesheet fraud issues at a grievance investigation meeting. (Page 424 – 428)

268. The claimant did discuss the switch repair issue at the grievance meeting with Mr Boggis on 20 August 2021.

269. For the reasons above, by this stage, the claimant had a reasonable belief that the health and safety of individuals had been endangered. However, this was a further repetition of an earlier disclosure; for the same reasons as set out above, the claimant knew that any potential danger was in the past and we do not consider that at the point that he made this disclosure he had a belief that such a disclosure was in the public interest, let alone a reasonable belief that it was in the public interest.

270. For this reason, this disclosure is not a protected disclosure.

271. As to the timesheet fraud issue, as we have found, the claimant did raise the issue in relation to alleged timesheet fraud by Mr Lovegrove on 30 April 2021. However, whatever the claimant may have genuinely believed in his desire to get at Mr Lovegrove, we do not consider that he had a reasonable belief based on the evidence (or rather lack of it) that Mr Lovegrove had falsified his timesheet. For this reason this cannot be a protected disclosure.

272. Furthermore, we do not consider that the claimant had a belief that this was in the public interest (let alone a reasonable belief that it was in the public interest); it was a narrow issue relating to a specific colleague's timesheet on a particular occasion and not something that the claimant could have believed at all, let alone reasonably believed, was in the public interest. For this reason too, it cannot be a protected disclosure.

Summary regarding protected disclosures

273. None of the protected disclosures alleged by the claimant have been established. Consequently there are no proven protected disclosures on which to found any of the claimant's detriment complaints. All of the complaints therefore fail at this first stage.

274. Nonetheless, we go on to consider the individual alleged detriments.

<u>Detriments</u>

(a) On 15 May 2021, James Moore interrogated the Claimant about the switch repair issue, called him a "one-trick pony", told him he was not "a proper supervisor" and belittled his letters of recommendation and award nominations.

275. As we have found, Mr Moore did not belittle the claimant's letters of recommendation or award nominations so that part of this allegation fails on the facts.

276. Furthermore, he did not "interrogate" the claimant about the switch repair issue. It was the claimant who raised the switch repair issue towards the end of their conversation and told Mr Moore about it. That element of the allegation therefore also fails on its facts. However, even to the extent that Mr Moore asked any questions about the switch repair issue, it was entirely proper of him to do so in the context the claimant having raised that issue; simply further exploring a serious issue which the claimant himself had chosen to raise cannot in any way be described as detrimental treatment and we find that it was not. That element of the claim fails for that reason too.

277. As we found, whilst Mr Moore in the earlier part of the discussion on 15 May 2021 about the changes to operations used the expressions *"one trick pony"* and *"proper supervisor"*, he did not call the claimant a one trick pony or tell him that he was not a proper Supervisor. Rather, these were general terms used to describe the proposed changes for Supervisors generally. This allegation is not therefore made out on the facts. However, even if it can be said that it was, it was not a detriment and the claimant could not reasonably have taken it as being a detriment; the expressions were simply used to explain Mr Moore's reasonable view that it was beneficial for the Supervisors to carry out a variety of skills as opposed to the siloed way of working which they had been doing up to that point. As the terms were not detrimental, the allegation fails for that reason.

278. Finally, they were in no sense whatsoever used because of the claimant raising the switch repair issue. First, chronologically the claimant raised the

switch repair issue at the end of that conversation after the use of the expressions *"one trick pony"* and *"proper supervisor"*, so there cannot be a causal link between the two. Secondly, they were of course used in the context of separate discussions about operational changes and were nothing to do with the switch repair issue. This allegation fails for this reason too.

(b) On 24 May 2021, Mr Moore told him that he was not a "proper supervisor".

279. Again, whilst Mr Moore used the expression *"proper supervisor"*, he did not direct it against the claimant or say that he was not a proper Supervisor. The allegation therefore fails on the facts. Furthermore, for the reasons set out in the section above, the use of the term was not detrimental treatment nor was there any causal link whatsoever between Mr Moore using it and the switch repair issue.

280. This allegation therefore fails.

(c) On 24 May 2021, Mr Moore made a false allegation that the Claimant had called him a "wanker" and Alistair Grice and Chris O'Connell falsely claimed to have heard the Claimant using that language.

281. Mr Moore did not make a false allegation that the claimant had called him a wanker; as we have found, the claimant did call him a wanker. Furthermore, as we found, neither Mr Grice nor Mr Chris O'Connell falsely claimed to have heard the claimant say that. These allegations are not, therefore, made out on the facts and therefore fail.

282. In any event, these matters are nothing whatsoever to do with the switch repair issue. The interchange was part of a heated meeting about the proposed changes to operational practices.

(d) In around June and July 2021:

(i) changes were forced on the Claimant. In response to the Tribunal's order for the Claimant to particularise the alleged conduct, the Claimant has referred to an email sent from James Moore to the Claimant, Alistair Grice, Jason Ridgely, Jamie Lovegrove and Christopher O'Connell on 17 May 2021 at 13:27pm; (Page 185)

283. Changes were not forced upon the claimant. The email referred to in this allegation is Mr Moore's detailed email of 17 May 2021 proposing organisational changes. As it happened, they were never implemented, so they were not forced upon the claimant. This allegation therefore fails on the facts at the first stage.

284. Furthermore, we accept Ms Ahmad's submission that an operational email directed to the whole team cannot be a detriment to the claimant.

285. Furthermore, the claimant has not identified what he says it is about these changes that he considered to be detrimental to him. We have seen his references at the meeting to the proposed changes being a *"Mickey Mouse plan"*.

However, when it was put to him that the detriment to him might be that the new changes meant that there was a reduction in the amount of overtime he was doing and therefore a financial impact on him, he denied it. Therefore, even if an operational email directed at the whole team could be said to be a detriment to the claimant, that detriment has not even been identified. The allegation fails for this reason too.

286. Finally, the changes had nothing to do with the switch repair issue. They had been discussed at management level weeks in advance of the claimant's alleged disclosure on 14 May 2021 and indeed Mr Moore had drafted the email in question a week or so prior to sending it on 17 May 2021 (in other words, prior to the first of the claimant's alleged protected disclosures on 14 May 2021). It cannot have been in any way because of the alleged protected disclosure. The allegation therefore fails for this reason too.

(d) In around June and July 2021:

(ii) he was sent unprofessional emails. In response to the Tribunal's order for the Claimant to particularise the alleged conduct, the Claimant has not provided further and better particulars of such unprofessional emails and has instead referred to the grievance he raised in August 2021 in respect of alleged bullying and victimisation of the Claimant by James Moore; (Pages 71 - 72)

287. As is evident from the text of the issue itself, the claimant did not provide examples of allegedly unprofessional emails other than cross-referencing his grievance about alleged bullying and victimisation by Mr Moore. In the absence of specifics, this allegation fails on the facts at the first stage.

288. The only actual email that could be referred to by reference to the grievance is the email which forms the basis of allegation (d)(i) above and is therefore a repetition of that. Therefore, for the reasons set out in relation to allegation (d)(i) above, this allegation fails.

(d) In around June and July 2021:

(iii) he was also sent profane and threatening WhatsApp messages. In response to the Tribunal's order for the Claimant to particularise the alleged conduct, the Claimant has referred to specific messages sent between Chris O'Connell and James Moore on 20 June 2021 between 07:22am – 10:16am. (Pages 872 - 873)

289. The claimant was part of the WhatsApp group where the messages in question were sent. As we found, the messages do contain some profanities. However, they are between Mr Chris O'Connell and Mr Moore and are not directed at the claimant. They were not therefore threatening to the claimant. In terms of the factual basis for this allegation, therefore, the claimant was sent messages which were profane (in the sense that he was part of the WhatsApp group on which these messages were interchanged), but he was not sent threatening messages. Only part of the factual basis for this allegation is therefore proven.

290. However, that part cannot be detrimental treatment of the claimant because the profanities are between Mr Chris O'Connell and Mr Moore; there is no detrimental treatment of the claimant. The allegation fails for this reason.

291. Furthermore, the interchange and the profanities were nothing whatsoever to do with the switch repair issue; they related to a separate operational matter. As noted, the use of profanities is commonplace on the railway (both in oral and written communication) and this was therefore just a normal interchange. It was in no way anything to do with or in any way because of the fact that the claimant had raised the switch repair issue. The allegation fails for this reason too.

(e) In around late July/early August 2021, James Moore left a box of uneaten cakes on the Claimant's desk. In response to the Tribunal's order for the Claimant to clarify the date this happened, the Claimant has referred to a text message sent from James Moore to the Claimant on 5 August 2021 and an email sent from James Moore to the Claimant on 6 August 2021 at 02:32am. (Page 240 & Page 263)

292. Mr Moore did leave a box of cakes on the claimant's desk on 5 August 2021. There were not "uneaten" in the sense of being the partial remnants of individual cakes; rather, they were the remainder of the cakes which Mr Moore had bought for the whole team.

293. This was a nice gesture on his part; he bought cakes for the whole team and he did not want the claimant to miss out. If the claimant thought that this was a comment about his weight, that says more about the claimant's state of mind than anything else. It was not anything to do with the claimant's weight; it was a nice gesture. In no sense could this be detrimental treatment. This allegation therefore fails for this reason. As Ms Ahmad rightly submits, it would be far more likely to have been detrimental treatment if the claimant had been deliberately excluded from having some of the cakes bought for the team.

294. In any event, Mr Moore's decision to leave cakes for the claimant was nothing whatsoever to do with the switch issue (or any references to timesheet fraud in the claimant's grievance of 3 August 2021, which Mr Moore did not even know about on 5 August 2021). The allegation fails for this reason too.

(f) On 6 August 2021, Jacqui Hall disclosed the Claimant's complaints to Stephen O'Connell which led to a meeting between the Claimant, Jacqui Hall and Stephen O'Connell, on 10 August 2021, when Stephen O'Connell laughed at the Claimant's allegations of bullying (Page 266)

295. Ms Hall did disclose the claimant's grievance to Mr Stephen O'Connell on 6 August 2021. She was perfectly entitled to disclose it to him as a senior manager and to discuss it with him. The context of her disclosing it and any discussion with Mr Stephen O'Connell was about how best to deal with the grievance which the claimant had brought. That can in no sense be considered a detriment to the claimant; to the contrary, it was done in an attempt to assist in

resolving his grievance. This element of this allegation therefore fails for this reason.

296. In any event, the decision to refer the matter to Mr Stephen O'Connell was not because of the switch repair issue or because of any mention of timesheet fraud in the grievance; as noted, it was about how best to deal with the grievance. It was not, therefore, because of any of the protected disclosures alleged by the claimant. This element of this allegation therefore fails for this reason too.

297. As to the meeting itself, Mr Stephen O'Connell admitted to have chuckled when the claimant referenced the cakes issue and the allegation by Mr Moore that the claimant had called him a wanker. Mr O'Connell apologised for chuckling. We accept that his chuckling at these points could be considered to be detrimental treatment by the claimant, albeit very much at the minor end of the scale, and we have some sympathy with Mr O'Connell, who is a very senior manager at the respondent, being bemused at being in a meeting with an employee making complaints about matters so obviously trivial as having been given some cakes by his manager. However, we do find that the chuckling was detrimental treatment.

298. Having said that, it was nothing whatsoever to do with the switch repair issue or any allegation of timesheet fraud. It was a response specifically to two issues raised by the claimant (the cakes and Mr Moore's allegation that the claimant called him a wanker) which Mr Stephen O'Connell, with some justification, found to be petty. This element of the allegation therefore fails for this reason.

(g) From 11 August 2021, the Claimant was redeployed by Stephen O'Connell to the Shenfield DU pending the investigation into his grievance. The Claimant complains about the delay which resulted in this redeployment lasting for five months. (Pages 271 - 272)

299. The claimant was redeployed by Mr Stephen O'Connell to Shenfield pending the investigation into his grievance. That was what he wanted. The fact of redeployment cannot therefore be detrimental treatment. This part of this allegation therefore fails for this reason.

300. In any event, his redeployment was not because of any of his alleged protected disclosures. It was done because it was what the claimant wanted and to enable him to be away from Camden whilst his grievance was being investigated. This part of the allegation therefore also fails for this reason.

301. The length of time during which the claimant was redeployed was a consequence of the time it took properly to investigate the claimant's grievance. The claimant received the grievance outcome on 10 November 2021 but he then appealed. Furthermore, following discussions with Mr Stephen O'Connell, the claimant himself said that he should remain at Shenfield until the beginning of 2022. The length of time that he was redeployed was therefore not detrimental treatment. This part of the allegation therefore fails for this reason.

302. Furthermore, the length of time for which the claimant was redeployed was not because of any of the alleged protected disclosures which he raised; it was to enable his grievance to be dealt with. This part of the allegation therefore fails for this reason too.

(h) On 1 September 2021, Jamie Lovegrove altered the Claimant's annual leave card and the Claimant was accused of taking leave without authorisation.

303. As we have found, Mr Lovegrove did not alter that the claimant's annual leave card (at any time). This part of the allegation fails on the facts.

304. We have not heard any evidence about the claimant being accused of taking leave without authorisation on or around 1 September 2021 and therefore this part of the allegation also fails on the facts. (The only reference to any issue about the claimant taking holiday which came up was the 2019 "DJ incident" referred to in our findings of fact, which was two years earlier than the timeframe envisaged in this allegation and in relation to which no action was taken by Mr Moore anyway.)

(i) On 4 January 2022, Jamie Lovegrove told the Claimant to "Fuck off back to Shenfield" and complained about the Claimant reporting him in relation to the switch repair and timesheet fraud issues. (Page 515)

305. We cross refer to our findings of fact in full for the full context of what happened on 4 January 2022.

306. Mr Lovegrove did tell the claimant to *"fuck off back to Shenfield"*. However, this was only after and in the context of the claimant's behaviour towards Mr Lovegrove that day, as detailed in full in our findings of fact above. In the context of the claimant's behaviour and the context of the nature of language used generally on the railway, the fact that Mr Lovegrove said this is both unsurprising and understandable. However, we still consider that it amounts to detrimental treatment of the claimant (notwithstanding the considerable amount of detrimental treatment of Mr Lovegrove by the claimant which preceded it).

307. However, the reason why Mr Lovegrove said this was the behaviour of the claimant which led up to him saying it. It was not because of the fact that the claimant had made the disclosures regarding the switch repair issue and timesheet fraud which he has alleged were protected disclosures. This part of the allegation therefore fails for this reason.

308. As to the second part of the allegation, the claimant never put it to Mr Lovegrove that he (Mr Lovegrove) complained about the switch repair issue or timesheet issue during the 4 January 2022 interchange. It was the claimant who brought up the issue on 4 January 2022 by saying that Mr Lovegrove had not been investigated for the two grievances he had raised against him (by which he meant the switch repair issue and the timesheet fraud), to which Mr Lovegrove replied that he had been. That is not a complaint by Mr Lovegrove about these matters. We therefore find that Mr Lovegrove did not complain about the claimant

reporting him in relation to the switch repair and timesheet fraud issues. As this part of the allegation has not been made out on the facts, it fails.

(j) On 4 January 2022, Stephen O'Connell told the Claimant "Who the fuck told you to go to back to Camden?"

309. Mr O'Connell did say to the claimant *"who the fuck told you to go back to Camden?"*. However, as explained more fully in our findings of fact above, he did so because he was surprised: he had just been woken up; the claimant's tone was agitated; Mr O'Connell genuinely thought that the claimant would not be going back to Camden and consequently had not himself told anyone at Camden that the claimant might be going there; and he was aware of the risk of a flashpoint if the claimant did. Furthermore, the expletive was not directed at the claimant and, in the context of railway parlance and the liberal use of expletives, was a fairly standard thing to say. Essentially, it was just a question from someone completely taken by surprise by the claimant's behaviour. In its proper context, it was not detrimental treatment. This allegation fails for that reason.

310. Furthermore, Mr O'Connell did not say it because of the switch repair issue or any allegations made previously by the claimant about timesheet fraud. Such things were not even in his mind when he said it; he said it purely because of his utter surprise that the claimant had taken it upon himself to go back to Camden that day. As the statement was not made because of any of the alleged protected disclosures, the allegation fails for that reason too.

(k) On 5 January 2022, Stephen O'Connell jumped from his chair which hit the wall, pointed at the Claimant telling him "Listen you cunt, you are pissing me off", told the Claimant "go on fuck off" and followed the Claimant outside and put his hands on him to stop him leaving. (Pages 519 - 521)

311. As we have found, Mr Stephen O'Connell did not tell the claimant *"Listen you cunt, you are pissing me off"* and did not put his hands on the claimant to stop him leaving. Those elements of this allegation therefore fail on the facts.

312. Mr O'Connell's chair did hit the wall when he stood up. However, as we have found, that was because he stood up too quickly and his chair was close to the wall anyway; it was not intended to be aggressive towards the claimant. There was, therefore, no detrimental treatment and this part of the allegation fails for this reason.

313. Furthermore, the fact that Mr O'Connell got up quickly and his chair hit the wall was nothing to do with any earlier alleged disclosures made by the claimant about the switch repair issue or timesheet fraud; he did so in order to try and bring a difficult and confusing meeting to an end. This part of the allegation therefore fails for this reason too.

314. Mr O'Connell did, as we found and as he admitted, tell the claimant to fuck off. This was in the context of the meeting as a whole (the details of which are set out in our findings of fact above), and the claimant having stood up and aggressively walked towards Mr O'Connell whilst swearing at him. Mr O'Connell

swore back and told the claimant to fuck off. Telling someone to "fuck off" is, in contrast to the normal use of profanities on the railway, directed at the individual rather than simply a profanity used as part of everyday speech, and, while we fully appreciate that the claimant was swearing at Mr O'Connell as well and therefore acting detrimentally towards him, we do consider that Mr O'Connell's telling the claimant to fuck off was a detriment (notwithstanding the immense provocation from the claimant which led up to it).

315. However, the reason why Mr O'Connell said this was because of the claimant's strange, frustrating and frankly insubordinate behaviour at that meeting. It was not in any way because the claimant had previously raised the switch repair issue or allegations of timesheet fraud. As the treatment was not in any way because of the alleged protected disclosures, this part of the allegation also fails.

(l) On 19 January 2022, Stephen O'Connell emailed the Claimant to inform him that he could return to work at the Camden DU where he would be required to work under James Moore's supervision. The Claimant complains that he was being directed to return to a hostile working environment. He alleges that this led to him taking sick leave. (Page 559)

316. In his email of 19 January 2022, Mr Stephen O'Connell did state that (if the claimant was to return to Camden the next day) he would be required to work initially under Mr Moore's supervision (as Mr Lovegrove was away). However, in the same email he was clear that working out of Tottenham was also available to the claimant as an option. In addition, Mr O'Connell had previously offered the claimant numerous different working options which would not have involved going back to Camden, all of which the claimant had rejected. Furthermore, the claimant himself then reverted to Mr O'Connell and told him that he wanted to go back to Shenfield, which Mr O'Connell agreed to. The charge under this allegation, therefore, that the claimant was *"being directed to return to a hostile working environment"* is not factually correct. There were lots of options available to the claimant which did not involve him returning to Camden; he just chose not to take any of them; he was not forced to return to Camden and, when he then stated that he wanted to go back to Shenfield, he was allowed to do so. Ultimately, he never went back to Camden but ended up at Broxbourne, which is what he wanted to do.

317. The factual basis of this allegation is not therefore made out and there was no detrimental treatment of the claimant in this respect. This allegation therefore fails.

(m) In April 2022, Jamie Lovegrove told colleagues about another D Oliver who was working at the same DU (and who is the Claimant's brother) "don't trust this one, watch what you say around him" and referred to him as a "younger" version of the Claimant.

318. As we have found, Mr Lovegrove did make these comments. The claimant was not present; Mr Lovegrove did not know who the individual was or that the claimant had a brother; the comments were made in a light-hearted

manner; and, in the context of the claimant's recent behaviour towards Mr Lovegrove, the comments were entirely understandable. Notwithstanding this, we do consider that the comments were detrimental to the claimant; they are, after all, detrimental comments about the claimant's character (albeit comments which are arguably justifiable on the evidence of the claimant behaviour's).

319. However, those comments were not in any way made because the claimant had previously raised issues about the switch repair or timesheet fraud. They were made because of the claimant's behaviour towards Mr Lovegrove, specifically his repeated attempts to get Mr Lovegrove into trouble and in particular his practice of recording conversations with a view to entrapping the individual and reporting what the individual said. Given the evidence we have heard and which is set out in our findings of fact above, it is entirely understandable that Mr Lovegrove might take that view of the claimant, and that is the explanation as to why the comments were made. As the comments were not made because of the alleged protected disclosures, this allegation fails.

Summary regarding detriments

320. In summary, therefore, all of the detriment complaints fail.

Time Limits

321. Notwithstanding that all of the complaints have failed, we are nonetheless obliged to consider the issue of time limits and whether the tribunal has jurisdiction to hear those complaints.

322. ACAS early conciliation commenced on 26 May 2022 and concluded on 7 July 2022. The claim was presented on 6 August 2022. Any complaints where the act or omission complained of was earlier than 27 February 2022 are therefore prima facie out of time. That means that all of the complaints are prima facie out of time with the exception of 3.1(m) (the comments in front of the claimant's brother), which took place in April 2022.

323. As that complaint failed, none of the earlier complaints can be deemed to be in time as being part of a series of similar acts or failures, the last of which was in time. All of the complaints, with the exception of 3.1(m), were therefore presented out of time.

324. We therefore have to go on to consider whether it was reasonably practicable for those complaints to have been presented in time. We heard no evidence or submissions to suggest that it was not reasonably practicable for the claimant to have presented those complaints in time and, having considered the entirety of the evidence available to us, we consider that there was no reason why the claimant could not have presented those complaints within the tribunal time limits. We find, therefore, that it was reasonably practicable to have presented those earlier complaints within the tribunal time limit.

325. Therefore, as it was reasonably practicable to do so, the tribunal does not have jurisdiction to hear those complaints and they are struck out.

326. As noted, and for all the reasons set out above, even if the tribunal had had jurisdiction to hear them, they would all have failed.

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Employment Judge Baty

Dated: 17 November 2023

Judgment and Reasons sent to the parties on:

17/11/2023

For the Tribunal Office

Annex

Agreed List of Issues

1 TIME LIMITS

1.1 In respect of any of the complaints which were presented outside the primary limitation period (as modified by any relevant early conciliation dates). The Claimant approached ACAS on 26 May 2022 (Day A), he was issued with the early conciliation certificate on 7 July 2022 (Day B) and submitted his claim form on 6 August 2022.

(a) Was there an act extending over a period?

(b) If not, was it reasonably practicable for the complaint to be presented in time, and if it was not, was the further period taken reasonable?

The Respondent's position is prima facie all claims arising prior to 27 February 2022 are out of time, meaning the only detriment in time is at subparagraph 3.1(m) below.

2 PROTECTED DISCLOSURES (ERA, SECTIONS 43A – C)

2.1 Did the Claimant make a protected disclosure? The Claimant relies on the following:

(a) On 14 May 2021, he told Alistair Grice that damage to the track on 9 May 2021 had not been declared by Jamie Lovegrove or repaired (i.e. a switch repair) which had resulted in trains being permitted to travel on the defective track during this period. (Page 141 and 165)

(b) On 15 May 2021, he discussed the same issue with James Moore when he stated that it had not been dealt with for a further 24 hours. (Page 180)

(c) On 16 May 2021, he raised the same issue with Chris O'Connell in a grievance. (Page 193)

(d) On 3 August 2021, he raised the same issue in a further grievance. (Pages 236 - 237)

(e) On 3 August 2021, in the same grievance he also raised an issue of alleged timesheet fraud in that Mr Lovegrove had claimed to have worked a 12-hour shift on 9 May 2021 when he had in fact left work early. (Pages 236 - 237)

(f) On 20 August 2021, he discussed the switch repair and timesheet fraud issues at a grievance investigation meeting. (Page 424 – 428)

2.2 In respect of each alleged disclosure:

(a) Did the Claimant disclose information (section 43B(1))?

(b) Did the Claimant reasonably believe that the disclosure was made in the public interest?

(c) Did the Claimant reasonably believe that the disclosure tended to show that the health and safety of any individual had been, was being or was likely to be endangered (section 43B(1)(d))?

(d) It is accepted that it was made to the employer (section 43C).

3 DETRIMENT (ERA, SECTION 47B)

3.1 Did the Respondent subject the Claimant to the following detriments:

(a) On 15 May 2021, James Moore interrogated the Claimant about the switch repair issue, called him a “one-trick pony”, told him he was not “a proper supervisor” and belittled his letters of recommendation and award nominations.

(b) On 24 May 2021, Mr Moore told him that he was not a “proper supervisor”.

(c) On 24 May 2021, Mr Moore made a false allegation that the Claimant had called him a “wanker” and Alistair Grice and Chris O’Connell falsely claimed to have heard the Claimant using that language.

(d) In around June and July 2021:

(i) changes were forced on the Claimant. In response to the Tribunal's order for the Claimant to particularise the alleged conduct, the Claimant has referred to an email sent from James Moore to the Claimant, Alistair Grice, Jason Ridgely, Jamie Lovegrove and Christopher O'Connell on 17 May 2021 at 13:27pm; (Page 185)

(ii) he was sent unprofessional emails. In response to the Tribunal's order for the Claimant to particularise the alleged conduct, the Claimant has not provided further and better particulars of such unprofessional emails and has instead referred to the grievance he raised in August 2021 in respect of alleged bullying and victimisation of the Claimant by James Moore; (Pages 71 - 72)

(iii) he was also sent profane and threatening WhatsApp messages. In response to the Tribunal's order for the Claimant to particularise the alleged conduct, the Claimant has referred to specific messages sent between Chris O'Connell and James Moore on 20 June 2021 between 07:22am – 10:16am. (Pages 872 - 873)

(e) In around late July/early August 2021, James Moore left a box of uneaten cakes on the Claimant’s desk. In response to the Tribunal's order

for the Claimant to clarify the date this happened, the Claimant has referred to a text message sent from James Moore to the Claimant on 5 August 2021 and an email sent from James Moore to the Claimant on 6 August 2021 at 02:32am. (Page 240 & Page 263)

(f) On 6 August 2021, Jacqui Hall disclosed the Claimant's complaints to Stephen O'Connell which led to a meeting between the Claimant, Jacqui Hall and Stephen O'Connell, on 10 August 2021, when Stephen O'Connell laughed at the Claimant's allegations of bullying (Page 266)

(g) From 11 August 2021, the Claimant was redeployed by Stephen O'Connell to the Shenfield DU pending the investigation into his grievance. The Claimant complains about the delay which resulted in this redeployment lasting for five months. (Pages 271 - 272)

(h) On 1 September 2021, Jamie Lovegrove altered the Claimant's annual leave card and the Claimant was accused of taking leave without authorisation.

(i) On 4 January 2022, Jamie Lovegrove told the Claimant to "Fuck off back to Shenfield" and complained about the Claimant reporting him in relation to the switch repair and timesheet fraud issues. (Page 515)

(j) On 4 January 2022, Stephen O'Connell told the Claimant "Who the fuck told you to go to back to Camden?"

(k) On 5 January 2022, Stephen O'Connell jumped from his chair which hit the wall, pointed at the Claimant telling him "Listen you cunt, you are pissing me off", told the Claimant "go on fuck off" and followed the Claimant outside and put his hands on him to stop him leaving. (Pages 519 - 521)

(l) On 19 January 2022, Stephen O'Connell emailed the Claimant to inform him that he could return to work at the Camden DU where he would be required to work under James Moore's supervision. The Claimant complains that he was being directed to return to a hostile working environment. He alleges that this led to him taking sick leave. (Page 559)

(m) In April 2022, Jamie Lovegrove told colleagues about another D Oliver who was working at the same DU (and who is the Claimant's brother) "don't trust this one, watch what you say around him" and referred to him as a "younger" version of the Claimant.

3.2 If so, was this done on the ground that the Claimant had made a protected disclosure?

<u>4 REMEDY</u>

4.1 If the Claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy. This may include to what, if any, compensation is the Claimant entitled in respect of financial loss and injury to feelings?