RESERVED

Case Nos. 2405923/2019
2405932/2019
2405924/2019

EMPLOYMENT TRIBUNALS

Claimants:
1. Mr K Flanagan
2. Mr R Rothery
3. Mr S Flanagan

Respondent: Vauxhall Motors Ltd

HELD AT: Liverpool **ON:** 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 31 July, 1 August 2023 & 28, 30 & 31 August , 1 September and 30 October 2023 (in chambers).

BEFORE: Employment Judge Shotter

Members: Mr A Clarke
Mr J Murdie

REPRESENTATION:

Claimant 1: In person
Claimant 2 & 3: Mr Lassey, counsel
Respondent: Mr MacNaughton, solicitor

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The first claimant withdrew the union detriment claim brought under sections 146(1)(a) and 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 which is dismissed on withdrawal.

2. The first, second and third claimant were unfairly dismissed, their claim for unfair dismissal brought under sections 94 and 98 of the Employment Rights

Act 1996 are well-founded and adjourned to a remedy hearing listed for **6 & 7 December 2023** at Liverpool Employment Tribunals, 35 Vernon Street, Liverpool, L2 0NH to start at 10am each day.

3. The second claimant did not suffer trade union detriment and his claim brought under sections 146(1)(a) and 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 is dismissed.

4. The first claimant's claims for alleged detriments that occurred prior to 10 December 2018 were presented to the Tribunal outside the statutory limitation period allowing for early conciliation, there were no similar acts or failures and it was reasonably practicable for the claim to have been made to the Tribunal within the time limit. The Tribunal does not have the jurisdiction to consider the complaints brought under section 47B(1) of the Employment Rights Act 1996 as amended which are dismissed. In the alternative, the respondent did not subject the first claimant to any detriment as claimed and the claims for detriment brought under section 47B(1) of the Employment Rights Act 1996 is dismissed.

5. The first second claimant's claims for alleged detriments that occurred prior to 10 December 2018 were presented to the Tribunal outside the statutory limitation period allowing for early conciliation, there were no similar acts or failures and it was reasonably practicable for the claim to have been made to the Tribunal within the time limit. The Tribunal does not have the jurisdiction to consider the complaints brought under section 47B(1) of the Employment Rights Act 1996 as amended and section 146(1)(a) and/or (b) of the Trade Union and Labour Relations (Consolidation) Act 1996 which are dismissed. In the alternative, the respondent did not subject the second claimant to any detriment as claimed and the claims for detriment brought under section 47B(1) of the Employment Rights Act 1996 and section 146(1)(a) and/or (b) of the Trade Union and Labour Relations (Consolidation) Act 1996 are not well-founded and dismissed.

6. The third claimant's claims for detriment that allegedly occurred before 9 January 2018 were presented to the Tribunal outside the statutory limitation period allowing for early conciliation, there were no similar acts or failures and it was reasonably practicable for the claim to have been made to the Tribunal within the time limit. The Tribunal does not have the jurisdiction to consider the complaints brought under section 47B(1) of the Employment Rights Act 1996 as amended and which are dismissed. In the alternative, the respondent did not subject third claimant to any detriment as claimed under issue 16(aa) to 16(at) and the claim for detriment brought under section 47B(1) of the Employment Rights Act 1996 is not well founded and dismissed.

7. The first and second claimant were not automatically unfairly dismissed under sections 152(1)(a) and 152(1)(b) of the Trade Union and Labour Relations

(Consolidation) Act 1992 and their claims for automatic unfair dismissal are not well founded and dismissed.

8. The first, second and third claimant were not automatically unfairly dismissed under section 103A of the Employment Rights Act 1996 as amended, and their claims for automatic unfair dismissal are dismissed.

REASONS

Preamble

Documents and issues arising during the final hearing.

1. The agreed documents that the Tribunal was referred to are in a number of lever arch files and total 1215, a supplemental bundle produced by the second and third claimant totalling 199 pages, an additional bundle produced by the first claimant totalling 28-pages, various additional documents produced during the hearing including C1 to C6, a reading list provided by all the parties, additional documents not previously disclosed and an agreed list of facts relating to documents that were not before the Tribunal but were known to the parties and undisclosed by agreement due to confidentiality issues. Reference has been made to the agreed facts replicated below.

2. A number of issues arose during this hearing including additional documents, two different versions of a witness statement, confidentiality issues and adjournments for personal reasons, all of which were satisfactory resolved by agreement with the parties. The second claimant also raised the issue of an intimidatory document sent to him by the respondent, which he accepted after an adjournment and discussion with counsel, was not intimidatory at all and the matter did not proceed any further.

3. There was the issue of Mr Hudson's compromise agreement entered into with the respondent and this was resolved to Mr Hudson's satisfaction who was assured that giving evidence on behalf of the claimants would not put him at any risk of repayment.

4. Finally, page 79 was redacted and replaced due to confidential information about a person unconnected to these proceedings with the agreement of the parties.

5. Judge Shotter apologies to the parties, particularly the first claimant who has mental health issues, for the delay in sending the reserved judgment and reasons out to them caused by the length of time it has taken to draft the reserved judgment, the complexity of the issues and pressure of work.

The claims

6. In a claim form received on the 29 May 2019 following ACAS early conciliation between the 11 March and 11 April 2019 Kevin Flanagan (first claimant) who was employed as an operative between 24 March 1007 to 27 February 2019, in case number 2405923/2019 brings complaints of unfair dismissal, whistleblowing and trade union detriment. The first claimant alleged that he had been shouted at managers and the respondent had "negativity towards him" for raising health and safety issues and whilst he was not a trade union representative at the time of dismissal, he had been active and vocal at the time he was a representative. Further, the claimant had been involved in a meeting in 2016 dealing with over 100 issues which amounted to protected disclosures which led to "negativity" and the disciplinary process was used "as a way of getting back at the claimant." Apart from in the context of the dismissal the first claimant makes no specific mention of the detriments listed later in the litigation.

7. The first claimant withdrew his claim for Trade Union Detriment contrary to sections 146(1)(a) and 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 during the liability hearing.

8. In a claim form received on the 29 May 2019 following ACAS early conciliation between the 11 March and 11 April 2019 Andrew Rothery (second claimant) who was employed as an operative between 24 March 1997 to 27 February 2019, in case number 2405924/2019, brings complaints of unfair dismissal, whistleblowing and trade union detriment maintaining he had a "target on his back" and he was involved in the 2016 meeting referred to by the first claimant. The second claimant claims that the disciplinary process and outcome was motivated by his earlier status as a union representatives and protected disclosures made in the September 2016 meeting referred to as the "101 issues meeting."

9. In a claim form received on the 29 May 2019 following ACAS early conciliation between the 10 April and 1 May 2019 Stuart Flanagan (third claimant), who was employed as an operative from 16 August 1993 to 27 February 2019 and is the brother of the first claimant brings claims of unfair dismissal and detriment for whistleblowing for being involved in the 2016 meeting.

10. As the litigation progressed following various preliminary hearings dealing with case management it was confirmed that all 3 claimants were claiming automatic unfair dismissal under section 103 of the Employment Rights Act 1996 ("the 1996 Act"), and the first and second claimant automatic unfair dismissal because they were engaged in union activities. In addition all 3 claimants complain that they were subject to various detriments in response to the protected disclosures made in September 2016 and for the first and second claimant in response to them having undertaken union activities. The detriments relied upon by the second and third claimant are set out in full within the agreed list of issues. In respect of the second and third claimant there are 48 and 19 detriments respectively. In respect of the first claimant the detriments he has claimed are not detailed in the list of issues save for the reference to paragraphs 14(i)

to (xii) to 2(26)(f) in the undated Further Particulars. The first claimant also relies on additional undated Further Particulars at paragraphs 2(f)(a) to (m) and further information provided in a 4-page document dated 31 May 2023 titled "Whistle blowing meeting and detriments." The detriments are listed at 1 to 15. In total the first claimant is alleging 40 detriments set out within 3 different documents. The Tribunal has unusually taken 4-days in chambers to consider the claims in this case, adjourning to three days originally allocated to a fourth as a result of the vast amount of information provided in respect of how the detriment claims have been put, the number of documents, difficulties with bundle pagination and the less than clear witness evidence.

11. Ignoring the disciplinary process, the vast majority of the detriments claimed have no dates and appear to go back either before the protected disclosures were made in some instances or immediately after in 2016, well outside the statutory time limit for making a claim. The claimants have had sufficient opportunity to clarify the dates and have been unable to do so due to the fact that not one raised any issues or a grievance alleging detriment for either whistleblowing or trade union activities for over a period of 2 years. It appears to the Tribunal that the real issue in this case was the investigation and dismissal from which the allegations of detriment flowed. The alleged detriments that took place earlier than 2016 to 2018 in respect of union activities and whistleblowing detriment between 2016 to 2018 were an afterthought arising from the disciplinary and dismissal. The Tribunal has explored this further in its findings of facts and conclusions as set out below.

12. The respondent do not deny the claimants were dismissed, maintaining it was for gross misconduct. It does not accept they were automatically unfairly dismissed or subjected to any of the detriments claimed.

Agreed issues.

13. The parties agreed the issues as follows:

Protected Disclosure Detriment: Claim under section 47B of the Employment Rights Act 1996:

1. Does the following amount to a disclosure of information:

    (a) The list of concerns submitted by the Claimants shortly in advance of the relevant list of concerns meeting in September 2016 [pp.106 – 111 & 112 – 113]; (the specific disclosures relied on from the list of concerns are points 26, 32, 33, 34, 35, 36, 37, 88 and 101 (pages 112 and 113), and these are detailed below); and

    (b) The matters discussed at that meeting pursuant to points 26, 32, 33, 34, 35, 36, 37, 88, and 101 [pp.112 – 113, 126 – 132 (KF), 137 – 144 (AR), and 147 – 154 (SF)].

2. The Claimants assert that the submission of the list of concerns containing points 26, 32, 33, 34, 35, 36, 37, 88 and 101 was a qualifying disclosure, and that the presentation of the points 26, 32, 33, 34, 35, 36, 37, 88 and 101 at the meeting with the Respondent's representatives in September 2016 were also qualifying disclosures.

3. Are the above disclosures qualifying disclosures within the meaning of section 43B of the Employment Rights Act 1996 in that they show, or tended to show either:

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

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

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

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

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

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

4. The qualifying disclosures relied on by the claimants are referred to in the Particulars of 104 paragraph document at pages 112 and 113 of the hearing bundle. The qualifying disclosures are identified as points 26, 32, 33, 34, 35, 36, 37, 88, and 101 in the Particulars of 104 paragraph, and they are detailed again below.

<u>Qualifying Disclosures Asserted by Mr Stuart Flanagan and Mr Rothery</u>

5. <u>Point 26</u>

a) '*Agreements ignored or broken, mandatory AT3, abuse of dinner t/break working out sourcing maintenance work, e.g. 4 racks £16,000, contractors trained up from maintenance budget and will now be paid to train maintenance group, justification.? Cells removed, lighting, mono rail, the list is endless and angers group. Company always have an excuse but still carry on ignoring their own agreement. Agreements only benefit company previous ones only honoured by the shop floor*.'.

b) The claimants claim that the Respondent did not comply with agreements that had been made previously. Although workers were adhering to such agreements, breaks were not permitted and budgets were not spent accordingly. Sometimes individuals were

expected to work through their lunch break and if they proposed to take a break it was subject to criticism from management.

c) The claimants claim that the Respondent was in breach of their contracts of employment, collectively agreed terms associated with breaks and other working practice, the Working Time Regulations 1998, the Health and Safety at Work Act 1974 and other relevant health and safety legislation.

d) The claimants claim that the disclosure was made in the public interest as the process involved a significant group of workers and the compilation of the list of concerns was always part of a group exercise. Those attending the meetings did so as representatives of the workforce on each of the shifts. The workforce is a relevant group of the public and the matters raised could impact upon any person visiting and/or working in the relevant area.

e) The claimants assert that this is a qualifying disclosure under the following sections of Section 43B(1) of the Employment Rights Act 1996:
   (i) Section 43B(1)(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and
   (ii) Section 43(1)(d) that the health or safety of any individual has been, is being or is likely to be endangered.

6. <u>Point 32</u>
   a) '*Why did the company and union have a meeting in regards to low temperatures working out of production hours and think it is acceptable to work in the cold with a free cup of coffee? 16c – 24c or risk assess temperature. Company have made no effort in over 50 years to try and retain heat in the body shop no improvements. Company not interested in our welfare. 16c is still cold*.'.

   b) The claimants claim that the Respondent and Unite the Union held a meeting regarding low temperatures in the workplace outside of production hours. No changes were implemented following this meeting, other than workers being offered a free cup of coffee, and the temperature within the workplace remained extremely low.
   c) The claimants claim that the Respondent was in breach of legal obligations that require employees to ensure the health and safety and welfare of employees; imposes upon the health and safety of workers as temperatures within the workplace were too low.
   d) The claimants claim that the Respondent was in breach of individual contracts of employment, collectively agreed terms associated with working practice, and the Health and Safety at Work Act 1974 and other relevant health and safety legislation.

e) The claimants claim that the disclosure was made in the public interest as the process involved a significant group of workers and the compilation of the list of concerns was always part of a group exercise. Those attending the meetings did so as representatives of the workforce on each of the shifts. The workforce is a relevant group of the public and the matters raised could impact upon any person visiting and/or working in the relevant area.
f) The claimants assert that this is a qualifying disclosure under the following sections of Section 43B(1) of the Employment Rights Act 1996:
   i) Section 43B(1)(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and
   ii) Section 43(1)(d) that the health or safety of any individual has been, is being or is likely to be endangered.

7. Point 33
   a) '*Cheapest overalls and boots not fit for purpose, shows company don't care about welfare*.'

The claimants claim:

b) that the overalls and footwear that the Respondent were providing were not fit for purpose and were not providing adequate protection.
c) the Respondent was in breach of legal obligations that require employers to ensure the health, safety and welfare of employees, and imposes upon the health and safety of workers as they were not sufficiently protected, causing further risk of injury.
d) claim that the Respondent was in breach of individual contracts of employment, collectively agreed terms associated with working practice, and the Health and Safety at Work Act 1974 and other relevant health and safety legislation.
e) claim that the disclosure was made in the public interest as the process involved a significant group of workers and the compilation of the list of concerns was always part of a group exercise. Those attending the meetings did so as representatives of the workforce on each of the shifts. The workforce is a relevant group of the public and the matters raised could impact upon any person visiting and/or working in the relevant area.
f) assert that this is a qualifying disclosure under the following sections of Section 43B(1) of the Employment Rights Act 1996:
   i) Section 43B(1)(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and
   ii) Section 43(1)(d) that the health or safety of any individual has been, is being or is likely to be endangered.

8. Point 34

a) '*Cheap plastic glasses that distort vision what long term effect does this have on our eyes?*'

The claimants claim:

b) that the Respondent was in breach of legal obligations that require employers to ensure the health, safety and welfare of employees, and imposes upon the health and safety of workers as they were not sufficiently protected, causing further risk of injury. Distorted vision put them in danger and concerns were raised if it would pose a long term threat to individuals eyesight.
c) the Respondent was in breach of individual contracts of employment, collectively agreed terms associated with working practice, and the Health and Safety at Work Act 1974 and other relevant health and safety legislation.
d) the disclosure was made in the public interest as the process involved a significant group of workers and the compilation of the list of concerns was always part of a group exercise. Those attending the meetings did so as representatives of the workforce on each of the shifts. The workforce is a relevant group of the public and the matters raised could impact upon any person visiting and/or working in the relevant area.
e) assert that this is a qualifying disclosure under the following sections of Section 43B(1) of the Employment Rights Act 1996:
    i) Section 43B(1)(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and
    ii) Section 43(1)(d) that the health or safety of any individual has been, is being or is likely to be endangered.

9. Point 35

a) '*Company employs safety contractor who only takes note of PPE but never flooring*
heating extraction, etc. Why? He must do all safety.'.
The claimants claim:

b) the Safety Contractor employed by the Respondent focussed solely upon Personal Protective Equipment but no other issues, including specific concerns involving flooring, heating and extraction.
c) the Respondent was in breach of legal
obligations that require employers to ensure the health, safety and welfare of employees, and imposes upon the health and safety of workers and/or any individual that enters the workplace as they were not sufficiently protected, causing further risk of injury.
d) that the Respondent was in breach of individual contracts of employment, collectively agreed terms associated with working practice, and the Health and Safety at Work Act 1974 and other relevant health and safety legislation.
e) that the disclosure was made in the public interest as the process involved a significant group of workers and the compilation of the list of concerns was always part of a group exercise. Those attending the meetings did so as representatives of the workforce on each of the shifts. The workforce is a relevant group of the public and the matters raised could impact upon any person visiting and/or working in the relevant area.

f) assert that this is a qualifying disclosure under the following sections of Section 43B(1) of the Employment Rights Act 1996:

i) Section 43B(1)(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and
ii) Section 43(1)(d) that the health or safety of any individual has been, is being or is likely to be endangered.

10. Point 36

a) '*Company have purges about PPE but PPE but never hearing flooring weld dust etc which is affecting and injuring people. Company responsible for ALL safety, not just PPE*.'.

The claimants claim:

b) that the Respondent concentrated on Personal Protective Equipment and disregarded other elements of Health and Safety such heating flooring, flooring and the accrual of dust.

c) that the Respondent was in breach of legal obligations that require employers to ensure the health, safety and welfare of employees, and imposes upon the health and safety of workers and/or any individual that enters the workplace as they were not sufficiently protected, causing further risk of injury.

d) that the Respondent was in breach of individual contracts of employment, collectively agreed terms associated with working practice, and the Health and Safety at Work Act 1974 and other relevant health and safety legislation.

e) claim that the disclosure was made in the public interest as the process involved a significant group of workers and the compilation of the list of concerns was always part of a group exercise. Those attending the meetings did so as representatives of the workforce on each of the shifts. The workforce is a relevant group of the public and the matters raised could impact upon any person visiting and/or working in the relevant area.

f) assert that this is a qualifying disclosure under the following sections of Section 43B of the Employment Rights Act 1996:

i) Section 43B(1)(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and

ii) Section 43(1)(d) that the health or safety of any individual has been, is being or is likely to be endangered.

11. Point 37

a) '*Inside the cells and outside weld dust, we have to breathe this in, flooring not cleaned, poor extraction not worth having. Lighting poor in areas beryllium rubbing, toilet facilities.*'.

The claimants claim:

b) an accumulation of dust was being inhaled by workers, floors that had not been cleaned for long periods and this caused people to slip which led to several injuries, the lighting in some areas of the workplace was very poor and the toilet facilities were filthy.

c) the Respondent was in breach of legal obligations that require employers to ensure the health, safety and welfare of employees, and imposes upon the health and safety of workers and/or any individual that enters the workplace as they were not sufficiently protected, causing further risk of injury. Individuals were likely to fall

and several injuries had already occurred from such incidents, poor lighting risked injury as workers could not see correctly and individuals were regularly inhaling large amounts of dust.
d) that the Respondent was in breach of
individual contracts of employment, collectively agreed terms associated with working practice, and the Health and Safety at Work Act 1974 and other relevant health and safety legislation.
e) that the disclosure was made in the public
interest as the process involved a significant group of workers and the compilation of the list of concerns was always part of a group exercise. Those attending the meetings did so as representatives of the workforce on each of the shifts. The workforce is a relevant group of the public and the matters raised could impact upon any person visiting and/or working in the relevant area.
f) assert that this is a qualifying disclosure under the following sections of Section 43B(1) of the Employment Rights Act 1996:
i) Section 43B(1)(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and
ii) Section 43(1)(d) that the health or safety of any individual has been, is being or is likely to be endangered.

12. Point 88
a) '*Managers happy to enforce PPE but on breakdowns when the job can't be done safely due to taking too long, working at height ladders not scaffolding standing on tooling , cars etc.*'.
The claimants claim:

b) the Respondent did not provide adequate equipment for individuals to safely work above ground level; workers would be forced to stand on top of cars or tooling and had to use ladders precariously as scaffolding which was not provided by the Respondent.
c) that the Respondent was in breach of legal obligations that require employers to ensure the health, safety and welfare of employees, and imposes upon the health and safety of workers and/or any individual that enters the workplace as they were not sufficiently protected, causing further risk of injury.
d) that the Respondent was in breach of individual contracts of employment, collectively agreed terms associated with working practice, and the Health and Safety at Work Act 1974 and other relevant health and safety legislation.
e) the disclosure was made in the public interest as the process involved a significant group of workers and the compilation of the list of concerns was always part of a group exercise. Those attending the meetings did so as representatives of the workforce on each of the shifts. The workforce is a relevant group of the public and the matters raised could impact upon any person visiting and/or working in the relevant area.
f) assert that this is a qualifying disclosure under the following sections of Section 43B(1) of the Employment Rights Act 1996:

i) Section 43B(1)(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and
ii) Section 43(1)(d) that the health or safety of any individual has been, is being or is likely to be endangered.

13. Point 101
a) '*Extract fans not all working or switched out, no means of checking air quality in laser cells?*'.

The claimants claim:

b) that many of the extraction fans provided by the Respondent did not work and there were no means to check the air quality in the Laser Cells.
c) the Respondent was in breach of legal obligations that require employers to ensure the health, safety and welfare of employees, and imposes upon the health and safety of workers and/or any individual that enters the workplace as they were not sufficiently protected, causing further risk of injury.
d) that the Respondent was in breach of individual contracts of employment, collectively agreed terms associated with working practice, and the Health and Safety at Work Act 1974 and other relevant health and safety legislation.
e) the disclosure was made in the public interest as the process involved a significant group of workers and the compilation of the list of concerns was always part of a group exercise. Those attending the meetings did so as representatives of the workforce on each of the shifts. The workforce is a relevant group of the public and the matters raised could impact upon any person visiting and/or working in the relevant area.
f) assert that this is a qualifying disclosure under the following sections of Section 43B(1) of the Employment Rights Act 1996:
    i) Section 43B(1)(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and
    ii) Section 43(1)(d) that the health or safety of any individual has been, is being or is likely to be endangered.

14. If so, did the Claimants reasonably believe that the disclosures were in the public interest?
15. As detailed above, Mr Stuart Flanagan and Mr Rothery believed and considered that all of the disclosures were in the public interest.

1. **Time limits- detriments inserted with agreement of parties and following original numbering of insert.**

    1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 10 December 2018 in respect of the second and third claimant and 9

January 2019 in respect of the first claimant may not have been brought in time.

1.2 Was the detriment complaint] made within the time limit in section 48 / 23 of the Employment Rights Act 1996? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act complained of?

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

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

1.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within such further period as the Tribunal considers reasonable?

16. Did the Respondent subject the Claimants to a detriment and/or detriments within the meaning of section 47B(1) of the Employment Rights Act 1996 as detailed below?

(a) Mr Kevin Flanagan: Paragraphs 14 (i) – (xii) (pp.93 – 95) and paragraphs 2(26)(f)(a) – (m) (pp.127 – 128); matters detailed in Mr K Flanagan's document entitled 'Whistle blowing meeting and detriments' dated 31 May 2023 (sent by Mr K Flanagan to the Employment Tribunal);

(b) **Mr Andrew Rothery**. Mr Rothery claims that he has been subjected to detriments as a result of making disclosures. Mr Rothery relies on the detriments in paragraphs 8(i) – (xiv) (pp. 98 – 101) (outlined below) and in paragraphs f (a-m) (pages 138 to 139) (outlined below) and the other associated detriments detailed below. Was Mr Rothery subjected to the detriments below?

(c) The disclosures in the September 2016 meeting about the list of concerns were intended to be anonymous and should not have been disclosed to managers on a basis which identified issues raised by the Claimants amongst others. The meetings were intended to clear the air and not to lead to reprisals. The fact of failing to maintain confidentiality, disclosing information and names, engaging in reprisals was a detriment. Mr Rothery claims that shortly before and after the meeting in September 2016 the Respondent reported to

managers that he had been involved in the disclosure of the list of concerns.

(d) After the September 2016 meeting there was an intention to have feedback to those involved from the Respondent, but the Respondent failed to undertake any feedback which would have allowed matters to be raised, including as to how those involved were being treated. The Respondent failed to provide relevant feedback.

(e) After the September 2016 meeting, at various different times, Mr Rothery was regularly excessively watched, monitored and questioned by managers including by Mr Andrew Shepherd, Mr Jamie Craig, Mr Pat MacDonough, Mr Rhys Ashworth, Mr Julian Cecere, Mr Phil Smith and Mr Dave Woodcock, as a form of intimidation. Managers also stood close to the Claimant and starred at the Claimant in an intimidatory manner. This happened on a regular ongoing basis until the date of Mr Rothery's suspension. The Respondent did not intervene and stop this bullying.

(f) Managers adopted a negative attitude to the Claimant failing to engage with him and disregarding him from discussions, for example, about health and safety. This occurred after the September 2016 meeting on a regular and consistent basis. Those engaged in such conduct were Mr P Smith, Mr R Ashworth and Mr E Fitzsimmons.

(g) In the past the Claimant had a two-way conversations with members of management, and this would have allowed the parties to try to resolve disputes before they became formal issues within the workplace. This process ceased after the meeting in September 2016 and the Claimant was given the impression by managers that they were offended by what they had been told about the matters raised in the list of concerns. After the meeting in September 2016 all communications became formal, and the informal method of communication between managers and representatives had ended. This included with the managers Mr P Smith, Mr R Ashworth and Mr E Fitzsimmons.

(h) After a meeting in the cube, Mr Smith said to Mr Rothery that he needed to be careful as a union representative because he would get "*shit*" from both sides. The Claimant took this as a threat and a step to intimidate him from raising issues.

(i) The Claimant was discouraged from involving the HSE in health and safety issues connected to cold temperatures by Mr Pat McDonough.

(j) Being bullied and forced to do overtime. Being unreasonably required to work on breaks, including when not on the rota to cover breaks. Requiring the Claimant to remain at his work station and not go on breaks even though there was no work to do. Requiring the Claimant to do higher amounts of maintenance work including outside of the Claimant's work area despite other staff in the other work area being available.

(k) Being bullied and pressured to do overtime.

(l) The false allegation in the anonymous letter and the false rumour about bullying.

(m) Following the meeting in September 2016, managers accused of bullying were treated more favourably than Mr Rothery, such as when they were accused of bullying they were not suspended, investigated nor disciplined unlike Mr Rothery. Mr Rothery relies on the example of Mr Julian Cecere who was accused of bullying by Mr Matthew Kelly (page 478) but was not suspended nor put through an investigation and disciplinary process unlike Mr Rothery. Mr Rothery represented Mr Kelly regarding his complaint against Mr Cecere. Mr Cecere subsequently falsely stated in his witness statement that only Mr Kevin Flanagan and Mr Stuart Flanagan had raised a grievance against him in an attempt to undermine the Claimant.

(n) On 16 July 2018 Mr Eddie Pritchard indicated that he was bullied, but not by Mr Rothery nor any of the Claimants (page 445), and this allegation was not investigated and pursued by the Respondent indicating less favourable treatment towards Mr Rothery when he was suspended and subject to an unfair investigation and process.

(o) Being suspended. Being suspended just on the basis of an anonymous letter.

(p) In being suspended Mr Rothery was not able work and to earn money that he would have received from overtime pay if he was in work.

(q) In being suspended and kept on suspension Mr Rothery lost the right to apply for voluntary redundancy.

(r) The Claimant considers that the formal procedures in relation to the investigation process, the disciplinary process and the appeal process were not followed to his detriment. The Claimant claims that the process involving the investigation, disciplinary process and appeal was unreasonably delayed and drawn out by the Respondent causing the Claimant stress, that incomplete and inaccurate minutes

were produced by the Respondent during the investigation, disciplinary and appeal process, on 6 November 2018 Ms Rosanna Andrews sent documents to the Claimant 48 hours before a hearing, that Mr Dave Brewster failed to investigate the allegation letter and the false rumour about bullying, Mr Brewster altered witness statements and was not impartial (pages 608 – 611). The Claimant claims that the investigating officer, the disciplinary officer and the appeal officer were all biased and prejudged the outcome of the process.

(s) The Claimant claims that the disciplinary investigation was flawed and breached the ACAS code of practice. The Claimant was prevented from obtaining and presenting witness evidence. Ms Dianne Miller was biased and failed to follow the ACAS code of practice (pages 774-776). Ms Miller failed to investigate the source of the allegation letter and the false rumour.

(t) The Respondent referred to Mr Rothery, and the two other Claimants, as "*The Three Amigos*" showing a disparaging and negative attitude towards him.

(u) During the investigation process, Mr Steve Cook said that Mr Rothery was a union steward and was only happy when on strike. Mr Rothery had never been on strike during his long career with the Respondent. This shows a disparaging and negative attitude towards Mr Rothery.

(v) Mr Phil Smith describing Mr Rothery, referring to mass meetings, and that Mr Rothery was a strong character.

(w) A breach of confidentiality concerning the disciplinary process, with the Respondent disclosing information inappropriately to third parties. The Claimant relies on Mr Rhys Ashworth informing Mr Mike Pickles at Jaguar Land Rover about the Claimant's disciplinary process.

(x) Following the Claimant's dismissal, the Respondent breaching the policy concerning the security and return of personal property belonging to the Claimant. Mr Dave Woodcock went inside the Claimant's locker without his authority and failing to preserve the Claimants property, which was only returned after formal complaints were made.

(y) The Respondent commencing and pursuing the investigation, the disciplinary, raising disciplinary charges, dismissing the Claimant, rejecting his appeal and the Respondents unfair conduct in this process.

(z) Causing stress for the Claimant as a result of detriments detailed above.

aa) **Mr Stuart Flanagan**. Mr Stuart Flanagan claims that he has been subjected to detriments as a result of making disclosures. Mr Stuart Flanagan relies on the detriments in paragraphs 8(i) – (x) (pp. 103 – 105) (outlined below) and in paragraphs f (a-j) (pages 148 to 149) (outlined below) and the associated detriments detailed below. Was the Claimant subjected to the detriments detailed below?

ab) The disclosures in September 2016 were intended to be anonymous and should not have been disclosed to managers on a basis which identified the Claimant as one of the those in attendance at the meeting. The meetings were intended to clear the air and not to lead to reprisals. The fact of the failing to maintain confidentiality, disclosing names, and engaging in reprisals was a detriment.

ac) After the meeting in September 2016 there was an intention to have feedback to those involved from the Respondent, but the Respondent failed to undertake any feedback which would have allowed matters to be raised, including as to how those involved were being treated. The Respondent failed to provide relevant feedback.

ad) After the September 2016 meeting, at various different times, Mr Stuart Flanagan was regularly excessively watched, monitored and questioned by managers, including by Mr Andrew Shepherd, Mr Jamie Craig, Mr Pat MacDonough, Mr Rhys Ashworth, Mr Julian Cecere, Mr Phil Smith and Mr Dave Woodcock, as a form of intimidation. Managers also stood close to the Claimant and stared at the Claimant in an intimidatory manner. This happened on a regular ongoing basis until the date of Mr Stuart Flanagan's suspension. The Respondent did not intervene and stop this bullying.

ae) After the meeting in September 2016 the Claimant noticed there was a cooling of his relationship with managers and the Claimant was advised to stay away from meetings by his union, because of the problems, and all who had been involved tended to try to keep their head down. It seems that managers were offended by what had been said in the list of concerns and the Respondent stopped, through managers, asking the Claimant to go on relevant courses, and there had never been any such problem for the Claimant prior to the meeting in September 2016.

af) Prior to the September 2016 meeting problems / issues could be raised occasionally even if they were not addressed. It became very bad after the September 2016 meeting and when problems persisted, e.g. no hot water, when the Claimant raised this it was dismissed by managers as being petty, but that was not the case as it was crucial because of the nature of the work required the Claimant and others to be able to keep clean.

ag) After the September 2016 meeting intimidation and bullying by managers,

Mr Andrew Shepherd, Mr Jamie Craig, Mr Steven Cook, and Mr Julian Cecere increased. These managers would stand over the Claimant on breaks and when the bell rang for the end of the break they would then walk away. The Claimant would be unreasonably required to work breaks when not on the rota to cover breaks. The Claimant was continually being picked and sent to work in other work areas when those other areas already had their own spare maintenance staff available. At the end of the shift Mr Shepherd would be watching and would stand and watch when breakdowns occurred, he said he was the shift manager and he could do whatever he wanted to them. The was a general discouragement of people raising issues, with managers stating that there was a better use of time available, rather than dealing with complaints.

ah) Managers accused of bullying were treated more favourably than the Claimant. Mr Julian Cecere was known to be a bully of employees. Mr Cecere was accused of bullying. Following the meeting in September 2016, managers accused of bullying were treated more favourably than Mr Stuart Flanagan, such as when they were accused of bullying they were not suspended unlike Mr Stuart Flanagan. Mr Stuart Flanagan relies on the example of Mr Julian Cecere who was accused of bullying by Mr Matthew Kelly but was not suspended nor put through an investigation and disciplinary process unlike Mr Stuart Flanagan.

ai) Mr Eddie Pritchard stated that he was bullied, but not by Mr Stuart Flanagan nor any of the Claimants, and this allegation was not investigated and pursued by the Respondent indicating less favourable treatment towards Mr Stuart Flanagan when he was suspended and subject to an unfair investigation and process.

aj) On 4 July 2018 being bullied and forced to do overtime, being threaten with dismissal if he did not do the overtime on 8 July 2018. The Claimant's name being put on a list of names by Mr Jamie Craig (page 422) as a person to be called to a meeting on 4 July 2018 and forced to do overtime on 8 July 2018 under the threat of dismissal. The Claimant and Mr K Flanagan were the only two employees intimated and bullied to work overtime by Mr Jamie Craig. The Claimant explained the child care difficulties that he would have working on 8 July 2018 but was still told to work on that day. The Claimant was forced, under the threat of being handed a disciplinary letter that the Respondent indicated that it had prepared, to do overtime on 8 July 2018, even though overtime should not be imposed on a compulsory basis, and even though the shift on 8 July 2018 was fully subscribed and was a non-production overtime shift. After the meeting with the Claimant on 4 July 2018 the Respondent did not continue to hold meetings with other employees on Mr Jamie Craig's list even though the full production shift on 7 July 2018 had not been fully staffed. The negative and less favourable treatment are considered by the Claimant to be detriments.

ak) The false allegation in the anonymous letter and the false rumour.

al) Being suspended. Being suspended just on the basis of an anonymous letter.

am) In being suspended Mr Stuart Flanagan was not able to work and earn overtime pay.

an) In being suspended and kept on suspension Mr Stuart Flanagan lost the right to apply for voluntary redundancy.

ao) The Claimant considers that the formal procedures in relation to the investigation process, the disciplinary process and the appeal process were not followed to his detriment. The Claimant claims that the process involving the investigation, disciplinary process and appeal was unreasonably delayed and drawn out by the Respondent causing the Claimant stress, that incomplete and inaccurate minutes were produced by the Respondent, that Mr Dave Brewster the Respondent's investigating officer altered witness statements and was not impartial (pages 608 – 611). The Claimant claims that the investigating officer, the disciplinary officer and the appeal officer were all biased and prejudged the outcome of the process. The Claimant claims that the decisions in relation to the investigation, disciplinary, and the appeal were unfair and not reasonable employer would have made them.

ap) The Claimant claims that the disciplinary investigation was flawed and breached the ACAS code of practice. During the investigation and disciplinary process the Claimant was not permitted to obtain witness statements from colleagues and call witnesses to the disciplinary hearing. Ms Dianne Miller was biased and failed to follow the ACAS code of practice. The Respondent interviewed managers who no longer worked for the in the area and who no longer worked for the Respondent were interviewed. Such individuals being interviewed would have no relevant knowledge of matters but could just have a negative view of the Claimant.

aq) The Claimant and other Claimants were referred to as '*The Three Amigos*' by managers showing a disparaging and negative attitude towards the Claimant.

ar) A breach of confidentiality concerning the disciplinary process, by the Respondent leaking information inappropriately to third parties. The Claimant relies on disclosures made by Mr Rhys Ashworth, (who worked for Ms Diane Miller), to Mr Mark Pickles at Jaguar Land Rover.

as) The Respondent commencing and pursuing the investigation, the disciplinary, raising disciplinary charges, dismissing the Claimant, rejecting his appeal and the Respondents unfair conduct in this process.

at) Causing stress for the Claimant as a result of detriments above, including resulting in the Claimant consulting with and seeking support from Occupational Health adviser.

17. Did the Respondent subject the Claimants to any or all of the above detriments because they had made any or all of the above protected disclosures?

Trade Union Detriment: Claim under section 146(1)(a) and/or (b) of the Trade Union and Labour Relations (Consolidation) Act 1992:

18. Did the Respondent subject the Claimants to a detriment as follows:
    a) **Mr Andrew Rothery:** Mr Rothery claims that he has been subjected to detriments. Mr Rothery relies on the detriments in paragraphs 8(i) – (xiv) (pp. 98 – 101) (outlined below) and in paragraphs f (a-m) (pages 138 to 139 (outlined below) and the other associated detriments detailed below. Was Mr Rothery subjected to the detriments below?

    b) The disclosures in the 19 September 2016 meeting were intended to be anonymous and should not have been disclosed to managers on a basis which identified issues raised by the Claimants amongst others. The meetings were intended to clear the air and not to lead to reprisals. The fact of failing to maintain confidentiality, disclosing information and names, engaging in reprisals was a detriment. Mr Rothery claims that shortly after the meeting on 19 September 2016 Respondent reported to managers that he had been involved in the disclosure of the list of concerns.

    c) After the meeting there was an intention to have feedback to those involved from the Respondent, but the Respondent failed to undertake any feedback which would have allowed matters to be raised, including as to how those involved were being treated. The Respondent failed to provide relevant feedback.

    d) After the September 2016 meeting, at various different times, Mr Rothery was regularly excessively watched, monitored and questioned by managers including by Mr Andrew Shepherd, Mr Jamie Craig, Mr Pat MacDonough, Mr Rhys Ashworth, Mr Julian Cecere, Mr Phil Smith and Mr Dave Woodcock, as a form of intimidation. Managers also standing close to the Claimant and starring at the Claimant in an intimidatory manner. This happened on a regular basis up to the date that the Claimant was suspended. The Respondent did not intervene to stop this bullying.

    e) Managers adopted a negative attitude to the Claimant failing to engage with him and disregarding him from discussions, for example, about health and safety. This occurred after the meeting on a regular and consistent basis. Those engaged in such conduct were Mr P Smith, Mr R Ashworth and Mr E Fitzsimmons.

f) In the past the Claimant had a two-way conversations with members of management, and this would have allowed the parties to try to resolve disputed before they became formal issues within the workplace. This process ceased after the meeting in September 2016 and the Claimant was given the impression by managers that they were offended by what they had been told about the matters raised. After the meeting in September 2016 all communications became formal, and the informal method of communication between managers and representatives had ended. This included the managers Mr P Smith, Mr R Ashworth and Mr E Fitzsimmons.

g) After a meeting in the cube, Mr Smith said to Mr Rothery that he needed to be careful as a union representative because he would get "*shit*" from both sides. The Claimant took this as a threat and a step to intimidate him from raising issues.

h) The Claimant was discouraged from involving the HSE in health and safety issues connected to cold temperatures by Mr Pat McDonough.

i) being unreasonably required to work breaks, including when not on the rota to cover breaks; requiring the Claimant to remain at his work station and not go on a break even though there was no work to do.

j) Requiring the Claimant to do higher amounts of maintenance work including outside of the Claimant's work area despite other staff in the other work area being available.

k) Being bullied and pressured to do overtime.

l) Following the meeting in September 2016, managers accused of bullying were treated more favourably than Mr Rothery, such as when they were accused of bullying they were not suspended unlike Mr Rothery. Mr Rothery relies on the example of Mr Julian Cecere who was accused of bullying by Mr Matthew Kelly (page 478) but was not suspended nor put through an investigation and disciplinary process unlike Mr Rothery. Mr Rothery represented Mr Kelly in his grievance meeting as a representative.

m) On 16 July 2018 Mr Eddie Pritchard stated that he was bullied, but not by Mr Rothery, and this allegation was not investigated and pursued by the Respondent indicating less favourable treatment towards Mr Rothery when he was suspended and subject to an unfair investigation and process.

n) The false allegation in the anonymous letter and the false rumour;

o) Being suspended. Being suspended just on the basis of an anonymous letter.

p) In being suspended Mr Rothery was not able work and to earn money that he would have received from overtime pay if he was in work.

q) In being suspended and kept on suspension Mr Rothery lost the right to apply for voluntary redundancy.

r) The Claimant considers that the formal procedures in relation to the investigation process, the disciplinary process and the appeal process were not followed to his detriment. The Claimant claims that the process involving the investigation, disciplinary process and appeal was unreasonably delayed and drawn out by the Respondent causing the Claimant stress, and that incomplete and inaccurate minutes were produced by the Respondent, Mr Dave Brewster was biased and failed to investigate the anonymous letter and the false rumour, Mr Brewster inappropriately altered witness statements. The Claimant claims that the investigating officer, the disciplinary officer and the appeal officer were all biased and prejudged the outcome of the process.

s) The Claimant claims that the disciplinary investigation was flawed and breached the ACAS code of practice. The Claimant was prevented from obtaining and presenting witness evidence. Ms Dianne Miller was biased and failed to follow the ACAS code of practice (pages 774-776). Ms Rosanna Andrews sent documents to the Claimant just 48 hours before a hearing.

t) The Respondent referred to Mr Rothery, and the two other Claimants, as "*The Three Amigos*" showing a disparaging and negative attitude.

u) During the investigation process, Mr Steve Cook said that Mr Rothery was a union steward and was only happy when on strike. Mr Rothery had never been on strike during his long career with the Respondent. The comment shows a negative attitude toward Mr Rothery as a union representative.

v) Mr Phil Smith describing Mr Rothery, referring to mass meetings, and that Mr Rothery was a strong character.

w) A breach of confidentiality concerning the disciplinary process, with the Respondent disclosing information inappropriately to third parties. The Claimant relies on Mr Rhys Ashworth's disclosure to Mr Mark Pickles at Jaguar Land Rover about the disciplinary process.

x) Following the Claimant's dismissal, the Respondent breaching the policy concerning the security and return of personal property belonging to the Claimant. The Mr Dave Woodcock went inside the Claimant's locker without his authority and failing to preserve the Claimants property, which was only returned after formal complaints were made.

y) The Respondent commencing and pursuing the investigation, the disciplinary, raising disciplinary charges, dismissing the Claimant, rejecting his appeal and the Respondent's unfair conduct during this process.

z) Causing the Claimant stress as a result of detriments above.

19. If so, subject to section 148 TULRCA 92, did the Respondent subject the Claimants to any or all of the above detriments for the sole or main purpose specified within the meaning of section 146(1)(a) and/or (b) of TULCRA 92?

Automatic Unfair Dismissal: Claims under section 103A Employment Rights Act 1996, and section 152(1)(a) and/or (b) of the Trade Union and Labour Relations (Consolidation) Act 1992 and;
Unfair Dismissal: Claim under section 95(1)(a) of the Employment Rights Act 1996:

20. Were the Claimants dismissed?

21. Was the reason or principal reason for dismissal *that the claimant made a protected disclosure*? If so, the claimant will be regarded as unfairly dismissed.

22. Were the Claimant's unfairly dismissed?

23. Were the Claimants dismissals automatically unfair?

24. Were the Claimants dismissed for an automatically unfair reason within the meaning of section 103A ERA 1996?

25. **Mr Kevin Flanagan and Mr Andrew Rothery only:** Were the Claimant's dismissed for an automatically unfair reason within the meaning of section 152(1)(a) and/or (b) TULRCA 1992?

26. Was the reason for the Claimant's dismissal a potentially fair reason pursuant to section 98(2) of the Employment Rights Act 1996? The Respondent relies upon conduct under section 98(2)(b) of the Employment Rights Act 1996 as the potentially fair reason for dismissal.

27. If so, applying the test laid down in *British Home Stores Ltd v Burchell [1978]* UKEAT/108/78:

    (a) Did the Respondent genuinely believe the Claimants to be guilty of the alleged misconduct?

    (b) Did the Respondent have reasonable grounds for that belief?

    (c) In forming that belief, had the Respondent conducted a reasonable investigation into the allegations of misconduct?

28. If so, did the Respondent act reasonably in treating the misconduct as a sufficient reason for dismissal under section 98(4) Employment Rights Act 1996?

29. Was the Respondent's decision to dismiss the Claimants within the range of reasonable responses?

30. Did the Respondent follow a fair procedure in dismissing the Claimants?

31. Did the Respondent breach the ACAS code of practice in relation to disciplinary and grievance procedures?

Remedy:

32. If the Claimants succeed in any or all of their claims, are they entitled to any remedy from the Respondent, including:

    (a) Compensation for financial losses;

    (b) An award for injury to feelings;

    (c) An order for reinstatement pursuant to section 114 of the Employment Rights Act 1996;

    (d) An order for re-engagement pursuant to section 115 of the Employment Rights Act 1996; or

    (e) An uplift to reflect any non-compliance by the Respondent in relation to the ACAS Code.

    (f) The compensation in the Claimants schedules of loss.

33. If so, should any of the compensation awarded under the Claimant's Unfair Dismissal complaints be reduced to reflect:

(a) Any failure by the Claimants to properly mitigate their loses;

(b) The fact that the Claimant's employment would have been terminated in the event of a fair procedure having been followed (*Polkey v AE Dayton Services Ltd [1987]);*

(c) Any contributory conduct on the part of the Claimants; and

(d) Any failure to act in accordance with the ACAS Code.

Evidence

7 The Tribunal heard evidence from the claimants and Anthony Hudson (ex-employee of the respondent who had entered into a compromise agreement with it) under oath.

8 On behalf of the respondent it heard evidence from John Hickson, health & safety manager, Jamie Craig, director of after sales, Julian Cecere, maintenance supervisor general assembly, Nicola Porschke, employee relations manager, David Brewster, industrial master planning and investigating officer, Diane Miller, general assembly manager and dismissing officer, Russell Martin, supply chain manager and first level appeal officer, and Mathew Hughes, transformation manager and second level appeal officer.

9 There were numerous conflicts in the evidence between the claimants and respondents witnesses, which the Tribunal has resolved on the balance of probabilities with reference to contemporaneous documents where possible. It found the claimants' evidence relating to the alleged detriments unsatisfactory and on the balance of probabilities did not find it credible taking into account the fact that all three claimants were members of the union and yet raised no complaints until they were facing the possibility of dismissal. The first and second claimants had been union representatives, were fully aware of the grievance procedure available to them and actively involved in standing up for their rights and those of their colleagues. It is not credible that they suffered a raft of detriments, many of which were serious, in the knowledge that they were being treated in this way for a number of years because of either union related activities as union representatives or because they had made protected disclosures in September 2016. There is not one complaint either orally or in writing, no grievance and what appears to be no discussion or complaint raised with other union representatives, such as Anthony Hudson, who worked with the claimants, regularly met up with the first and third claimant and represented them all in his union capacity.

10 Anthony Hudson produced handwritten trade union notes during the final hearing immediately before he gave evidence, and nowhere in these notes does he record the claimants informing him of any detriments or discussing them with

management even when the claimants were suspended at the commencement of the disciplinary process culminating in their dismissal. The reason for this is that the claimants raised no issues at the time and on the balance of probabilities the Tribunal has concluded the alleged detrimental treatment did not take place as described by the claimants.

11 Anthony Hudson in his written statement describes how worker DO, who was also involved in the September 2016 meeting was "picked on" and disciplined "because he was involved in the 101 plus list meeting." He goes on to describe how he thought "that the company would try and take action against others as well" and yet, despite regularly sharing a car with the first and third claimant from 2012 to 2018 (when work matters were discussed) no mention was made to any detriments suffered by the claimants during this period against a backdrop of "the relationship between company managers, company representatives and staff as hostile" (para. 20). It is notable that in his written statement Anthony Hudson stated "I feel" the claimants were singled out and used as scapegoats for whistleblowing, and only the second claimant described as a "good vocal shop steward" involved in union activities in addition to whistleblowing "could well have caused the company to dismiss him." The claimants have raised a raft of detriment claims that they allegedly suffered over a lengthy period of time, and as an experienced union shop steward working in that role since the 1980's Anthony Hudson appears to be oblivious to these claims and the Tribunal inferred the reason for this is that the detriments did not occur as alleged by the claimants in this litigation.

12 The Tribunal was referred to an agreed bundle and additional documents, which it has taken into account. The first 2-days was spent by the Tribunal reading the witness statements and documents as confirmed by the parties, the Tribunal having made it clear that they were not reading documents to which it was not taken either in a list, the witness statements or oral evidence. A transcript of the handwritten note found at page 416 was agreed between the parties and taken into account by the Tribunal.

13 Anthony Hudson produced his notebook for the first time when giving evidence having failed to inform any party that he had this information or refer to it in his witness statement. A delay was caused pending the parties looking through the notebook and by agreement extracting the relevant pages and giving the respondent time to take instructions, prepare cross-examination and give evidence in chief on the new evidence to avoid any prejudice caused by the late introduction of relevant evidence.

14 With reference to the written evidence apart from the notes taken by the respondent at various meetings no other notes were taken either by the claimants individually or union representatives with the exception of Anthony Hudson who had made a small number of notes in his union notebook which were written after the event.

15 The written submissions presented the parties were lengthy and extensive. Having considered the oral and written evidence and written and oral submissions

presented by the parties (the Tribunal does not intend to repeat all of the written and oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), we have made the following findings of the relevant facts.

Facts

16 The respondent is a worldwide car manufacturer and has two production sites in the UK, including the Ellesmere Port branch. It employees a substantial number of employees, into the thousands plus some agency workers. One department, for example, the general assembly line, had one shift of 4-500 people in July/August 2018. The respondent was purchased by a French company in 2017 and contracts transferred under TUPE. The Ellesmere Port factory was seeking to secure a new model Vauxhall to build and higher level managers felt under pressure as the factory was in competition to secure work .

17 The in-house maintenance department spread over the three areas; Bodyshop, paint shop and general assembly. It dealt with maintenance and repairs, without which the production line could not operate. The maintenance department were fundamental to the running of the factory. The lines were automated to run continuously through shifts, and stoppages could block the lines behind and "starve the lines in front." As a result Bodyshop employees could and would be asked on occasion to work their break or lunch in order to keep the line running. This was a subject of contention for some Bodyshop workers, particularly the first and third claimant.

18 The respondent recognised trade unions and all three claimants were members of UNITE the union. The union engaged in collective bargaining as well as representing individual members.

19 Julian Cecere, a longstanding employee of 40 years, had worked with the first and third respondent line managing them as the Bodyshop maintenance supervisor. The first claimant was a team leader and the third claimant a temporary team leader when both reported to Julian Cecere, who also interacted with the first and second claimants in their role of trade union representative. Part of his duties included Julian Cecere supervising i.e. watching over employees carrying out repairs. The first claimant had raised grievances against Julian Cecere in the past which were not upheld, including alleged bullying when he was reminded to fully complete a Maintenance Breakdown Report. Julian Cecere moved to the General Maintenance team in January 2017 and after this date did not manage the claimants. The Tribunal accepts Julian Cecere's evidence that he was unaware he had allegedly been named in the 2016 meetings as a bullying manager until these proceedings and it follows that all of his interactions with the claimants had no causal connection with what was said or not said at the 2016 meetings, and so the Tribunal found on the balance of probabilities.

20 There were a number of issues with workers based in the Bodyshop Maintenance concerning the way they were required to work i.e. carrying out repairs in breaks, overtime and shift patterns. Jamie Craig an employee of 40 years and the director of aftersales, transferred across with the aim of resolving the problems, including overtime cover which some employees refused to work.

Disciplinary Procedure

21 The respondent had a Disciplinary Procedure dated January 2014 that included dismissal for gross misconduct which are "the only cases in which an employee may be dismissed for a first offence (para. 4)." Para.6 provided; "appeals will wherever possible heard by the manager to whom the person who made the previous decision reports…if the manager who made the decision is one of the managing director's reports, it should, where possible, be agreed that another independent manager from this group should hear the appeal. In the absence of agreement the managing director will hear the appeal…Managers who report directly to the managing director will not normally hear an appeal unless the original decision is made by a manager who reports to them…in exceptional circumstances a further appeal may be made to the personnel manager…"

Mr K Flanagan

22 The first claimant started to work for the respondent on the 24 March 1997 and was employed as skilled mechanical maintenance fitter and occasional team leader. His role was to maintain the production lines. The first claimant was issued with a contract of employment but a signed copy was not before the Tribunal. There is a blank contract in the bundle that was relevant to all three claimants and it is accepted this was the relevant written contract of employment.

23 The first claimant was a member of UNITE the Union until dismissal. The first claimant was a trade union representative on two occasions, the last finishing in 2012. The important point is that the first respondent was no longer a trade union representative when the alleged protected disclosure was made on 29th September 2016 or dismissal.

24 The first claimant represented the respondent in a number of media appearances, he travelled abroad and worked in the Luton factory in 2001 when a vehicle was relocated to Ellesmere Port. He was well regarded, had no disciplinary record and the undisputed written evidence was that all his yearly appraisals were positive. A key factor is that the first claimant was never "pulled up" or disciplined for bullying allegations throughout his entire 22 years of employment until the events of June 2018. In short, he was an ambassador for the respondent with an excellent employment record.

Mr A Rothery

25 The second claimant started his employment on 26 October 1998 and he became a shop steward in UNITE the Union in 2010 until approximately 2 months before the "101 list meeting" on 29 September 2016 referred to as the "101 list meeting" by the parties and throughout this judgment. The second claimant was not a union representative at the 101 list meeting having resigned some time beforehand.

26 The second claimant worked as a multi-skilled maintenance electrician in the Bodyshop maintenance team and worked a different shift to the first and third claimant. He had a good employment record and volunteered for overtime on a regular basis.

27 The second claimant had the habit of giving some colleagues what he described as "naked birthday hugs" which were in effect half-naked hugs as Mr Rothery always wore an item of clothing such as underpants or cycling shorts. Nobody complained about Mr Rothery's behaviour and he was never disciplined for it until the events which resulted in his dismissal.

Mr S Flanagan

28 The third claimant started working for the respondent in 1993 as a mechanical engineer and worked up to the position of maintenance team leader, training and mentoring apprentices. It is undisputed he was given "exemplary appraisals" and had an excellent timekeeping and sickness record. He was a member of Unite the Union and had raised a grievance in February 2016 against Julian Cecere for intimidating behaviour and conduct, and his evidence was that from 2016 (before the protected disclosure) there were problems in the workplace between management and staff that included bullying, intimidation and poor working conditions.

29 All three claimant agreed that they were "vocal and loud" within the workplace, for example, the third respondent Stuart Flanagan had been on a "go slow" objecting to working in the breaks and a mock speed camera painted yellow had been installed as a joke.

30 The first and third respondent are brothers and shared a car with Anthony Hudson on a regular basis. Anthony Hudson was the union shop steward for 30 years until the 8 March 2019 when his employment terminated after 39 years in employment with the respondent. He worked closely with the first and third respondent, and not the second respondent who he knew from the Bodyshop and trade union activities.

The 101 list meeting

31 Anthony Hudson experienced the first and third respondent vocal opinions about Shopfloor issues first hand. He was aware of the problems in the Bodyshop workplace in 2016 that culminated in UNITE the union becoming involved in resolving them. The first step was for staff on the 3 shifts to record on paper the issues they experienced, and this was put in place to the leadup of the "101 list meeting" in

September 2016. The union also provided a list of issues and a number of the issues raised overlapped. The first, second and third claimant assisted in producing the list, for example, the second claimant by taking the pieces of paper from employees. The first and third claimant attended one of the 101 list meetings; the second claimant did not.

32 A large number of people were involved in producing the list at the request of both the union and management. It was an agreed process which included meeting unofficial representatives/spokespeople of the three shifts and union in a question and answer session. There were around 8 employee representatives at each meeting. One of the meetings held on 29 September 2016 was attended by the first and third claimant at Anthony Hudson's request. Anthony Hudson and the 8 employee representatives met with Nicola Porschke who was handed a handwritten list containing over one hundred points of concern referred to as the "101 list meeting." Shona Craig, niece to Jamie Craig, took a note of the discussion and drew up the list as discussed with the focus groups.

33 There is an issue concerning whether the names of alleged bulling managers were discussed at the meeting, the first and third claimant maintaining they raised the bullying at the outset of the meeting and named names, Nicola Porschke's evidence was that they had not. According to the written notes the first issue was not bullying as maintained by the second and third respondent but rate of pay, and at least the first 20 issues related to wages, hours, difference of pay between executive directors and staff and targets not being hit by the business. Issue number 1 – 25 relate to salary, 26 to 40 heating and health and safety, 41 to 48 production, 49 "no trust from management and being micro managed," 50 "being disturbed on breaks and dinners" and general performance through to 60, 61-62 pay, 63 to over 100 (numbers unclear) that relate to a number of other issues which do not include any specific allegations of bullying and harassment by managers set out within 6-pages of complaints. No names of managers are set out in the list provided.

34 After the meetings the respondent produced a detailed 12-page document from all of the feedback received including from union, titled "Themes highlighted through focus groups" that made no mention of allegations of bullying and harassment by individual managers or at all. It also produced a document titled "Maintenance Focus Group Feedback)(master)" that ran to 12 pages that included a reference to managers as follows; "bullying way managers treat you. Not willing to listen…management say we don't work unless a supervisor is standing over us" and "we are not treated with respect…there is money in the pot and managers get a bonus, we get nothing…we get man marked by management (sometimes there are 6-9 people watching when we try and fix a breakdown **local supervisors and maintenance managers are okay** – people higher up are awful" [the Tribunal's emphasis]. There is no reference to any specific allegations of bullying with the exception of possibly managers looking on while a job is being performed, and no mention of any individual managers. On the balance of probabilities the Tribunal preferred Nicola Porschke's evidence supported by the contemporaneous documents that no specific allegations of bullying were

raised and individual managers were not named by the first and third claimant or any other person. The Tribunal's finding is supported by the credible evidence of Julian Cecere that he was unaware his name had been mentioned in the context of bullying, and contrary to the claimants evidence his move in January 2017 to General Assembly was unconnected to the 101 issue meeting and any part played by the claimants.

35 There are issues with the first and third claimant's credibility in relation to the allegation that they named bullying managers and as a result were subjected to detriments. The Tribunal found very little information was given to the respondent about any alleged bullying managers or details of any bullying. Bullying was not a key issue, rate of pay, performance and health and safety were key issues.

36 The basis of the detriments claim brought by the claimants in this litigation take root in Shona Craig's notetaking. The claimant's believe without any supporting evidence that Shona Craig was made aware of the bullying managers which included her own uncle, Jamie Craig, she reported to them, retribution followed and the claimants were caused the detriments as set out in the list of issues. On the balance of probabilities the Tribunal preferred Jamie Craig's evidence as credible, and on the balance of probabilities it found Shona Craig was not provided with the information alleged when she was taking notes at the 101 list meeting, no managers were put on notice that their names had been mentioned and the alleged acts of detriment had not taken place. The Tribunal is further supported by the third claimant's evidence that detriment treatment occurred prior to the 101 list meeting and he did not indicate this had escalated after the 101 list meeting had taken place, and the evidence was that a number of the managers had moved to different areas and the situation had not got any worse. It is notable neither the first, second nor third claimant raised a grievance as indicated above. All were well aware of the grievance process; the third claimant had raised grievances in the past. The claimants had considerable experience of union matters, what support it had to offer employees and were assertive in their attempt to change things, describing themselves as "loud and assertive." The Tribunal found it surprising that had the claimants believed at the time they were being treated in such a way as to cause them detriments due to union activities, being union representatives and making protected disclosures steps would have been taken presumably with the support of the union, and yet nothing was said or done until the events which resulted in their dismissal. On the balance of probabilities taking account of the factual matrix the Tribunal found there was no causal connection with the 101 list meeting, gathering information for it, or any of the claimants acting in a union capacity or being a member of UNITE.

37 The allegations brought by the claimants as set out in the list of issues are extensive, not easy to understand and often duplicated. The Tribunal has unusually dealt with its conclusions in respect of the allegations in its findings of facts in an attempt to make sense of the convoluted history going back many years.

<u>Second claimant's detriment allegations September 2016 onwards to the 2018 anonymous letter issues numbered 16(c) to 16(n)</u>

38 Turning to the second claimant's issue 16(c) the Tribunal found the 101 list was anonymous, no managers were identified and there was no evidence of any breach of confidentiality which caused reprisals as alleged.

39 With reference to issue 16(d) no feedback was given to individuals such as the second claimant, and nor was it expected to be given. The feedback was to the union and to individual working areas/departments via team briefs and ongoing dialogue concerning an action plan that had been agreed with unions. There was no evidence that the second claimant was entitled to individual feedback; all he had done was gather the pieces of paper which were unattributable to individuals including the second claimant, and the Tribunal questioned how he could realistically individually feedback when this action had not been mentioned or agreed to. The purpose of the exercise was for communication to take place between groups of people, the union and management with a view to issues being resolved with the union spearheading dialogue. The involvement of the claimants in the process was limited and as they were not union representatives there could have been no expectation on their part that they would be consulted by management.

40 With reference to second claimant's issue 16(e), (f) and (g) the Tribunal was not satisfied that the alleged incidents had taken place at all, and had they done so the second claimant and/or the union would have taken action and yet no complaints were made. The second claimant's evidence was not credible on this issue, taking into account some of the complaints made in the 101 list meeting that managers monitored repairs and production and the fact that monitoring employees working was part and parcel of a supervisors duties. Once the second claimant had resigned as a union representative there would be no management responsibility to have any informal conversations with him about resolving formal disputes. Management would expect to have such conversations with union representatives, and the second claimant appears to be complaining about a change in status following his resignation as a union representative before the 101 issue meeting.

41 With reference to 16(h) it did not appear to be credible to the Tribunal that on an unknown date and unknown year before the 101 list meeting that Mr P Smith (a manager) told the second claimant that as a union representative he needed to be careful "because he would get 'shit' from both sides in an attempt to intimidate him from raising issues. The Tribunal recognised that union representatives can sometimes have a difficult role to play, and on occasions be subjected to criticism from members and management. , The second claimant alleges Mr Smith acted towards him in an intimidatory manner when he gave him the warning, and if this was the case it is surprising that the second claimant took no step at the time to complain or protect his position until this litigation. It is notable that the second claimant cannot remember the date when this occurred and on his own account, was not intimidated by his union duties and in fact took part in the compilation of issues that led to the 101 list meeting when he was no longer a union representative. The Tribunal found on the balance of probabilities this event did not take place in the way described by the second claimant on an unknown date at an unknown time.

42 With reference to the second claimant's issue 16(i) there was no satisfactory evidence that the second claimant was being discouraged from involving HSE by Pat McDonough. The evidence before the Tribunal was that there were heating issues, and this was one of the matters referenced in the 101 list meeting and beyond. The second claimant has been unable to give any date, time or place and there was a lack of any documentation to support this claim, no reference in his written statement or in oral evidence. The Tribunal concluded that the claimant was not treated as alleged.

43 With reference to allegations 16(j) and (k) the Tribunal found on the balance of probabilities that there was no satisfactory evidence the second claimant was bullied and forced to do overtime, unreasonably required to work on breaks, including when not on the rota to cover breaks, required to remain at his work station and not go on breaks even though there was no work to do required to do higher amounts of maintenance work including outside of the second claimant's work area despite other staff in the other work area being available. A number of these issues raised by the second claimant as detriments for whistleblowing were included in the 101 issue list that related to employees generally, and the Tribunal concluded, preferring the evidence put forward on behalf of the respondent, that the second claimant did not suffer the detriments relied on, including being pressured to do overtime against a background of all employees being required to carry out a reasonable amount of overtime, which the respondent believed was a contractual requirement.

<u>The third claimant's detriment allegations September 2016 onwards to the 2018 anonymous letter.</u>

44 With reference to 16(aa), (ab), (ac) and (ad) the Tribunal repeats its findings made above in relation to the second claimant.

45 Turning to 16(ae) no reference was made by the third claimant to this allegation in his witness statement, in oral evidence the claimant was unable to specify what training had been refused, who had refused it, when it had been refused (possible in 2018) but the third claimant was unable to say. The Tribunal found by reference to the third claimant's appraisal that some training had been given, and there was no written record of any training being requested and subsequently refused. Allegation 16(ae) was not made out, the third claimant's evidence was not credible, and in the alternative, there was a total lack of any causal link between training refusal or otherwise and the alleged protected disclosure and so the Tribunal found on the balance of probabilities.

46 With reference to alleged detriment 16 (ae) prior to September 2016 the third claimant's original evidence was that the detrimental treatment took place before the protected act. There was no evidence whatsoever before the Tribunal that when the claimant complained about lack of hot water he was described by Julian Cecere as "petty" after the 101 issues meeting, the Tribunal found that the claimant did not meet the burden of proof. Had the conversation taken place as described by the claimant and had the claimant attributed the comment as retribution for making a protected

disclosure, it is surprising nothing was said at the time or a complaint raised, given the undisputed evidence before the Tribunal that the third claimant was loud, vocal and assertive. On the balance of probabilities the Tribunal found the claimant was not described as "petty" and if he was so described, it was not causally linked to the 101 list meeting.

47 With reference to alleged detriment 16(ag) the undisputed evidence was that all employees were required to work breaks, one of the departmental issues set out in the 101 list and raised at the 101 list meeting. Julian Cecere's evidence that employees would rearrange breaks when required was credible. The first and third claimant refused to rearrange their breaks until an arrangement was reached that employees would be given 30 minutes notice. In oral evidence on cross-examination the third claimant confirmed this was not a regular occurrence and no dates could be provided when he was picked on as alleged. The Tribunal concluded on the balance of probabilities that the third claimant was required to work breaks as was everyone else, and there was no satisfactory evidence that he was the only person singled out to work on breaks taking into account working breaks was an issue recorded in the 101 list. When an automated line broke down it was imperative for the respondent shutdown to be minimised by a repair being carried out, the third claimant would have understood this and the need for the repair to be carried out, even if it meant breaks were rearranged.

<u>First claimant's detriment allegations to 2018 anonymous letter</u>

48 With reference to the first claimant the detriments post-September 2016 through to the anonymous letter in 2018 are set out in the Further Particulars paragraphs 14(i) and 14(ii) the Tribunal found that before and after the 101 list meeting in September 2016 the first claimant was no longer a union representative having resigned in 2012, and there was no reason for management to engage with the second claimant, who was not a health and safety representative on health and safety matters.

49 The first claimant had "an impression" that he was being treated differently, and yet he raised no complaint either with the respondent or through his union. Had there been a genuine issue the first claimant would not have been slow in raising a complaint, and there was no basis for him to conclude that the managers listed in 14(i) and 14(ii) possessed any knowledge to the effect that the first claimant had accused any of those managers of bullying and the Tribunal repeats its observations above.

50 With reference to undated further particulars (page 125) paragraphs (f)(a) to (d) has been dealt with above. The first claimant is a litigant in person, and his documents are extensive, lengthy, repetitive and not always easy to follow. The Tribunal has attempted to paraphrase the main allegations, which have no dates, satisfied that the first claimant did not raise the issue of being caused detriments for whistleblowing at the time despite his vocal and assertiveness when it came to complaints against management. The claimant alleges in his document dated 31 May 2023 titled "Whistleblowing Meeting and Detriments" a number of detriments as

follows: “Following the whistleblowing meeting manager’s attitudes became worse…they would not constantly stare, they would always pick me to do jobs, they would stand over me, they made me work breaks and dinners ignoring the new HR rota. I would be chosen to do dangerous or dirty jobs…this hostile behaviour continued until my dismissal…(i) The new dinner/tea break rota was not used for me, I was still forced and told to work, Ste Cooke and Andy Shepherd statements show this…they would then stand over me and stare…Name calling is happening…in reference to my mental health…Manager Ste Cooke…when read what my grievance accused him of, he was bullying me going up to my face…Manager Andy Shepherd confirms he threatened me with discipline if I never worked dinner…he attaches nicknames bolder brothers and crazy…Manager Phil Smith used nicknames for me here is the mad one…Julian Cecere would often refer to my mental health using humiliating nicknames, Crazy Kev, the mad one, the nutty brother…he would always pick me to work breaks and stand over me when I was working…I was humiliated by certain managers…Jamie Craig did not know me or Stuart Flanagan, he had been in the Bodyshop for only 4 weeks and already he seemed to be selecting me and Stuart Flanagan…stood over us staring, breached our employment contracts by making overtime mandatory and disciplinary, he bullied us to work unscheduled voluntary overtime with only 2-days’ notice…he forced us to work a fully subscribed Sunday 8/7/18…”

51 The Tribunal concluded that the reason why the first claimant was silent related to the fact that the incidents did not take place as described by the claimant, who was found to have exaggerated his evidence. Had the claimant believed he was forced to work breaks and dinners ignoring the rotas, chosen to do dangerous jobs and be subjected to hostile behaviour because he had whistleblown, at the very least he would have reported such behaviour to the union, and raised a formal grievance with union support. As he and the third respondent shared a car with Anthony Hudson reporting the allegations would have been straightforward, and yet no mention was made to such matters by Anthony Hudson in his union notes or witness statements. As recorded by the Tribunal above, the claimants raised no complaints about whistleblowing detriment until they were facing the possibility of dismissal many years after the protected disclosures had been made, and the reason for this is that the detriments described in this litigation did not occur and the first claimant was not found to have been a credible witness in this regard.

<u>David Owens disciplined after the 101 list meeting.</u>

52 Prior to the 101 list meeting taking place on 29 September 2016 there was an issue with employees objecting to working their breaks by working slowly referred to be the Tribunal above. There were consequences following the “speed camera incident” when a mock up speed camera was constructed because employees were working slowly. David Owens, who had attended the 101 list meeting was disciplined for taking a photograph of the speed camera and placing it on social media.

53 Stuart Flanagan was questioned on the 5 October 2016 about his supervision of David Owens. It was at this meeting Stuart Flanagan for the very first time allegedly accused Andy Shepherd of standing over him as follows: "Can I ask questions? Why do you stand over me?" Andy Shepherd responded "I ask do you need any more help or assistance" to which Stuart Flanagan responded "You've never asked me that." Nothing more was said and the third claimant took the matter no further, he did not raise a grievance or complain in any way either to the respondent, union or Anthony Hudson and so the Tribunal found.

54 The Tribunal concluded that contrary to Stuart Flanagan's evidence at this liability hearing, he was not raising grievance. It is notable at no stage did Stuart Flanagan suggest either at this meeting or any other time that Andy Shepherd and other managers were singling him or any the other claimants out because of their union activities and/or they had made a protected disclosure a few days before. Towards the end of the meeting the third claimant Stuart Flanagan said "I feel sorry for Dave. No other maintenance man has been pulled in - is there a "vendetta" against him [meaning Dave Owens] and later asked "is there a vendetta against maintenance?" There was no suggestion of any vendetta against the claimants and it clear from the language used by Stuart Flanagan that he had no problems being assertive and raising issues. The contemporaneous documents undermine Stuart Flanagan's claim that he was being caused any detriment and singled out but unable to raise a grievance. In oral evidence Stuart Flanagan explained he had not raised a grievance because he had already raised one, "nothing happened so did not want to upset them again." The Tribunal did not find this explanation credible and the contemporaneous document reflects Stuart Flanagan had no issue with upsetting any manager, he used forceful language and was aggressive in meetings, such as the investigation meeting on the 5 October 2016 when he alleged vendettas against all apart from the claimants and Dave Owen "being pulled in for being too slow…this is trivial and petty…fucking ridiculous."

55 A key part of the claimants' case is that Dave Owens was disciplined because he had participated in the 101 issues meeting and this was evidence from which the Tribunal could infer the claimants had been subjected to the detriments alleged for also participating in the meeting. The Tribunal preferred the undisputed evidence of Julian Cecere that there were go slow issues with the shift, he had witnessed employees working slowly including Dave Owens, and that is why the "speed camera came." Dave Owens was disciplined for taking a "selfie" with the speed camera in the background and had posted the camera and BPD board that included sensitive commercial material on social media. There was no connection between the 101 issues meeting and Dave Owens being disciplined, and from the evidence before the Tribunal it found on the balance of probabilities that there was no escalation of the poor management behaviour complained of prior to the 101 issues meeting that led to a number of grievances being raised, and had there been an escalation the claimants would have taken steps with the assistance of the union to put a stop to the alleged detriments and the alleged behaviour.

56 The Tribunal has before it a number of allegations without any specific details such as dates, and had the first claimant believed he were being caused a detriment for whistleblowing at the very least there would be some documentary evidence showing the escalation in the managers behaviour after the 101 issues meeting and there was no such document. The Tribunal concluded on the balance of probabilities, taking into account its finding that the names of managers were not referenced in the list of complaints compilation or the 101 list meeting that there was no escalation of behaviour by managers towards the claimants from the 101 list meeting to the effective date of termination that could be causally linked to whistleblowing or union activities/union membership.

The events leading to the suspension April 2018 onwards.

57 From April 2018 zero overtime was available and offered to employees, including the claimants. There were issues with changes in contracted shift patterns and employees were unhappy. Union and managers were involved in resolving the issues and the breakdown in relations, which Anthony Hudson described as "a shortage of staff to cover overtime shifts at the weekend…during 2017 and 2018…the relationship [between] company managers, company representatives and staff was hostile." The breakdown in relationship between managers and workers was confirmed by Julian Cecere, who gave credible and straightforward evidence on how his job as supervisor was to watch and monitor, and when returning to the department had noted "a marked change on the attitude in the shift."

58 On the 4 June 2018 Jamie Craig started to work in the Bodyshop and part of his role was to "fix" the problems with the teams. Jamie Craig worked with Anthony Hudson in his capacity as shop steward to stabilise the situation. Overtime was reinstated. A notice was issued on the 20 June 2018 that overtime would restart on the 23 June 2018. Overtime hours were offered on the 16 June 2018 "to all" and there appears to have been sufficient volunteers, although many workers had personal commitments that prevented overtime being taken up. None of the three claimants worked overtime over those weekends, although they had worked overtime in the past.

59 On the 27 June 2018 Jamie Craig met with Anthony Hudson and showed him an email from David McConnell, head of HR (which was not before the Tribunal) which guaranteed shift stability for a period of 6-months. Anthony Hudson informed maintenance staff of this agreement, who were pleased and volunteered to work overtime as a result of the promise, covering the weekend of the 30 June and 1 July 2018. The claimants did not put themselves forward to work overtime that weekend, and the first and third claimant were not scheduled to work the Friday 29 June and 2 July 2018, with the last day being at work Thursday 28 June 2018.

60 On Thursday 28 June 2018 the union, who had collected the names of volunteers for overtime that weekend as was normal practice, confirmed they had sufficient numbers, being 24 people on each day.

Mark Noble's announcement

61 On the 28 June 2018 Mark Noble, plant director, put out an announcement that maintenance staff would be taking on "autonomous maintenance roles." The required number would be achieved by volunteers and if insufficient numbers selected by length of service with the result that the claimants were not affected by this change. However, other employees were not happy as reflected in the evidence given during the disciplinary investigation. There were repercussions following Mark Noble's announcement that severely affected the business. A significant number of people took their names off the overtime list, and only 8 maintenance staff worked that weekend, which included Anthony Hudson. The evidence before the Tribunal was that the respondent had access to the union list of employees who had agreed to work overtime, and could easily have discovered the number and identity of employees who had withdrawn and the reasons for the withdrawal, the nub of the disciplinary allegations brought against the claimants.

62 As a consequence this affected the business over the weekend by the reduced number of cars built, and it had a knock on effect Monday 2 July 2018 when production was reduced by 326 cars as 5/600 people were sent home due to the problems experienced over the weekend when productivity came to a halt as a result of the Body Shop workers refusing to turn up and work the agreed overtime.

Refusal to work overtime letters 2 July 2018

63 Val Thomas, Plant Personnel manager, sent a letter dated 2 July 2018 to a number of individuals including the three claimants, who worked in in the Body Shop maintenance team headed "refusal to work overtime." The letter was sent to the claimants on the basis that Val Thomas believed they had not worked overtime, they were not selected due to union activities and/or whistleblowing and so the Tribunal found. A number of other employees were also sent identical letters.

64 Reference was made in the letter to the contractual requirement "to respond to the need for reasonable overtime when it arises" and "that together with a number of your maintenance colleagues, you have refused to work overtime on a number of recent occasions including Saturday 26 May, Saturday 2, 9, 16 and 30 June and Sunday 1 July 2018. The company regards such a refusal as a concerted action to disrupt the business operational requirements and a breach of contract. Refusal to work overtime has put the ability of the plant to meet its production schedule at risk as a result of insufficient maintenance personally being available to attend breakdowns. I am writing to warn you that should you refuse to work a reasonable amount of overtime on Saturday 7 July 2018 or any planned production overtime, catch back overtime and preventative maintenance overtime from this date; this may result in disciplinary action being taken against you for which may include sanctions up to an including dismissal."

65 This written notification was the first instance of the respondent threatening disciplinary action and possible dismissal if an employee refused to work a

"reasonable amount" of overtime against a background where overtime was voluntary and the respondent had delegated responsibility to the union to keep a list of the volunteers. The Tribunal concluded that the respondent went from the position of not taking any responsibility for arranging adequate weekend overtime cover which it left to the union, to threatening dismissal without specifying what a "reasonable amount of overtime" consisted of, in an attempt to avoid a repetition of the disastrous weekend. There was no attempt by Val Thomas or any manager to investigate why employees had volunteered and then withdrawn from working overtime that weekend.

66 The unchallenged evidence of Anthony Hudson was that he had been approached by Mark Noble on the 30 June 2018 and he asked where the volunteers were Anthony Hudson informed Mark Noble that "everything was okay on the 27 June after the email from Mr Connell with his guarantee of shift pattern stability was provided, and people not doing overtime today must be due to Mr Noble's announcement on Thursday 28 June 2019 about forced autonomous working…Mr Noble was clearly very annoyed and angry…said 'oh fucking hell' angrily threw his arms in the air, then turned around on his heel and walked off." Anthony Hudson did not give this evidence during the disciplinary process including the hearings which he attended when accompanying the claimants in the capacity of union representative.

67 Taking into account the factual matrix the Tribunal found there was no causal link between the whistleblowing in 2016 and the 2 July letter sent to the claimants and other employees working in the Bodyshop team to the protected disclosures, union activities or union membership. In short, managers were panicking following the weekend that had caused so much damage commercially, especially given the general situation concerning attracting work from the new French owners following the earlier TUPE transfer.

<u>The anonymous letter</u>

68 A letter dated 2 July 218 posted on the 4 July 2018 and delivered to the respondent on the 6 July 2018 was anonymous and addressed to Val Thomas. There was no way of knowing or discovering who the writer of the letter was, and so the Tribunal found. It referenced the writer being concerned "for my future. After the past weekend on the Sunday for the first time **I am really afraid the plant might close. I am witnessing people intimidating other people not to work overtime within the maintenance group**. **I have overheard a number of times maintenance people discussing this. There are three people who are leading the intimidation, Kevinn and Stuart Flanagan and Andy Rothery**. The reason I haven't come forward publicly because I fear for reprisals against my family. These people are well known for their threatening behaviour. **I am asking you to stop this bullying in the body shop where a small group of people are ruining the future of this plant. Proud worried Vauxhall worker**" [Tribunal's emphasis].

69 The Tribunal concluded there was no way of knowing who had written this letter. It would take the writer to admit to it, and this never happened. The claimants

case that the letter was written either by Jamie Craig and/or Mark Noble had no basis, and the Tribunal was not persuaded that the motivation was whistleblowing nearly 2 years previously and/or union activities which went back 6 years in time in the case of Kevin Flanagan. The anonymous letter fits squarely within the factual matrix and there is no satisfactory evidence that it was fabricated with the sole purpose of getting the claimants into trouble and dismissed. It followed in the wake of a weekend when on the Monday 400/500 employees were sent home with severe consequences for the business.

Internal rumours concerning the claimants.

70 On the 2 July 2018 the second claimant became aware that there were rumours in the General Assembly that the first and third claimant had been involved in bullying. The second claimant immediately informed the first and third claimant, he met with Kevin Jackson, the senior shop steward about the "false rumour" and confirmed there was "nothing for him to investigate." The union did not investigate. The quick response to the allegations of bullying was in marked contrast to the complete lack of activity by any of the claimants in response to the alleged bullying and detrimental treatment they had allegedly been subjected to from 2016 onwards as a result of raising protected disclosures or union activities. It underlines the Tribunal's conclusion that the allegations had no basis in fact, and had the detriments occurred as described by the claimants, immediate actions would have been taken and yet there was no action whatsoever.

71 On the 3 July 2018 the first and third claimant met with Anthony Hudson and they went to see Kevin Jackson wanting the "false rumour" to be "nipped in the bud." The union did not investigate and the rumour went no further. The union reported the rumour to Jamie Craig on either the 2 or 3 July 2018. The rumours were ignored, neither the respondent or trade union took any action on them, and yet the respondent relied on them at a later date as part of the reason for dismissal. At no stage did the claimants mention their suspicion that they were being singled out due to union activities and/or making a protected disclosure. It was open to Jamie Craig and/or HR to discuss the rumour with the claimants or go to HR about it with a view to an investigation taking place. It is notable that the claimants were very proactive when it came to the rumours and yet took no steps even at this late stage to bring to the respondent's attention the alleged detriments which included the anonymous letter and rumours, undermining their evidence that these detriments ever took place.

72 On the 3 July 2018 Mark Noble sent a message to all employees as follows " Yesterday, I had to send every person who works in General Assembly home…the result of this is that the plant did not build 326 cars and is now minus 467 cars to the schedule…I had no choice. I needed 24 maintenance employees to work each day and only 8 volunteered…the action taken by the majority of the Body Shop maintenance team severely compromised the Plant. It has damaged the Plant's reputation." Reference was made to other plants who had reduced schedules and "now we look unprofessional to the whole of the PSA Group. Going forward we need

to think ahead of any consequences that our actions may take…the decision taken by the majority of the Body Shop maintenance group has damaged the Plant's reputation…" The severe consequence to the respondent's business coupled with the rumours against the claimants linked them to the disastrous weekend and Mark Noble's attempt to cover up the part he had played was the nub of the disciplinary proceedings and dismissal of the claimants, which had no causal connection to union activities, union membership or the protected disclosures.

73 Mark Noble sent a written message to the General Plant in a "Weekly Plant Team Brief" dated 5 July 2018 describing the week as "the most difficult week the Plant has faced since 2015 and all the difficulties have been created by ourselves. We are in a vulnerable situation and as a Plant collectively we need to reverse this urgently…Ten months of excellent progress is in danger of being wiped from the memory of our owners PSA…we are now in the spotlight of PSA…We need to take responsibility for our future right now. We can start by supporting the overtime planned for Saturday 14 and 15 July. I need every one of you to work…"

4 July 2018 meeting Jamie Craig with first and third claimant

Allegation 16(aj) On 4 July 2018 being bullied and forced to do overtime, being threaten with dismissal if he did not do the overtime on 8 July 2018.

74 On the 4 July 2018 Jamie Craig met with the first and third claimant together with other employees from maintenance to discuss overtime. He also met with Gary White having selected the first trench of employees from information he had obtained from the SAP payroll system. The first and third claimant allege they were selected as a result of the whistleblowing and/or union activities, but their position was undermined by the fact that Gary White met with Jamie Craig. The first and third claimant maintain they were "forced to work overtime" and there were letters on the desk with their names on the envelope. There was no evidence the letters were opened. Jamie Craig denies there were any letters as described by the first and third claimant. Anthony Hudson attended the meeting and his evidence was that Jamie Craig referred to them indicating that if they did not work that weekend they would be sent the prepared letters. On cross-examination by the first respondent only Anthony Hudson confirmed there were four letters on the desk and he could not recall if they were named or not. Anthony Hudson did not record in his notes that there were four letters on the desk, however there is reference to "letters being issued" with no explanation of what those letters set out and the reason for this was because nobody was shown the actual letters.

75 The Tribunal is unable to reach any conclusion as to whether there were letters on the desk or not. If it was the case that there were four letters this points to the first and third claimant being treated no differently to other employees, including Gary White who was given a concession from working overtime due to a confidential personal matter. The notes taken at the meeting do not record that Jamie Craig referred to any letters on his desk. Later on in the meeting Jamie Craig asked the first

and third claimant "letter?" The third claimant responded "not had yet" and not seen copy. As recorded by the Tribunal above, the first claimant was vocal about a number of matters including contractual changes and shift changes confirming "[I] speak mind plus no one likes me" with no reference being made to any allegations of detriment including the letters on Jamie Craig's desk threatening disciplinary proceedings and the Tribunal concludes, on the balance of probabilities, that the claimants were treated no differently from any other employee who worked in the Bodyshop and there was no causal connection between union activities, union membership and making a protected disclosure when it came to their treatment by Jamie Craig, whose motivation was solely to avoid a repeat of the previous weekend.

76 There is also an issue as to whether the first and third claimant were "forced" to work the weekend in question as alleged The contemporaneous notes reflect the third claimant on being told that "need people overtime" stating "would have worked but Kev birthday…wife work Saturday…no problem Sunday." The first claimant confirmed he was "**happy [to] work overtime…got plans birthday party, definitely available, next weekend…Sunday can do cancel night out**" [the Tribunal's emphasis].

77 Taking into account the contemporaneous notes, the lack of any complaint by Tony Hudson regarding "forcing" the first and third claimant to work overtime and threatening them with dismissal, on the balance of probabilities the Tribunal concluded that the first and third claimant agreed to work the Sunday after discussion with Jamie Craig who accepted they could not work the Saturday and thanked them for the breakdown they had recently attended. The Tribunal concluded John Healing, the deputy senior trade union official who also attended the meeting, would have taken action and/raised objections had there been letters on the table alluding to dismissal, but there was none either during or after the meeting. On the balance of probabilities the Tribunal concluded that whilst there may have been letters on the desk, there was no reference by Jamie Craig to the disciplinary letters being addressed to the first and third claimant. Finally, the tenor of the meeting and words used by Jamie Craig during it do not point to any intimidation or bullying, and the first claimant who indicated "wife does law" was able to express assertively the problems he had with the respondent, which did not include any alleged acts of detriment despite the opportunity for the allegations to be raised with Jamie Craig in the presence of two senior union officials. The Tribunal concluded that the reason it was not mentioned was because the first and third claimant did not consider they had suffered a detriment.

78 After the meeting on the 4 July 2018 at 16.53 Jamie Craig emailed four recipients including Mark Noble and Val Thomas. He referred to the need for 24 people to work overtime on the Saturday and a minimum of 12 people to work on the Sunday. 21 people volunteered for Saturday "so we started the ball rolling with getting letters issued to people to enforce working…this afternoon Rosie and **I sat with Gary White, Kev Flanagan and Stu Flanagan based on a list I generated of people who had yet to support the company in working…Kev and Stu are now working overtime this weekend…Since I sat with these individuals we have had an influx of people**

volunteering to work…so the process has the desired effect in galvanising the correct level of support for the company. I am hopeful this will draw a line under the issue going forward." Reference was also made to Gary White although this has been subsequently redacted due to the sensitivity of his family issue, which the Tribunal is aware of.

79 The email initially concerned the Tribunal in that Jamie Craig was reporting to the plant director about first and third claimant before he knew about the anonymous letter pointing out the first and second claimant by name. However, Jamie Craig was aware of the rumours concerning the three claimants. Cross-examination of Jamie Craig dealing with the 4 July 2018 email concentrated on whether the action was taken to "break the claimant's hold" described as "ringleaders" the objective being to get them to work overtime so other employees volunteered. The cross-examination did not reference the detriment claim, and the Tribunal concluded that despite its reservations about the 4 July 2018 email, Jamie Craig took the action of confirming the position to Mark Noble and Val Thomas in order to prove he was taking positive steps to ensure that there was no repeat of the previous incident, set their minds at rest that there were sufficient volunteers and in doing so there was no connection with the whistleblowing or union activities in the past.

80 The second claimant volunteered to work overtime and there was no issue with him or any question of pressured or coerced and so the Tribunal found.

Receipt of anonymous letter by Val Thompson on 6 July 2018, 9 July 2018 meeting and investigation 11 July 2018 onwards

Allegation 16(o) Being suspended. Being suspended just on the basis of an anonymous letter.

81 Val Thomas received the anonymous letter on the 6 July 2018. Nothing happened and the claimants worked the agreed overtime that weekend.

82 Phil Smith, shift supervisor in the Bodyshop, met with the three claimants on the 9 July 2018. Tony Hudson was in attendance. They were informed of the anonymous letter and suspended on full pay. The first claimant asked if he could contact a solicitor, and the second claimant responded "This is a disgrace. Some snitch is going to make me lose my job for fucks sake." The third clamant responded "this is a prime example of me having done nothing my name springs to people's mind."

83 On the balance of probabilities, taking into account the factual matrix recorded above, the Tribunal was satisfied that there was no causal link between union activities, union membership and/or whistleblowing with the suspension of the claimants on the 9 July 2018. The sole reason for the suspension was the anonymous letter which followed internal rumours about the part played by the claimants in persuading workers not to work overtime that disastrous weekend to avoiding any repetition by being seen to take action.

84 The plant was shut down 3 weeks for the summer holidays and during this period there could not be any investigation and this contributed to the delay.

Investigation by David Brewster 11 July 2018

85 David Brewster, industrial planning manager, agreed to act as investigating officer. He commenced his investigation on the 11 July. He understood that he was investigating the allegations in the anonymous letter and testing the substance of those allegations, however he ended up investigating whether the claimants had bullied and harassed colleagues over a period in time, and not the actual incident surrounding the weekend of 30 June to 1 July 2018.

86 There was no satisfactory evidence before the Tribunal from which it could conclude Mark Noble had directed David Brewster to find negative evidence against the claimants as allege. The Tribunal is satisfied on the balance of probabilities that David Brewster's investigation and conclusions had no causal connection with whistleblowing or union activity despite deliberately ignoring evidence that could favour the claimants. David Brewster had no previous knowledge of the claimants and the protected disclosures. The claimants denied the allegations raised against them in the anonymous letter at various meetings including that held on the 11 July 2018, and David Brewster did not believe them from the outset.

87 The claimants were supported by union and were accompanied throughout. The ACAS Code was complied with and so the Tribunal found.

88 David Brewster interviewed 44 people, including a number of past employees. He did not obtain a list of employees who had volunteered to work overtime on the 30 June and 1 July 2108, only to withdraw, which was unfortunate. This information was available to him, the disciplinary and appeals officer through auspices the union who had gathered the information and yet chose not to share it. At no stage during the disciplinary process was key information about the names of those employees who had withdrawn from working overtime that disastrous weekend despite this being an obvious area of inquiry given the task David Brewster was charged with. There are 41 statements in the bundle, 8 statements had not been included (see below) plus the 3 claimants, all of which the Tribunal read in detail before concluding a reasonable investigating officer, acting objectively, would have questioned the employees named seeking clarification as to why they had withdrawn from working overtime and whether anyone had influenced/pressurised them to do so. The gathering of such information within the investigation and disciplinary process was key would have fallen well within the band of reasonable responses, yet it did not happen which resulted in a procedural and substantive unfairness not put right at either dismissal or appeal stage and so the Tribunal found.

Mr Brewster's investigation

89 The parties agreed the following facts in relation to David Brewster's investigation: "In addition to the interview statements included within the hearing bundle, the Investigation officer Mr Brewster conducted further interviews on the below dates with the following individuals:

(a) Mr Jack Boardman – 18th July 2018;
(b) Mr Paul McGarth – 19th July 2018;
(c) Mr Dave Woodcock – 20th August 2018;
(d) Mr Adam Peech – 22nd August 2018;
(e) Mr Matthew Frackleton – 22nd August 2018;
(f) Mr Julian Cecere – 23rd August 2018;
(g) Mr Dave Wells – 28th August 2018; and
(h) Mr Rhys Ashworth – 3rd September 2018.

1. Ms Rosie Andrews (HR) attended each of the above meetings set out above at paragraph 1 (a) – (h) in a note-taking capacity.

2. Each of the above individuals set out at paragraph 1 (a) – (h) requested and was granted anonymity by Mr Brewster during their respective meetings with him.

3. As a result of those requests, none of the above statements set out at paragraph 1 (a) – (h) were taken into consideration by the investigatory (David Brewster), disciplinary (Dianne Miller), or appeal officers (Russell Martin and Matt Hughes) when reaching their respective decisions in the July 2018 – February 2019 disciplinary process.

4. None of the individuals interviewed in the above statements set out at paragraph 1 (a) – (h) report witnessing the Claimant's bullying and intimidating staff members not to work overtime, whether on the weekend of 30th June – 1st July, or at all.

5. None of the individuals interviewed in the above statements set out at paragraph 1 (a) – (h) report witnessing or having received 'naked birthday hugs' from Mr Rothery.

6. Mr Peech (apprentice) is recorded in his interview as stating that he was not asked to work overtime in July 2018."

90 The Tribunal concluded from the agreed facts that as Diane Miller did not take the statements into account despite the fact that they were relevant to the decision to dismiss. The statements reflected eight employees, including Julian Cecere, had never witnessed any bullying or intimidation on the part of the claimants to stop employees from working overtime, and had this information been before Diane Miller (or the appeal board) it may have underlined the fact that the investigation was poor

and the thrust of the evidence pointed away from the claimants being responsible for that disastrous weekend.

The investigation process.

91 David Brewster placed the witnesses into groups; (i) currently employed maintenance employees, current such as Steve Cooke and ex-management employees such as Andy Shepherd who had retired in April 2018 before the weekend in question, (ii) apprentices who gave their evidence on an anonymous basis and (iii) trade union stewards including Anthony Hudson. Originally he intended to question 24/30 employees, however, this number increased as the investigation progressed. David Brewster made a conscious decision not to investigate the person who wrote the anonymous letter. He reasonably accepted that he could not know the writer's motive and whether it had been written in spite to "try and get rid" of the claimants. D He reasonably held the view that it was unlikely the person would ever be discovered and what was important was to investigate the allegations raised in writing and rumours within the workforce to see if there was any truth in them. David Brewster cannot be criticised for failing to investigate who the writer of the anonymous letter was, he can however be criticised for the manner in which he conducted the investigation.

92 At the outset of every interview employees were asked the same question as part of the investigation by David Brewster; "We have received an anonymous letter alleging that Andrew Rothery, Stuart Flanagan and Kevin Flanagan have been intimidating employees within the Maintenance department to influence them not to work overtime. The allegation amounts to bullying…do you have any comments?" Reference was also made at the outset to all employees sharing their identity or giving evidence anonymously, which a number chose to do.

93 The Tribunal has considered the evidence given by individual employees during the investigation process, for example, Mathew Kenny, a maintenance employee (and the fourth man who met with Jamie Craig after the weekend in question) confirmed the claimants "**have not bullied anyone. They have never come up to me…Andy never bullied me or anyone that I know of**…" [the Tribunal's emphasis].

94 Mathew Kelly was interviewed on the 15 August 2010 and confirmed that he had not seen the "**them bully anyone…the opposite. They have helped me**…We are in our fifth shift pattern this year and then we have had the overtime issue. **I am aware some were not prepared to work overtime, and also backed out due to shit from other lads. This was no more than usual banter**…I am not aware of bullying going on. I had my own reasons for not working overtime…waiting for clarification on shifts. When asked "are you aware of anyone else having an altercation or heated discussions with any other them?" Mathew Kelly responded "we all have our opinions. **I know Andy well and Kevin, and Stu more so recently, and they are all very anti-bullying. When I was bullied they helped**." He accused management of bullying stating "these three individuals are not…I have seen nothing."

95 David Brewster took the view that Mathew Kelly's comment referring to people getting "shit from other lads" supported the anonymous complaint despite Mathew Kelly's evidence that is was not the claimants. David Brewster also concluded that the reference to "his was no more than usual banter" was attributable to the claimants and added weight to the allegations in the anonymous letter, when on any clear reading of the words used by Mathew Kelly what he was saying could not have been interpreted this way by an investigator acting reasonably, and so the Tribunal found.

96 Interpreted as a whole Mathew Kelly's evidence given at investigation stage was favourable to the claimants and pointed away from the allegations in the anonymous letter and so the Tribunal found. David Brewster's interpretation was unreasonable and reflected his closed mind to any evidence that supported the claimants so sure was he of their guilt. In oral evidence David Brewster explained that Mathew Kelly supported the fact that "intimidation was going on" and he appeared to be unable to grasp the fact that any intimidation was attributable to "other lads" and not the claimants. A reasonable employer looking at the evidence objectively would not have drawn the same conclusion; it was clear as far as Mathew Kelly was concerned the claimants were not guilty of intimidation and bullying and a reasonable investigating officer would have reached this conclusion.

97 Sean Kirman referred to hearing "a few whispers…Stu and Andy have been ok with me…" He denied witnessing anything or feeling intimidated.

98 Mark Harrison confirmed he had "never seen or heard that from anyone" Despite it not being a disciplinary issue Mark Harrison was asked if Andrew Rothery "provides naked birthday hugs." It is notable that when David Brewster asked the question he did not clarify that the hugs were in fact not naked as Andrew Rothery, who had volunteered the information in the first place, made it clear he had worn underpants under cycle shorts. The Tribunal concluded David Brewster was intent on leaving no stone unturned which could implicate Andrew Rothery and result in a disciplinary, underlining his less than objective attitude towards the investigation that culminated in numerous witnesses being questioned in the vain hope that David Brewster would find evidence to support guilt ignoring the raft of information before him, which he had no reason to disbelieve, pointing to their innocence.

99 Jamie Craig was interviewed on the 16 August 2018 and his response was that he had only been in the Bodyshop as unit manager for 6 weeks and "I have had no dealings with them." Reference was made to the maintenance department struggling to get overtime numbers and a discussion with Greg Plowman to the effect that "it was not a coordinated effort not to work, but it was pressure from certain people. He would not give me any names. The week after I know the TU pulled the 3 individuals suspended off the job and spoke to them about a bullying allegation going around. Other than that I do not know anything else.. I have sat with the TU shop stewards numerous times over various things including overtime…I do not think this pressure came from Stewards." In his witness statement before this Tribunal Jamie Craig

referred to being "completely open" with Dave Brewster. The Tribunal did not agree with this assessment given Jamie Craig omitted to mention what he believed had sparked off the withdrawal by employees to work overtime the disastrous weekend of 30 June to 1 July 2018, namely the Mark Noble announcement.

100 In oral evidence under cross-examination Jamie Craig explained he failed to mention the events which gave rise to the weekend of 30 June and 1 July 2018 because he was not asked the question by David Brewster, which was correct on the basis that David Brewster did not put any questions concerning the weekend in question to anybody. Jamie Craig was aware of the announcement by David Connell "which answered a lot of concerns and gave me a shift pattern," the announcement on the 29 June 2018 about autonomous maintenance by Mark Noble followed by the reduction in employees prepared to work overtime when they withdrew their names.

101 Jamie Craig contradicted his evidence in that one the one hand he stated that "I did not hear the claimant names until the letter came" and at paragraph 9 of his written statement that he was made aware of the allegations "that they were involved in some form of bulling by the trade union when he questioned the reason for their meeting." As indicated above, the Tribunal found Jamie Craig knew the claimants had been implicated in the bullying allegations before the anonymous letter, and the contradictions in his evidence raises a question mark over his credibility. It is notable that in oral evidence Jamie Craig confirmed the action of the maintenance team on the weekend in question was "severely damaging…had a significant impact on the business…damaging to reputation…a really serious incident…we were all very angry…**it was the maintenance team's responsibility…a coordinated effort – unofficial industrial action**" [the Tribunal's emphasis].

102 In oral evidence when asked a question by the Tribunal Jamie Craig stated, "the only credible explanation we had was that we made the announcement on the autonomous maintenance PSP and it had gone down very badly on the 28th. Up until then on the 27 we had an announcement on the new shift pattern everyone was pleased with that." When asked why Jamie Craig had not given this very relevant information during the investigation he explained "When I was interviewed by Mr Brewster it was specifically about allegations of intimidation and bullying. Yes, not about the weekend in question. In my opinion they are not connected. I hadn't considered it in that vein and just answered the questioned that had been asked. It was all predating the complaint and rumour and I did not make that link. At that time I thought it was autonomous maintenance PSP." There is a brief note of this evidence in Jamie Craig's witness statement and none in his very short interview by David Brewster.

103 The Tribunal concluded Dave Brewster did not ask any questions about the weekend of the 31 June and 1 July 2018 because he was not investigating that weekend, despite having been instructed by Val Thomas to look at allegations of intimidation and bullying made in the anonymous letter, when it was clear from an objective reading of the autonomous letter it related to the loss of 3 days production

and future of plant, namely the 31 June and 1 July 2018. The investigation was flawed from the outset and this was never put right and so the Tribunal found. There was incompetence on the part of Val Thomas as head of HR who should have made the position clearer to David Brewster as to what exactly he was investigating, and David Brewster who believed the claimants were guilty from the outset on the basis that rumours and the anonymous letter must be correct, despite numerous employees coming forward confirming the claimants did not intimidate and were not bullies. Had an objective investigation taken place with the right questions being asked, Dave Brewster would have known from Jamie Craig that the events of 30 June and 1 July 2018 were attributable to the actions of Mark Noble and employees had chosen not to work overtime because of his actions. The only conclusion he could have drawn had a fair and objective investigation taken place taking into account the evidence given by witnesses as reflected in the bundle, was that the claimants were not guilty of the allegations and there was another reason for what had transpired on the weekend in question that lay with the plant manager.

104 It is notable that David Brewster interviewed a manager who had left 2 years previously in an attempt to bolster up the number of people interviewed, make it appear he was carrying out a full investigation, and obtain evidence from at least one witness of the claimant's guilt. Andy Shepherd was not positive in the terms he described the first claimant, it appears he had a personal issue with him yet unable to refer to any intimidation or bulling by the claimants. His opinion of Stuart Flanagan was that he "does a poor job" and "kind of called me a knobhead." Andy Shepherd did not support the allegations.

105 Despite the lengthy time it took to investigate (11 July 2018 to 12 October 2018, a period of 3-months) David Brewster did not provide a written report of his findings. Instead, the claimants were provided with the evidence when David Brewster orally summarised his findings at the first disciplinary hearing. The invitation to the disciplinary hearing sent to the claimants on 19 October 2018. The allegation to be considered was ""intimidating and/or influencing other employees to not work overtime." In addition to this the second claimant was accused of "giving 'naked hugs' to colleagues, and "posting of offensive and potentially discriminatory comments on twitter."

106 It is notable that David Brewster did not ask any questions from any of the witnesses concerning whether they had worked the weekend of 31 June and 1 July 2018, whether they had put their names down on the overtime list and if they took their names off the reason for this. This was clearly the matter to be investigated and due to incompetence David Brewster's investigation was inadequate and unfairly carried out with the result that the dismissals were procedurally and substantively unfair.

<u>Disciplinary hearings 19 October 2018</u>

107 At the disciplinary hearing David Brewster was asked to outline "your decision" which he did orally. This was the first occasion the claimants had to understand David

Brewster's investigation. The Tribunal finds it surprising that David Brewster, given the extent, complexity and length of time of the investigation, chose not confirm his findings in writing and send written investigation reports to the claimants in good time before the first disciplinary hearing, and this resulted in yet more delay. David Brewster's failure was especially relevant to Kevin Flanagan who was complaining of mental health issues at the time, and had been in receipt of an occupational health report. An investigating officer acting within the band of reasonable responses would have provided the claimants, particularly the first claimant, with a written report taking into account the considerable size and recourses of the respondent who had HR support which David Brewster could have accessed in order to ensure a fair investigation and disciplinary hearing took place.

108 The notes of the disciplinary hearings record David Brewster's handover where he presented a "summary of findings" that ran to 10-pages. Reference was made to a welfare meeting with apprentices that pre-dated the investigation which David Brewster confirmed he would use. He referred to anonymous statements made by apprentices concerning "negative comments towards people working overtime" being made. It undisputed that the apprentices did not link the comments to the claimants. David Brewster also interviewed apprentices, although he was unable to confirm to the Tribunal whether they were the same apparencies who had been interviewed initially or different because they were anonymous in some cases. David Brewster referred to "many of the individuals questioned – in a highly air conditioned environment became agitated and clammy – this is even though offered anomality and in an open environment." In David Brewster's view their "stories had changed" and "they also gave short and direct responses, meaning that the interviews lasted less than 5 minutes. Many of the responses appeared contrived/rehearsed…"

109 David Brewster's finding was "there is limited but persuasive evidence that there has been intimidation within maintenance based on the anonymous letter, previously concerned addressed by the trade union and the lack of volunteers for overtime; the evidence that contradicts this is undermined by the demeanour of many of the witnesses and their brief and evasive responses and changes to their accounts." The Tribunal found there was no evidence on which David Brewster could reach the conclusions objectively assessed, and it reflected his bias against the claimants who he was certain were guilty because of the rumours and anonymous letter, which was the only evidence he had pointing to the claimant's guilt, despite interviewing 51 people, an extensive investigation over a period of 3 months during which time the claimants were suspended on full pay and unable to make contact with anybody within the workplace.

110 Anthony Hudson was interviewed on 15 August 2018 and he made no mention of the part played by Mark Noble's communication when employees decided to withdraw from the overtime they agreed to carry out on the weekend in question, despite having had a conversation with Mark Noble as recorded by the Tribunal above.

111 The first disciplinary hearings took the same pattern for all claimants and all were adjourned.

112 On the 30 October 2018 non-verbatim notes of the meeting were provided to the claimants. The evidence before the Tribunal was that the claimants requested some amendments but they are not substantial and nothing hangs on it. By agreement certain statements were excluded at the request of claimants who raised numerous grievances throughout the process, challenging information and what people said in multiple communications which were addressed by Diane Miller, who was trying to be as even handed as possible. One of the witness statements excluded was that of Steve Cook who had made the comment that the second claimant was a union steward and was only happy when on strike, which the second claimant has included in his list of detriments at issue 16(v) on the basis that the comment showed a negative attitude toward him as a union representative. The Tribunal accepted that Steve Cook could only make that comment because the second claimant had been a union representative. Steve Cooke was interviewed on the 16 August 2018 and his evidence played no part in the decision making process of Diane Miller as she had agreed to discount it, with the result that any detriment caused to the second claimant was minimal and so the Tribunal. There was nothing to stop the second claimant from issuing proceedings claiming trade union detriment but he took not step until entering into ACAS early conciliation outside the statutory time limit. It was reasonably practicable for the second claimant to have issued proceedings within the statutory time limit and so the Tribunal found.

113 The claimants wanted to call 40 additional witnesses which were refused, on the basis that a sample of employees could be provided. Nobody addressed the real issue in the case, which was talking to employees who had agreed to work overtime on the weekend in question only to change their minds. It was alleged by the claimants that Jamie Craig had written the anonymous letter when there was no basis for this, the claimants having pointed to a number of managers as the author of the anonymous letter at various stages during the disciplinary process and this liability hearing.

<u>Jamie Craig second interview 5 November 2018</u>

114 Diane Miller spoke with Jamie Craig on the 5 November 2018 following representations made by the claimants, and he confirmed “I have had no negative dealings with them…There are breakdowns they have all worked on, and they did a brilliant job. With work, I have had a positive interaction with them. There were meetings with the Flanagan’s about overtime letters but my comment was around no interaction in relation to the allegation…work wise I have been positive about them. “ He confirmed the 4 July meeting “had no relevance to the case. That had nothing to do with intimidation allegation. My interaction with them has been positive…I made a concession for them not to work the Saturday as they had plans.” With reference to the rumours of bulling, Jamie Craig confirmed his understanding was “the TU called them in. It had nothing to do with me as this was done by the TU themselves.” He

denied writing the anonymous letter pointing out "when I have a disciplinary issue I deal with it myself through the process."

115 Diane Miller did not ask what had happened on the weekend of the 30 June and 1July 2018 and the events leading up to it despite confirming to the Tribunal that this was the disciplinary issue she was looking at. Jamie Craig did not think to offer the information up, and merely answered the questions that were put to him. Had Diane Miller asked the right questions, as a reasonable disciplinary officer would have, she would have discovered that in Jamie Craig's view the events of the 30 June and 1 July 2018 were attributable to Mark Noble's autonomous maintenance announcement and not the claimants alleged intimidation and bullying. It is surprising to the Tribunal that Jamie Craig did not offer this information, nevertheless, it accepted Jamie Craig's evidence that his responses including the denial that he was the author of the anonymised letter, had no connection with union activities or whistleblowing which were not on his mind. The Tribunal concluded on the balance of probabilities that the conspiracy theory relating to Jamie Craig, his niece (who had taken notes at the 101 issues meeting over 2 years before) and other managers was farfetched taking into account the numerous other employees involved at the time, both in compiling the 101 issues list and attending 1010 issues meetings.

<u>Reconvened disciplinary hearings 14 November 2018 and the first time detriment was alleged.</u>

116 The reconvened disciplinary hearings took place on the 14 November 2018, Diane Miller confirmed the witness statements of Phil Smith, Steve Cooke and Andy Shepherd would not be taken into account due to objections from the claimants, and Trevor Vaughan's statement relevant to the allegations only was taken into account. The claimants objected to the use of anonymised evidence taken from the apprentices and Diane Miller took the view they were relevant. It was at this hearing the "100-point note" was introduced by the first claimant for the first time, when he alleged he was being targeted as a result of whistleblowing. The first claimant also made reference to being caused a detriment linked to acting as a trade union official approximately 6 years ago.

117 The second claimant, Andrew Rothery, refused to answer questions about the Twitter evidence and was not prepared to comment "until I known about the consequences." He did not mention any detriments linked to being a trade union representative or for compiling the list of 101 issues for the meeting in September 2016.

118 The third claimant, as had the other two, referred to the grievances submitted (which the Tribunal was not taken to). Diane Miller when discussing the witness evidence stated she would interview Phil Smith, the other shift supervisor in the maintenance department, at the third claimant's request. This did not happen as later during the meeting the third claimant agreed to Phil Smith not being interviewed. The third claimant when asked "why do you think the anonymous letter referred to you doing this" responded "We are strong characters. We stand up to bullies. The

managers make us work through dinner. Due to the actions of managers Val made a rota. We had another meeting with Nicci where we stated a load of issues. The attitudes of managers from then changed dramatically I think the letter came from then."

Disciplinary hearing adjournment from 14 November 2018 to decision 6 December 2018

119 The disciplinary hearings were adjourned approximately 4 months into the disciplinary process, the claimants having asked for statements to be taken from additional witnesses, in the case of the first claimant 40 witnesses. During this period the claimants were sending in substantial amounts of information, for example, the first claimant sent in a document "Issue Maintenance not covering overtime in shift strength" which ran to 15-pages linking the "autonomous maintenance" announcement "forced on young maintenance…now people changed their minds." An example was given of an employee "who said he was working then changed his mind due to forced autonomous maintenance. Only action available to him to show his displeasure. He is now leaving the company." This was significant information Diane Miller could have corroborated and did not. She was also pointed to inconsistencies between the interviews David Brewster conducted and is conclusions, for example, that Lewis Jones had confirmed he had been encouraged by the first claimant to work overtime rather than not to. It is unfortunate that Diane Miller had closed her mind to the possibility that the claimants were correct in their assumption that the autonomous maintenance announcement made by her line manager was the catalyst for people changing their minds about working overtime on the weekend in question. Diane Miller ignored this evidence and failed to investigate, for example, she could have spoken with relevant employees.

120 Following the hearing Diane Miller took the view that the request for a large number of additional witnesses was excessive, having taken HR advice. Diane Miller failed to appreciate that there were witnesses who had not originally been interviewed concerning the weekend in question that had volunteered to work overtime only to withdraw their name, such as the young employee named by the first claimant who was leaving his employment as a result. Diane Miller failed to interview those witness and the Tribunal finds this was purely down to incompetence. She had been given evidence from the claimants concerning how David Brewster had incorrectly paraphrased the witness evidence by concentrating on a selection of sentences which pointed to guilt, and it was incumbent on Diane Miller to satisfy herself as to what exactly was being said and whether the finger was being pointed to the claimants. The irreconcilable problem was that David Brewster and Diane Miller were looking at two different things; Diane Miller was concentrating on the weekend in question when David Brewster had not even considered the weekend in question. The investigation was fundamentally flawed both at investigation and disciplinary stage, and this was not corrected on appeal and the entire disciplinary process fell outside the band of reasonable responses open to an employer acting reasonably, including the length of time it took.

Diane Miller's decision on 6 December 2018

121 By the 6 December 2018 Diane Miller had made her decision. Before this date Diane Miller had received additional correspondence from the claimants including for example the 20 November 2018 email from the first claimant requesting 11 witnesses subsequently withdrawn on the 21 November 2018. The Tribunal concluded that there was delay but given the complexity of the case, the fact that 3 employees were involved, the substantial amount of documentation and exchange of correspondence, the delay was understandable and did not breach the ACAS Code.

The first claimant's dismissal

122 The first claimant was informed by Diane Miller on the 6 December 2018 "that there is sufficient evidence to sustain a reasonable belief that you have been intimidating employees within the Maintenance department to influence them not to work overtime. In deciding the appropriate sanction, I have taken account of your previous record and length of service, however, what you are accused of involved 2 very serious issues. Firstly, **putting undue pressure on colleagues which is wholly unacceptable and in my view would reasonably cause employees to feel threatened and intimidated as is apparent from the anonymous letter**. **Secondly, your motive was to prevent them working overtime with the intention of disrupting production. Further, this was successful and as a result the company was left with no option but to stop production meaning that 326 cars were not delivered to schedule**" [the Tribunal's emphasis].

123 The circumstances of the weekend 30 June and 1 July 2018 and the first claimant's motive was not explored discussed with him. Diane Miller did not investigate what had taken place that weekend, and she failed to pick up the inadequacy of David Brewster's investigation. The only additional information Diane Miller had was the interview with Jamie Craig when the weekend was not discussed and questions about it not asked. The Tribunal repeats its observations above. Diane Miller had no evidence to support her conclusions, and it may have been helpful had she asked the claimants questions about their intention taking into account the timeline which gave the claimants less than a day when they were at work to organise those who had volunteered for overtime to withdraw their names with a view to intentionally disrupting production by taking part in "unofficial industrial action", against a background of union representatives working on the shop floor and Anthony Hudson sharing a car with the claimants.

124 Diane Miller also dealt with the grievances as part of the disciplinary process, and there was no attempt to investigate the issues raised, for example, the criticism that David Brewster was not impartial. Had Diane Miller reviewed David Brewster's evidence thoroughly she may have come to appreciate that he was not impartial and

appeared to have formulated a belief of the claimants guilty based on rumour and the anonymous letter. Diane Miller repeated this fundamental unfairness.

125 Diane Miller also concluded that "you also stated that Bodyshop were refusing to work overtime until a maintenance shift pattern was agreed and signed by David Connell and were unhappy about PBP's. this indicated some form of concerted effort not to work overtime." This evidence was not before Diane Miller, and the Tribunal were not shown where the first claimant had allegedly made this concessions against a background of the respondent stopping overtime in April 2018.

126 Diane Miller confirmed she was not going to investigate a rumour; "it is not practicable as the nature of a rumour is such that it is difficult to find the origins." The Tribunal disagreed with Mr Lassey's submissions that this gave rise to a procedural and substantive unfairness. What was important in the case was whether the rumours/allegations set out in the anonymous letter were supported by any evidence. Diane Miller took into account the rumours, the apprentice's comments and the anonymous letter convinced that the claimants were guilty. She did not weigh the anonymous letter and rumours against the witness evidence and information obtained at investigation stage, such as Jamie Craig's positive comments, the claimants objections and arguments they put forward against the background of excellent employment records that included no previous allegations of bullying, harassment or pressurising employees not to work overtime.

<u>The second claimant's dismissal</u>

127 The second claimant, Andrew Rothery, was given a near identical outcome to the other claimants. Diane Miller wrote "you have highlighted that you previously worked overtime and encouraged others to do so and that employees are now working overtime. I accept these points but they [do] not alter my finding about the weekend of 30 June and 1 July 2018…I have looked for evidence that undermines the allegation but have concluded that although these statements include a number of positive comments about you, they do not name anyone else." In other words Diane Miller took the view the second claimant was guilty because he (and the other 2 claimants) were the only people named in the rumour and letter, notwithstanding the raft of evidence supporting the claimants denying they were guilty of harassment and/or bullying. No reference was made to Diane Miller investigating the rumour, and yet in oral evidence on cross-examination she said "I did speak to a lot of people outside…I never said I totally believed it just on the balance of probabilities, with the letter these people did it." No information was given to the claimants about what Diane Miller was told by people outside the disciplinary procedure, and as a consequence the claimants were not given a chance to refute evidence which had clearly been taken into account. The Tribunal does not know what the evidence was, and the fact the claimants were not told during the disciplinary process was both procedurally and substantively unfair. A reasonable manager would have ensured employees at a disciplinary hearing had the opportunity to comment on any matters that may be taken into account in the final decision, particularly long-standing employees of between 25-30 years continuity with

clean employment records and no similar allegations giving rise to any investigation in the past.

128 With reference to the re-tweeting allegation Diane Miller referenced the second claimant's "lack of honesty in relation to this allegation" and his admission that he had given naked birthday hugs concluding both would have "warranted formal disciplinary sanctions, however, in view of the decision to dismiss, this is no longer relevant." In oral evidence Diane Miller explained that both issues would have gone to a separate investigation prior to a decision being made. In short, retweeting and birthday hugs did not form part of the reasons to dismiss, and the Tribunal was not convinced on the balance of probabilities that had a separate investigation followed the second claimant would have been fairly dismissed at a later date taking into account the fact that the birthday hugs were strictly speaking not naked and only given to friends who did not complain.

The third claimant's dismissal

129 The third claimant's outcome meeting, which followed the same format as the earlier hearings and reasons for the decisions to dismiss. The third claimant had referred Diane Miller to the investigation failing as there was "no mention of autonomous operator. This has been missed out despite being a key issue coupled with the reason why people did not work the weekend in question. It is notable that Diane Miller referred to the weekend in question being a coordinated effort, which was not put to any of the witnesses or for example, the union representatives who supported the claimants throughout the disciplinary process.

130 . There was no mention to the claimants or investigation into unlawful union activity, behaviour Diane Miller concluded was attributable to the claimants without any evidence to support her belief. The Tribunal accepted on the balance of probabilities that Diane Miller was unaware of the whistleblowing until it was brought up by Stuart Flanagan. The Tribunal was satisfied that there was no causal connection between whistleblowing and /or union activity and Diane Miller's decision to dismiss. She held a genuine belief that the claimants were guilty of the act of misconduct, but the Tribunal found that belief was misguided and not based on a reasonable investigation. It did not accept the claimants argument that Diane Miller had been told to dismiss the claimants by Mark Noble, and it did not accept David Brewster in turn had been told to reach the findings he did by Mark Noble or any other manager named in the 101 issue list either personally or though relatives.

Appeal 18 December 2028 before Russell Martin and the further delay in outcome

131 The claimants appealed. Russell Martin heard the first appeal on the 18 December 2018. Diane Miller set out the case and her findings including the retweet and naked birthday hugs being no longer relevant in view of the decision to dismiss.

132 The hearing was adjourned to 10 January 2019, and despite Diane Miller's clarification Russell Martin incorrectly concluded ""your dismissal was also linked to other acts of misconduct and nothing that you have raised detracts from the finding that those allegations are well-founded." Russell Martin took into account the retweet and naked birthday hugs despite Diane Miller's confirmation that no decision could be made without further investigation and hearing on these matters, which he dismissed after speaking with David Brewster, concluding David Brewster had sought to get a fair sample of statements. Russell Martin also dealt with the appeal relating to the grievances and the length of time it had taken to process the disciplinary hearing. He concluded that it was reasonable to include demeanour of a witness in David Brewster's findings. Russell Martin did not correct the deficiencies and unfairness in the investigation and disciplinary hearing as recorded by the Tribunal above. David Brewster referred to the 101 issue point, but again there was no reference to union detriment. Russel Martin looked the process followed, satisfied that it was perfectly acceptable to dismiss long-standing employees with a clean record on the basis of rumour and an anonymous letter, the apprentices not having specifically referred to the claimants by name. The written first level appeal outcome was sent to the claimant's on the 15 January 2019. He repeated a number of errors made in the disciplinary hearing including evidence by the second claimant that there were issues over the shift patterns and the PSP announcement and this caused a lack of maintenance support with the motive being to "prevent them working overtime with the intention of disrupting production." The basis of this belief was that only 3 people had been named in the anonymous letter "and no one else had been mentioned". The appeal outcomes followed a similar format for each claimant.

Second and third appeal

133 In accordance with the respondent's procedure the claimants appealed a second time, and the final stage appeal was dealt with by Mathews Hughes, transformation manager, outside the respondent's procedure as Mathew Hughes was a peer to Russell Martin, David Brewster and Diane Miller, who all reported to Mark Noble. Given the size of the respondent's undertaking it would have been straightforward for it to have arranged for a manager from another area, independent and experienced, to deal with the appeals in accordance with the respondent's procedures.

134 Mathew Hughes heard the final appeal on 7 & 8 February 2019. The claimants remained suspended on full pay. In the final level appeal notes relating to the third claimant Russell Martin concluded the third claimant had not been found guilty of bullying and had been found guilty of intimidation, confirming the "rumour has not been used to sway the decision." When asked whether it had been dropped the hearing was adjourned and when it recommenced Russell Martin confirmed the "rumour is relevant to the case but carried less weight. It has not been removed." On the evidence before it the Tribunal was satisfied that the rumours were relevant to all decision makers and formed their basis for the outcome.

135 During the appeal hearing the third claimant raised matters a reasonable appeal officer would have investigated, however Mathew Hughes disregarded the information, preferring to concentrate on the steps taken by managers rather than make an effort to understand the case being put forward by the claimants. Had Mathew Hughes done so he may have realised to weakness in the investigation and disciplinary hearing, instead it was unthinkingly adopted alongside the conclusions of colleagues Diane Miller and Russell Martin.

136 The effective date of termination for the claimants was 6 December 2018.

Law and Conclusions

Protected disclosures.

137 Section 43B ERA defines a qualifying disclosure as 'any disclosure of information' relating to one of the specified categories of relevant failure. It is accepted by the respondent that there was a 'disclosure of information' for the purposes of S.43B and it was a qualifying disclosure within the meaning of S.43B of the Employment Rights Act 1996 ("ERA"). There is no issue with the claimants reasonably believing that the information disclosed, and any allegation contained in it, was substantially true.

Automatic unfair dismissal – S.103A of the ERA & Section 152 TULR(C)A 1992:

138 S.103A ERA provides there may be more than one reason for a dismissal. An employee will only succeed in a claim of unfair dismissal if the tribunal is satisfied that the reason (or 'principal' reason) is that the employee made a protected disclosure.

139 The principal reason is the reason that operated on the employer's mind at the time of the dismissal — Lord Denning MR in the well-known case of *Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA.* If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under S.103A will not be made out. Furthermore, as Lord Justice Elias confirmed in *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372, CA,* the causation test for unfair dismissal is stricter than that for unlawful detriment under S.47B — the latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas S.103A requires the disclosure to be the primary motivation for a dismissal.

140 Mr MacNaughton reminded the Tribunal that whistleblowing can claim fail at the first hurdle because the worker is unable to establish the causal link between their whistleblowing and the subsequent dismissal. The importance of establishing the causal link was underlined in Simpson v Cantor Fitzgerald Europe [2020] EWCA Civ 1601. In the case of the 3 claimants the Tribunal, taking into account motivation of the

decision makers, found the causal link was not made out with the exception of issue 18 (u) in relation to the second clamant, namely, Steve Cook's reference to the claimant not being happy unless he was on strike.

141 Mr Lassey referred to section 152 TULR(C)A 1992 provides protection from dismissal for employees for reasons related to trade union membership and activities. It states: *"For purposes of [Part X of the Employment Rights Act 1996] (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—*

> *(a) was, or proposed to become, a member of an independent trade union,*
>
> *(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time […]"*

142 Mr Lassey submitted that as a general rule, the focus of the Tribunal's enquiry is on the reason of the decision-maker (*Orr v. Milton Keynes Council [2011] EWCA Civ 62*) However, that rule now has an important qualification in the light of the Supreme Court's decision in *Royal Mail v. Jhuti [2019] UKSC 55.* Where a person in the hierarchy of responsibility above the employee determines that he should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason. The claimants case was that Jhuti applied and relying on the EAT decision in *Associated Society of Locomotive Engineers and Firemen v Brady 2006 IRLR 576, EAT,* submitted that the fact an employer acts opportunistically in dismissing does not preclude the potentially fair reason from being the true reason for the dismissal. The Tribunal was referred to the following extract - Elias J held:

> *"Dismissal may be for an unfair reason even where misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that ..... .It does not follow, therefore, that whenever there is misconduct which could justify dismissal, a tribunal is bound to find that that was indeed the operative reason, even a potentially fair reason. For example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – will not be the misconduct at all, since that is not what brought about the dismissal, even if the misconduct in fact merited dismissal."*

143 Mr MacNaughton also referred to Jhuti suggesting the Tribunal when asking themselves "was the making of a disclosure the reason (or principal reason) for the dismissal?" inquired into what facts or beliefs that caused the decision-maker (in the present case Diane Miller) to decide to dismiss, accepting that the respondent bears the burden of proof. The Tribunal carried out this process and concluded on the

balance of probabilities that not one of the managers who took part in the disciplinary process from investigation to the final appeal had in mind whistleblowing or trade union activities, and there was no evidence whatsoever that high level managers had written the anonymous letters and spread gossip about the claimant in order to engineer a dismissal – Jhuti, and the claimant's had not met the burden of proof.

Burden of Proof in an automatically unfair dismissal case:

144 Mr Lassey submitted that in an ordinary case of unfair dismissal, the burden of proof as to showing a potentially fair reason for dismissal lies with the employer. If the employer is able to show that potentially fair reason, then the burden of proof as to the test of fairness is neutral. The situation is different where the reason for dismissal asserted by the employee is one which is automatically unfair. This was explained in *Kuzel v Roche Products Limited [2008] IRLR 530*, where Mummery LJ summarised the position in the following terms:

> *"When an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason."*

145 In short, the employee need only demonstrate "*that there is an issue warranting investigation and capable of establishing the prohibited reason*" (*Dahou v Serco Ltd [2017] IRLR 81*). The burden of proving the reason for dismissal, however, remains on the employer. If the employer fails to show an innocent ground or purpose for the treatment concerned, it is open to the Tribunal to drawn adverse inferences on the basis of that failure. However, it is not obliged to do so (Kuzel). It will be rare for there to be direct evidence of an employer dismissing an employee because of a disclosure and/or union activities. A tribunal may therefore draw inferences from findings of primary fact as to the real reason for the dismissal.

Detriment – whistleblowing

146 The Tribunal was referred to a number of legal principles by Mr Lassey as record below.

147 Section 47B(1) of the ERA provides that a worker has the right not to be subjected to any detriment because he has made a protected disclosure. It states: *"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."*

148 The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in *Shamoon v The Royal Ulster Constabulary [2003] ICR 337.* The test is whether a reasonable employee would or might take the view that they had been disadvantaged in circumstances in which they had to work. In that sense, it is not limited to some physical or economic consequence. Whether or not a claimant has been disadvantaged is to be viewed subjectively (*St Helens Metropolitan Borough Council v Derbyshire* [2007] IRLR 540 HL). However, an unjustified sense of grievance cannot amount to a detriment.

149 In order for a claim to succeed, the protected disclosure must be a material (i.e. more than minor) influence on the employer's treatment of the whistle-blower. Accordingly, the actor (or their manipulator) must have knowledge of the protected disclosure in question – *Jhuti* above.

150 The reason for the detrimental treatment may be the means or manner of disclosure rather than the act of disclosure itself, but such a distinction must be carefully scrutinised carefully (*Shinwari v Vue Entertainment [2015] UKEAT/0394/14, EAT*).

151 Thus, where it is established that there has been a protected disclosure, in considering whether a worker has been subject to a detriment as a result, an Employment Tribunal must ask itself:

> *"26.1 Whether the worker has been subject to detriment; if so,*
>
> *26.2 Whether that detriment has arisen from an act or deliberate failure to act by the employer, and if so*
>
> *26.3 Whether that act or omission was done on the ground that the worker has made a protected disclosure."*
>
> (see: *Harrow London Borough v Knight [2003] IRLR 140*).

152 The claimants bear the burden of proof to establish they suffered a detriment. The initial burden is also on the claimant to show a prima facie case that they have been subjected to a detriment because of their protected act. However, section 48(2) of the ERA 96 also provides that: *"…it is for the employer to show the ground on which any act or deliberate failure to act was done."* In practice, this means that where the claimant has established a prima facie case, the respondent must prove on the balance of probabilities that the act, or deliberate failure, was not on the grounds that the claimant had done the protected act i.e. that the protected act did not materially influence (was not more than a trivial influence on), the respondent's treatment of the claimant *Fecitt* above. If the employer fails to show an innocent ground or purpose for the treatment concerned, it is open to the Tribunal to drawn adverse inferences on the basis of that failure. However, it is not obliged to do so (*Kuzel v Roche Products Ltd*

[2008] IRLR 530, CA). In the present case the Tribunal concluded on the balance of probabilities that the claimants have not discharged the burden of proof, and either the alleged incident did not happen as described by the claimants or the respondent has succeeded in showing an innocent ground, namely, legitimate disciplinary proceedings with the procedural and substantive unfairness that occurred was not done so in the ground that the claimants had made protected disclosures and were attributable to human failure and incompetence - *International Petroleum Ltd and ors v Osipov and ors [2017] UKEAT /0058/17/DA* the EAT (Simler P) summarising the causation test in whistleblowing detriment complaints and *proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case.*

Detriment: trade union

153 Mr Lassey has set out the undisputed legal principles in his written submissions including the question being "whether the individual was 'acting as a union member' or simply 'acting as an employee'.

154 Section 146(1) TULR(C)A 92 provides that:

> *"a worker has the right not to be subjected to any detriment as an individual by any act or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of –*
>
> > *(a) preventing or deterring him from being or seeking to become a member of an independent trade union or penalising him for doing so,*
> >
> > *(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, ..."*

155 Where the detriment in question is dismissal of an employee, section 146(5A) confirms that section 146 is not applicable. That is because a separate claim can be brought under section 152 TULR(C)A 1992.

156 Section 148 TULR(C)A 1992 provides as follows: "(1) *on a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.* "Mr Lassey submitted the focus in trade union detriment claims is not on whether the worker was subjected to a detriment because of his union membership or activities, but instead on what purpose the employer was seeking to achieve by subjecting the worker to the detriment. In *Yewdall v Secretary of State for Work and Pensions [2005] UKEAT/0071/05*, the EAT provided the following framework for determination of claims under section 146 TULR(C)A 92:

156.1.1 "Have there been acts or deliberate failures to act by the employer;

156.1.2 Have those acts or omissions caused detriment to the Claimant;

156.1.3 Were those acts or omissions in time;

156.1.4 if there was a detriment and the claim was presented in time, has the Claimant established a prima facie case that they were committed for a purpose proscribed by section 146;

156.1.5 if so, the onus transfers to the employer to show the purpose behind its acts or omissions. The employer must show, on the balance of probabilities, that the alternative purpose was not one proscribed by section 146."

Law: unfair dismissal section 98 ERA

157 Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal. The respondent bears the burden of proving on the balance of probabilities that the dismissal was for a potentially fair reason within section 98 of the Employment Rights Act 1996.

158 Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

159 Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Burchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is

required to conduct an objective assessment of the entire dismissal process, including the investigation and appeals, without substituting itself for the employer.

160 The degree of investigation required very much depends on the circumstances. The Court of Appeal in Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94 made it clear that it is not necessary for an employer to extensively investigate each line of defence advanced by an employee. This would be too narrow an approach and would add an "unwarranted gloss" to the *Burchell* test. What is important is the reasonableness of the investigation as a whole. The employer should assess its approach taking account of the following: the strength of the prima facie case against the employee, and the seriousness of the allegations and their potential to blight the employee's future.

161 Mr McNaughton referred the Tribunal to OCS v Taylor [2006] ICR 1602, the Court of Appeal clarified that the proper approach is for the tribunal consider the fairness of the whole of the disciplinary process. Mr Lassey referred to *South Maudsley NHS Foundation Trust v Balogan UKEAT 0212/14*, the EAT held at paragraph 9:

> *"As this Tribunal has said countless times, the crucial thing is the statutory test in section 98(4) namely whether in all the circumstances the employer acted reasonably in treating its reasons for dismissing the employer sufficient. A procedural defect is a factor to be taken into account but the weight to be given to it depends on the circumstances and the mere fact that there has been a procedural defect should not lead to a decision that the dismissal was unfair. The fairness of the whole process needs to be looked at and any procedural issues considered together with the reason for the dismissal, as the two will impact on each other".*

162 Mr Lassey also referred to Jhuti above in the context of a section 94/98 unfair dismissal claim. Where a manager determined an employee should be dismissed for a reason, but hid it behind an invented reason which the decision-maker adopted, the reason for the dismissal was the hidden reason, rather than the invented reason. He also made reference to the respondent opportunistically using the rumours and anonymous letter and the judgment of Elias J *"Dismissal may be for an unfair reason even where misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that ..... .It does not follow, therefore, that whenever there is misconduct which could justify dismissal, a tribunal is bound to find that that was indeed the operative reason, even a potentially fair reason. For example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – will not be the misconduct at all, since that is not what brought about the dismissal, even if the*

misconduct in fact merited dismissal:" Associated Society of Locomotive Engineers and Firemen v Brady 2006 IRLR 576, EAT.

163 A key issue in this case was the reasonableness of the investigation. Mr Lassey submitted that the extent of investigation reasonably required will depend, amongst other things, upon the extent to which the employee disputes the factual basis of the allegations concerned. As confirmed in *A v B [2003] IRLR 405, EAT* and *Salford NHS Trust v Roldan [2010] ICR 1457, CA*, in determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effects upon the employee. There is a spectrum of gravity of misconduct which needs to be taken into account in deciding what fairness requires in any particular case. The investigation need only be a reasonable one and need not be a forensic examination of all possible evidence.

164 The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

165 The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

Contributory fault

166 Mr Lassey referred to the test in *Polkey v A E Dayton Services Ltd [1987] IRLR 503, HL, the ACAS Code* which the Tribunal must have regard to and contributory fault; *Jagex Ltd v McCambridge UKEAT/0041/19*), *Steen v ASP Packaging Ltd UKEAT/0023/13, [2014] ICR 56* (Langstaff P Presiding) observed that a finding of 100% contributory conduct is an unusual finding, albeit a permissible finding. A Tribunal should not simply assume that because there is no other reason for the dismissal therefore 100% contributory fault is appropriate. It may be the case but the percentage might still require to be moderated in the light of what is just and equitable: see *Lemonious v Church Commissioners UKEAT/0253/12* (27 March 2013,

unreported) (Langstaff P presiding) and *Rao v Civil Aviation Authority [1994] IRLR 240* Court of Appeal.

Conclusion: applying the law to the facts

Protected Disclosure Detriment: Claim under section 47B of the Employment Rights Act 1996:

167 With reference to the first issue, namely, does the following amount to a disclosure of information it is accepted by the respondent that it does and the relevant list of concerns referred to in the September 2016 meeting are protected disclosures. qualifying disclosures within the meaning of section 43B of the Employment Rights Act 1996. There is no issue with reasonable belief or public interest.

Detriment: time limits

168 Mr Lassey provided the legal framework in written submissions. It is accepted by the parties that the time limit issues relate to the detriments claim only, as the unfair dismissal claims were received within the statutory time limit. Section 48(3) of the Employment Rights Act 1996 (ERA 1996) provides a Tribunal may only extend time for presenting a claim where it is satisfied that it was *"not reasonably practicable"* for the complaint to be presented in time, and where the claim was nevertheless presented *"within such further period as the Tribunal considers reasonable*" (Section 48(3)(b), ERA 1996).

169 There are two limbs to this test. Firstly, the employee must show that it was not reasonably practicable to present the claim in time. Secondly, if the claimant succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable. However, it should be noted that time limits should be strictly enforced and that any extension of time should be the exception, and not the rule (*Robertson v Bexley Community Centre [2003] IRLR 434*). The Claimant holds the burden of proof in respect of both limbs of the test (See: *Porter v Bandridge Ltd 25 [1978] IRLR 271, CA*).

170 The Court of Appeal has recently considered the correct approach to the test of reasonable practicability. In *Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490*, Underhill LJ summarised the five essential points (paragraphs 10.1; 10.2; 10.3; 10.4; and 10.5) that Tribunals should consider when determining such applications as follows:

170.1 Firstly, it was confirmed that the test should be given a "liberal interpretation in favour of the employee" (*Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 470, [2005] ICR 1293*, which reaffirms the older case law going back to *Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53).* However, if the claimant simply fails to argue that it was not reasonably practicable to present the claim in time, the Tribunal must find that

it was reasonably practicable (see: *Sterling v United Learning Trust [2014] UKEAT 0439/14*.'

170.2 Secondly, Underhill LJ confirms that the phrase "reasonably practicable" does not mean physically possible, which would be too favourable to employers (nor it should be noted does it mean reasonable, which conversely would be too favourable to employees). Instead, he suggests that the statutory language might be paraphrased as something akin to whether it was "reasonably feasible" for the Claimant to present their claim in time (See: *Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119, CA*). In *Asda Stores v Kauser [2007] UKEAT/0165/07/RN,* Lady Smith helpfully summarised the position, stating that: '*the relevant test is not simply a matter of looking at what was possible* ***but to ask whether on the facts of the case as found it was reasonable to expect that which was possible to have been done*****.'** [the Tribunal's emphasis]. In the present case the Tribunal found that it was reasonable to expect the claimants to have issued proceedings for detriment within the statutory time limits taking into account all of the circumstances of this case as set out in the factual matrix.

170.3 The third principle cited is that of ignorance of time limits, which Underhill LJ summarises in the following terms: 'If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable (see: *Riley v Tesco Stores Ltd [1979] ICR 223*). If it is, then it will not have been reasonably practicable for them to bring the claim in time (see: *Wall's Meat Co Ltd v Khan [1979] ICR 52*). In assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.' The question for the Tribunal is thus, not what the employee did know at the relevant time, but what the employee *ought* to have known had they acted reasonably (See: *Avon County Council v Haywood-Hicks [1978] IRLR 118* and *John Lewis plc v Charman [2011] UKEAT/0079/11/ZT)*. Once the Claimant knows of their right, the tribunal should also determine whether they took reasonable steps to ascertain how to enforce that right (See: *Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488, EAT).* In the present case the Tribunal concluded that the claimants either knew or ought to have known of their rights, had access to legal advice and support through the union, and could have checked up on the time limits had they thought, at the relevant time, they had a case.

The Second Limb:

171 Accordingly, once the impediment rendering it not reasonably practicable to present the claim in time has been removed, the claim must be brought within a reasonable period thereafter. In the present case the claimants did not get over the hurdle set out in the first limb, had they done so they would have failed on the

second limb also against the general background of the primary time limit, the strong public interest in claims being brought promptly (See: *Cullinane v Balfour Beatty Engineering Services Ltd and anor [2010] EAT 0537/10)* and prejudice caused to the respondent given the lengthy passage of time affecting memory and cogency of evidence.

The agreed issue time limits issue 1.1 and 1.2

172 The first claimant submitted his claim on the 29 May 2019 following ACAS early conciliation between the 11 March and 11 April 2019 and for the purpose of the detriment claims, all claims that occurred prior to 10 December 2019 were received out of time. The chronology set out within the findings of facts above reveals that by 6 December 2018 the claimant was dismissed for misconduct. The disciplinary outcome letter was dated 10 December 2018 followed by the appeals.

173 The second claimant submitted his claim on the 29 May 2019 following ACAS early conciliation between the 11 March and 11 April 2019 and for the purpose of the detriment claims, all claims that occurred prior to 10 December 2018 were out of time and the position relating to the first claimant is duplicated.

174 The third claimant submitted his claim on the 29 May 2019 following ACAS early conciliation between the 10 April and 1 May 2019 for the purpose of the detriment claims, all claims that occurred prior to 9 January 2019 were received out of time. The chronology set out above reflects that on 10 January 2019 the reconvened stage 1 appeal hearing took place.

175 With reference to issue 2.1, namely, given the dates the claim forms were presented and the effect of early conciliation, the detriment complaints alleged to have occurred prior to and after September 2016 through to 10 December 2018 in respect of the second and third claimant, and 9 January 2019 in respect of the first claimant, were not claimed within the statutory time limit taking into account the effect of ACAS early conciliation.

176 Throughout the hearing, as observed by Mr Lassey in written submissions, we discussed the fact that a number of alleged detriments went back years and the claimants were unable to state on a number of occasions during cross-examination when the detriments allegedly took place. Mr Lassey submitted the fact the detriments cannot be given a date or time does not mean the Tribunal cannot adjudicate on them, and they constitute a series of acts or failures from the dismissal process back to the claimants being seen as troublemakers by senior management as a result of making protected disclosures. The Tribunal accepted it can adjudicate on undated and untimed detriments, however, it found for the reasons given in the factual matrix above, that the detriments relied on by the claimants did not take place with the exception of issue 18(u) in respect of the second claimant. The Tribunal found the claimants did not give reliable evidence and were not credible witnesses when it came to the detriments allegations for the reasons already stated. Their evidence was entirely unsupported by

contemporaneous documentation because they made no complaints at the relevant time and the principles set out the well-known case of Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) [16] – [22] was applicable as follows: "We are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are; memories are fluid and malleable, being constantly rewritten whenever they are retrieved; external information can intrude into a witness's memory as can his or her own thoughts and beliefs; both can cause dramatic changes in recollection. The claimants have liaised with each other over this case, and the Gestim principle that "memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory is already weak due to the passage of time" if particularly valid. Finally, Gestmin confirmed "the best approach for a judge to adopt is to base factual findings on inferences drawn from the documentary evidence and known or probable facts" which is precisely what the Tribunal has considered for the duration of this case..

177 In the alternative, had it found the claimants were subjected to the detriments with the exception of issue 18(u) in respect of the second claimant, the Tribunal would have gone on to find there was no causal link with the protected disclosures and/or trade union activities.

178 With reference to issue 1.2.1 the Tribunal found the following detriment claims were not claims made to the Tribunal within three months (allowing for any early conciliation extension) of the act complained of:

178.1 First claimant: Further Particulars (pages 89 to 95 in bundle) para 14(i), (ii), (iii), (iv), Further Particulars (pages 125 to 135) para 2(26)(f)(a), (b), (c), (d) and the Whistleblowing Meeting and Detriments 31 May 2023 paras. 1, 2, 3, 4, 5, 6, 7, 8 and 9. The only alleged detriment claims made within the statutory time limit were those that had allegedly occurred on or after 9 January 2019 in respect of the disciplinary process.

178.2 Second claimant: List of issues - issue 16(c), (d), (e), (f), (g), (h), (i), (j), (m) and (n), 18(b), 18(c), 18(d), 18(e), 18(f), 18(g), 18(h), 18(i), 18(j), 18(k), 18(l), 18(m), 18(n), 18(o) and (p), 18(q). The only alleged detriment claims made within the statutory time limit were those that had allegedly occurred on or after 9 January 2019 in respect of the disciplinary process.

178.3 Third claimant: List of Issues – 16(ab), (ac), (ad), (ae), (af), (ag), (aj), (ak), (al), (am), (an) and (aq).

179 With reference to issue 1.2.2, if not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the last one, the Tribunal found that there were none. The senior managers who conducted the disciplinary process did not form any part of a conspiracy and the only connection between them was that they all worked under

the line management of Mark Noble, the plant manager. Mr Lassey referred to the senior managers involved in the disciplinary process as "the same underlying actors, with the same motivation – namely to closely monitor, supress dissent from, and eventually dismiss, employees who were seen as troublemakers by senior management as a result of making protected disclosures, and in AR's case his previous affiliation with Unite the Union as a shop steward." The Tribunal did not agree drawing on the findings of facts above, concluding there was no link between the acts which makes it just and reasonable for them to be treated as in time and for the claimants to be able to rely on them. Potentially relevant factors were cited as being the disciplinary process from investigation to appeal that could bring the other alleged acts of detriment within the time limit. The Tribunal did not accept on the balance of probabilities that the disciplinary process was organised such a way to bring about the dismissals (Jhuti above) and it does not accept the anonymous letter was written by senior management to achieve that purpose having considered the evidence presented to it with a view to establishing whether inferences could be drawn, and whether there was any basis to the Jhuti argument put forward on behalf of the claimants.

180 It is an accepted feature in this difficult case that the claimants were" loud" and "opinionated" by their own admission. It is possible that the anonymous letter was genuine, nobody can say for sure. It could genuinely reflect someone's belief but be inaccurate. The real issue that precipitated the overtime withdrawal appeared to be Mark Noble's communication of the 28 June relating to autonomous maintenance. The Tribunal acknowledges from the evidence before it that production issue of this magnitude would have raised many questions with the French owners, not least the dip in the overtime known to Jamie Craig when it was too late to take any remedial steps to increase the number of employees prepared to work overtime to the extent that other employees, including managers and union representatives, were brought in to fill the gaps. It is difficult to understand how management involved in the disciplinary process were oblivious to what had gone on, and not taken this into account at all stages of the investigation, including the disciplinary and appeal hearings. For example, Jamie Craig was aware of the situation and did not bring it up in any great detail. The Tribunal was also concerned with the jump within the disciplinary process from a lack of enough people working overtime to unofficial industrial action. The Tribunal considered whether adverse inferences could be drawn from the failings and unfairness in the entire disciplinary process, questioning itself whether the evidence supported the possibility of the claimants being selected because of whistleblowing in September 2016 and previous union activity on the part of the second claimant. The Tribunal took into account the motivation of Diane Miller, concluding that whistleblowing and union activity was not in her mind when she took the decision to dismiss, and she did not realise the full implications of Mark Noble's announcement that only affected employees with less continuity pf employments than the claimants. The Tribunal also considered the motivation of David Brewster, Russell Martin and Matt Hughes reaching the same conclusion.

181 The Tribunal had before it evidence from managers involved in the disciplinary process, all who were peers under the management of Mark Noble, and it took the view that as there were people available from outside Mark Noble's management team and at least one of the appeals could have been heard by someone independent from the team, and had this been the case, it is possible that the part played by Mark Noble would have come to light and the claimants not subjected to a disciplinary hearing and dismissed after a reasonable investigation. However, it does not necessarily follow that because this did not happen there must be a causal link with the protected disclosures and/or union activity and the Tribunal found there was no such link concluding the individuals involved were incompetent and blinded by the letter and rumours that followed a commercial disaster on the weekend in question.

182 With reference to issue 1.2.3, the Tribunal found it was reasonably practicable for the claims to be made to the Tribunal within the time limit. Mr Lassey submitted relying on Lady Smith observations in the case of *Asda Stores v Kauser [2007] UKEAT/0165/07/RN*: '*the relevant test is not simply a matter of looking at what was possible but to ask whether on the facts of the case as found it was reasonable to expect that which was possible to have been done*. Mr Lassey submitted that given the level of hostility towards these claimants, which is apparent from the evidence before the Tribunal, it is clearly not reasonable to expect them to have brought a claim before they did. The Tribunal did not agree concluding the "level of hostility" alleged was not proven, the senior managers taking part in the disciplinary process did not believe the claimants against a background of their attitude and behaviour towards management outside union activities, the rumours and anonymous letter giving an explanation for why employees had withdrawn from working overtime the weekend in question.

183 Mr Lassey "respectfully reminded" the Tribunal "borrowing" Underhill LJ's words, it was not 'reasonably feasible' for them to have done so (*Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490*). The Tribunal did not agree. It was reasonably feasible and there was no "fear" whatsoever on the part of the claimants who were assertive, bullish and at times aggressive during the disciplinary process. The true reason for their failure to issue proceedings within the statutory time limit is that it did not cross their minds that they had been caused any detriment until late on during the disciplinary process when it dawned on them that they could be dismissed. They acted promptly following dismissal because they wanted to strengthen their claim and had they believed detriments had or were taking place because of whistleblowing and/or union related activities, action would have been taken much earlier, not least a grievance as found by the Tribunal above. It is not just and equitable for the Tribunal is thus to exercise its discretion to extend time to allow for the presentation of these claims.

184 In the alternative, had the Tribunal found it was not reasonably practicable it would have gone on to find that the claims were not made within such further period as the Tribunal considers reasonable.

Conclusion on time limits

185 The first claimant's claims for alleged detriments that occurred prior to 10 December 2018 were presented to the Tribunal outside the statutory limitation period allowing for early conciliation, there were no similar acts or failures and it was reasonably practicable for the claim to have been made to the Tribunal within the time limit. The Tribunal does not have the jurisdiction to consider the complaints brought under section 47B(1) of the Employment Rights Act 1996 as amended which are dismissed.

186 The first second claimant's claims for alleged detriments that occurred prior to 10 December 2018 was presented to the Tribunal outside the statutory limitation period allowing for early conciliation, there were no similar acts or failures and it was reasonably practicable for the claim to have been made to the Tribunal within the time limit. The Tribunal does not have the jurisdiction to consider the complaints brought under section 47B(1) of the Employment Rights Act 1996 as amended and section 146(1)(a) and/or (b) of the Trade Union and Labour Relations (Consolidation) Act 1996 which are dismissed.

187 The third claimant's claims for detriment that allegedly occurred before 9 January 2018 were presented to the Tribunal outside the statutory limitation period allowing for early conciliation, there were no similar acts or failures and it was reasonably practicable for the claim to have been made to the Tribunal within the time limit. The Tribunal does not have the jurisdiction to consider the complaints brought under section 47B(1) of the Employment Rights Act 1996 as amended and which are dismissed.

Detriments - section 47B(1) of the Employment Rights Act 1996

188 With reference to the issue, namely, did the Respondent subject the claimants to a detriment and/or detriments within the meaning of section 47B(1) of the Employment Rights Act 1996 as detailed below, the Tribunal found on the balance of probability that it did not with the exception of the second claimant in relation to issue 16(u), which in any event it found was unreasonably submitted outside the statutory time limits.

189 The Tribunal refers to its findings of facts and conclusion above, which it does not intend to repeat in any great detail. In short, it found the disclosures in the September 2016 meeting about the list of concerns were anonymous and names of managers were not disclosed by the first and third claimant during the September 2016 meeting. The claimants were not union representatives and after the September 2016 meeting there was no intention or agreement for management to feedback personally to the claimants, who were not entitled to feedback, and objectively assessed could not have reasonably expected such feedback. The feedback and exchange of communications was between

management and the union, not individuals who were no longer held union positions.

190 The Tribunal did not accept the claimants evidence that they were regularly excessively watched, bullied to work overtime, monitored and questioned by managers including by Mr Andrew Shepherd, Mr Jamie Craig, Mr Pat MacDonough, Mr Rhys Ashworth, Mr Julian Cecere, Mr Phil Smith and Mr Dave Woodcock, as a form of intimidation and bullying. As set out in the findings of facts the claimants were not slow in coming forward with assertiveness when complaints were raised, and yet there was no reference to the respondent or any union representatives to bullying, intimidation, or to managers adopting a negative attitude to the claimants on a regular and consistent basis. Had this been the case the claimants would have said so at the time, and not left it to dismissal stage and later, when the alleged detriments could not be recalled in any detail including the context of the alleged comment made by Mr Smith to the second claimant; the circumstances, date and time of a raft of allegations being lost in time. The fact that the claimants raise detriment complaints relating to no longer having two-way conversations with members of management after the meeting in September 2016 raises issues of credibility; the claimants were not union representatives and the communications concerning the 101 issues list was between management and the union representatives which the claimants would have realised at the time as they held no formal positions including that of health and safety representative.

191 The allegation that the claimants were bullied and forced to do overtime, unreasonably required to work on breaks and do higher amounts of maintenance work were found to have no basis in reality for the reasons already stated above. The contemporaneous documents point away from the claimants being bullied and forced to work overtime. The Tribunal found that an agreement was reached as set out in the contemporaneous documents and supported by the fact that no complaint or grievance was raised at the time.

192 The allegation that following the meeting in September 2016, managers accused of bullying were treated more favourably than the second claimant had no basis and the comparison was not like for like. The claimants were suspended following serious allegations which brought the production line to a standstill and put the business at risk in the long term. The allegations raised in respect of the part played by the claimants required suspension on full pay given they related to alleged bullying of a number of employees. The Tribunal found there was insufficient evidence to conclude that the managers including Eddie Prichard, were facing similar bullying allegations, the claimants situation was completely different because it followed an incident that had serious repercussions on the business years after any allegations of bullying raised against managers.

193 With reference to the claimants being suspended just on the basis of an anonymous letter, the evidence before the Tribunal was that the background to the suspension included rumours around the business downplayed by the claimants

and union. The Tribunal acknowledges that a suspension can in certain circumstances amount to a detriment even when on full pay. However, in this case the respondent was entitled to suspend on full pay pending investigation given the seriousness of the allegations raised. The second claimant's allegation he was not able work and to earn money that he would have received from overtime pay if he was in work relates to remedy, is not a detriment but the consequences of being caused detriment as does the allegation raised by the second claimant that during the suspension he had lost the right to apply for voluntary redundancy. This allegation also relates to remedy. The undisputed evidence before the Tribunal was that in 2018/2019 there were to be redundancies, and it made little sense for the claimants to be investigated and dismissed over allegations fabricated by managers when a fair redundancy dismissal may have taken place when, according to second claimant, he would have volunteered.

194 With reference to the criticisms of the disciplinary process from investigation stage to final appeal, the Tribunal accepted the entire process taken as a whole was unreasonably delayed. Some of this delay was down to factory shut down in July 2018 coupled by the vast amount of emails and information presented by the claimants during the process. The second claimant's criticism have some basis, but there was no causal connection with the protected disclosures. The Tribunal found the delay was attributable to incompetence on the part of senior management including the investigating officer, who was out of his depth. There was a period of approximately 5 months (9 July to 6 December) between the time the claimants were suspended and disciplinary leading to dismissal, a lengthy period that included factory shut down for 2 weeks in the summer and David Brewster's unreasonable attempt to widen the number of witnesses interviewed to include people who would have no idea why employees decided not to work overtime the weekend in question as they were no longer working in the business . The delay had an adverse effect on the first claimant due to his mental health issues, which was well known to the respondent. There was no satisfactory evidence of any meaningful inaccuracies in the minutes and the altering of witness statements in any relevant way. The minutes were not intended to be verbatim.

195 The claimants criticise the respondent for referring to them as "*The Three Amigos*" maintaining the use of the phrase was evidence oof a disparaging and negative attitude. The Tribunal found that there was no satisfactory evidence the claimants were described as the "three Amigos" by managers with the exception of one email that has been heavily redacted which appears to have come from an unknown employee dealing with payslips. Mr Lassey referred to the date being the 29 August 2018 email from a payroll employee and not the senior managers involved in this case. The email does not assist the Tribunal due to the fact that it is heavily redacted and cannot be read in context. The email appears to be concerned with posting payslips home and the reference to the claimants as follows: "…do you want the 3 amigos adding to?" It is notable the claimants were described as the "three amigos" by Anthony Hudson with no criticism from the claimants as it described three friends and was not disparaging. The respondent's

email was likewise not disparaging and the Tribunal finds the claimants reliance on this tenuous allegation was intended to bolster up their claims, although they took no action was taken at the time. Mr McNaughton described the claimants as "hypersensitive" and the Tribunal took the view that a more likely explanation is the case has been "over-engineered" with a view to increasing damages.

Allegation 16(u) brought in relation to the second claimant.

196 With reference to allegation 16(u) brought in relation to the second claimant only, namely that during the investigation process, Steve Cook said that Mr Rothery was a union steward and was only happy when on strike, the Tribunal accepted that the remark showed a disparaging and negative attitude towards the second claimant and could amount to a detriment. The Tribunal accepts that the comment made the second claimant unhappy at the time, but this was short lived as Steve Cook's evidence (and comment) was not taken into account when the dismissal decision was made. As set out above under time limits, the complaint was brought outside the statutory limitation period when it was reasonably practicable for the second claimant it to have been made in time. The second claimant does not claim this comment was causally linked to the protected disclosure and for the avoidance of doubt there was no evidence that this was not the case.

197 With reference to Phil Smith describing the second claimant as a strong character, it is undisputed the claimants were all "strong characters" not slow in coming forward even when they were not union representatives and not dealing with union business. The claimants describe themselves as such and objectively assessed, describing the claimants in this way cannot amount to a detriment.

198 With reference to the alleged breach of confidentiality concerning the disciplinary process, the claimants relies on Rhys Ashworth informing Mike Pickles at Jaguar Land Rover about the Claimant's disciplinary process. The evidence in relation to this allegations was unpersuasive, and appeared to involve gossip between neighbours. In any event, the Tribunal was satisfied on the balance of probabilities that there was no causal connection between the protected disclosures, protected disclosures and/or union activities.

199 With reference to the allegation that following the second claimant's dismissal, the respondent breached the policy concerning the security and return of personal property belonging to the second claimant. Dave Woodcock went inside the Claimant's locker without his authority and took out his property which was subsequently returned to the second claimant in its entirety and undamaged. Assessed objectively, there was no detriment and in the alternative, causation was not established. In short, the second claimant had been summarily dismissed for misconduct, he no longer required a locked and is property was returned to him.

200 With reference to the allegations concerning the respondent commencing and pursuing the investigation, the disciplinary, raising disciplinary charges, dismissing

the claimants, rejecting appeals and the respondents unfair conduct in this process, the Tribunal found that all of these matters can amount to detriment, however, there was no causal connection to whistleblowing and/or union activities for the reasons already stated. The stress caused to the claimants by the process are not detriments but the effect of detriment relevant to remedy if causation had been established in the claimants' favour, which it was not the Tribunal having found that the respondent did not subject the claimants to any or all of the above detriments because they had made protected disclosures and/or were involved in union activities (the second claimant only).

Trade Union Detriment: Claim under section 146(1)(a) and/or (b) of the Trade Union and Labour Relations (Consolidation) Act 1992:

201 With reference to the first allegation the Tribunal repeats its findings above including the fact that the second respondent had ceased to be a union representative before all of the alleged protected disclosures and detriments. The Tribunal found managers names were not disclosed at the 19 September 2016 meeting, which the second claimant did not attend and nor did he put anything in writing before or after naming the managers allegedly accused of bullying.

202 The second claimant succeeded in establishing issue 16(u) amounted to detrimental treatment, namely that during the investigation process, Steve Cook's comment that the second claimant was a union steward and was only happy when on strike. The comment shows a negative attitude towards the second claimant as a union representative, a comment that could only have been made because the second claimant had been a union representative in the past. Steve Cooke was interviewed on the 16 August 2018 and the second claimant was provided with a copy. By the 14 November 2018 after receiving objections the respondent agreed not to rely on the Steve Cooke statement, with the result that it played no part in the decision making process thus minimising the amount of detriment the second claimant could reasonably claim he had suffered. The second claimant had known about its contents but failed to issue proceedings until 29 May 2019 following ACAS early conciliation on 11 April 2019. The claim is out of time, the Tribunal having found that it was reasonably practicable for it to have been made in time.

Automatic Unfair Dismissal: Claims under section 103A Employment Rights Act 1996, and section 152(1)(a) and/or (b) of the Trade Union and Labour Relations (Consolidation) Act 1992 and;

Unfair Dismissal: Claim under section 95(1)(a) of the Employment Rights Act 1996:

203 With reference to the unfair dismissal complaint, it is undisputed the claimants were dismissed, The Tribunal found the claimants were unfairly dismissed following a raft of procedural and substantive unfairness. The claimant's dismissals were not automatically unfair and they were not dismissed for an automatically unfair reason within the meaning of section 103A ERA 1996. The second claimant was not dismissed for an automatically unfair reason within the meaning of section 152(1)(a) and/or (b) TULRCA 1992.

204 The reason given for the claimants dismissal was a potentially fair reason pursuant to section 98(2) of the Employment Rights Act 1996. The claimants were dismissed for conduct under section 98(2)(b) of the Employment Rights Act 1996, a potentially fair reason for dismissal.

205 Applying the test laid down in Burchell *above,* with reference to the issue, namely, did the respondent genuinely believe the claimants to be guilty of the alleged misconduct, the Tribunal found that it did on the balance of probabilities. The respondent accepted the contents of the anonymous letter and the rumours concerning the claimants, ignoring and/or being unaware of other possibilities that were the potential cause of the disastrous weekend, primarily the part played by Mark Noble.

206 With reference to the issue, namely, did the respondent have reasonable grounds for that belief, the Tribunal found that it had no reasonable grounds and the investigation, disciplinary and appeals (which did not put right the unfairness) did not fall within the band of reasonable responses open to an employer acting reasonably for all of the reasons recorded above. The Tribunal in assessing reasonableness has taken into account the disciplinary process as a whole.

207 In forming that belief, the respondent did not conduct a reasonable investigation into the allegations of misconduct for the raft reasons set out by the Tribunal, including the misinterpretation of the interviews where no person admitted to experience or witness the claimants bullying as alleged. The majority of the interviews praised the claimants, and a number referenced them as being "anti-bullying." There was a failure to identify and ask questions from those workers who withdrew from working overtime on the disastrous weekend in question, and their reasons for doing so. The number of people interviewed was widened to include ex-employees who could not cast any light whatsoever on the weekend in question. Widening the net was an attempt to obtain detrimental information against the claimants, so convinced was David Brewster that the rumours and anonymous letter must be true. There was complete failure to investigate the impact of Mark Noble's autonomous maintenance announcement, including there being no reference to this being made during the investigation or disciplinary process when the facts were well known. Anthony Hudson who supported the claimants throughout, had a discussion about the announcement with Mark Noble which he omitted to mention in the disciplinary process. He and other managers remained silent on the detrimental effect of Mark Noble's actions. The investigation and

disciplinary concerned issues that required overlapping but different evidence. It started with whether the claimants had been guilty of bullying and harassment in the workplace over an unspecified period of time as far as the David Brewster was concerned, culminating in dismissal for the disastrous weekend and taking "unofficial industrial action" despite a complete lack of investigation into this.

208 Without substituting its view with that of the respondent, the Tribunal found the dismissals were also unfair in that the entire investigation, disciplinary and appeal process was conducted by peers within the same management team who were all line managed by Mark Noble. It is incredible that the same management team would have been unaware of Mark Noble's announcement and possible repercussions, on staff preferring instead to rely on anonymous letter and anonymous rumours. Diane Miller spoke to unnamed people about the rumours and yet took no notes of what was said and nor did she give the claimant an opportunity to challenge or refute the evidence given. This is a procedural and substantive unfairness, the action in breach of the ACAS Code.

209 The Tribunal found David Brewster's lack of a written report amounted to an unfairness in that he orally reported the evidence given by witnesses out of context, preventing the claimants from preparing their case early on in the process. Had a written report been provided the claimants and union could have taken the time to unravel the evidence and the biased way in which it was presented by David Brewster, who had taken the view from the outset the claimants were guilty of the alleged misconduct. Had the investigation report been in writing it may have been clearer to Diane Miller that a less than adequate investigation had taken place. Part of the respondent's case is that they interviewed 48 employees, not including the claimants, and therefore the process must have been a fair one. It was hard to pin point how many people, including former employees, were interviewed, as a number of the statements were not disclosed on the basis that they were anonymous. Those people who did give evidence at investigation stage, as agreed between the parties, did not witness "the claimants bullying and intimidating staff members not to work overtime, whether on the weekend of 30th June – 1st July, or at all." An objective investigating officer and dismissal officer acting within the band of reasonable responses would have taken into account the cumulative evidence, an important factor in this case. On the one side there was an anonymous letter and rumours, and on the other side numerous employees including managers, unable to confirm the contents of that letter and rumours.

210 A reasonable employer assessing the weight of the evidence would not have proceeded down the disciplinary route let alone dismiss for gross misconduct. The procedural and substantive unfairness was such that it was not unreasonable for the claimants to look for reasons why they were being treated in such a way, clutching at events that had taken place many years before as a basis for their theory that it was all a pre-determined conspiracy. The Tribunal grappled with this throughout its deliberations, and on the balance of probabilities concluded that the explanation was not one of conspiracy and union related detriment/whistleblowing

detriment, but the respondent's belief that the rumours and anonymous letter must be true following hot on the heels of that disastrous weekend, and people were not prepared to come forward against at the claimants in fear of retribution as they were "strong characters" who held sway in the workplace even when they did not represent the union and were not involved in union activities.

211 The Tribunal accepted on the balance of probabilities that the claimants were investigated and dismissed for one reason only, and that reason was they had been named in the anonymous letter and the subjected of rumours immediately after the weekend when employees having volunteered for overtime withdrew and did not turn up. There was no causal link with protected disclosures or union activity and the Tribunal took the view that the personality of the claimants who were loud, assertive and complained to management when they were not union officials, completed the picture of employees capable of persuading staff not to work overtime as described in the anonymous letter. Had someone outside the management team independent from the Ellesmere Port factory looked at the position objectively, as required in the respondent's Disciplinary Procedure that managers who report directly to the managing director will not normally hear an appeal unless the original decision is made by a manager who reports to them, the outcome would have been different. The first and second appeal did not follow the respondent's process, which allowed an appeal to the personal manger. Val Thomas did not hear the appeal, and the reason given by the respondent was that she had received the anonymous letter. The letter was addressed to Val Thomas and she passed it to David Brewster without carrying out any investigation herself, and apart from this she played no part in the process. Val Thomas had written the letter threatening dismissal if employees refused to work overtime sent to a multitude of workers not limited to the three claimants, and writing such letters fell within her HR role. There was nothing to stop Val Thomas form taking part in the appeal, or higher level managers from head office and/or the production site independent from Ellesmere Port.

212 Mr Lassey submitted that the dismissal was carefully orchestrated and predetermined to remove the claimants from the business relying on Jhuti above. The Tribunal has dealt with this above. I did not agree with Mr Lassey, there was a straight forward explanation and that was the anonymous letter and rumours. The first claimant submitted that the claimants were used as "scapegoats" to deflect blame from Mark Noble, which contradicts Mr Lassey's submission that the dismissal was "carefully orchestrated" as it would require one of individuals involved in the conspiracy to have produced the anonymous letter that followed an event which could potentially close the factory. The Tribunal was unclear as to why a conspiracy aimed at engineering the claimants' dismissal took place some two years after the 101 issue meeting when no managers were named and numerous other individuals were involved whether in the production of the issues that made up the 101 list or and/or in attending the meetings. The Tribunal notes that the claimants allege a conspiracy against three different managers who they argue wrote and/or produced the anonymous letter, and even they cannot agree on this

point the reason being that nobody will ever know who wrote it unless the writer were to come forward.

213 Both appeal hearings did not address the procedurally unfair and substantive failures, which were not put right on appeal. The disciplinary outcome was essentially "a rubber stamp" without looking into the investigation process particularly the witness evidence and the issues flagged up by the claimants. The decision to dismiss had been made and the appeal officers took the view that it was the correct decision based on the anonymous letter and rumours without putting the obvious questions to the employees who had agreed to work overtime only to subsequently withdraw. The appeal hearings as recorded above in the findings of facts also included a number of matters that were discounted at disciplinary stage on the basis of further investigation being required. Taking into account the entire factual matrix and disciplinary process adopted by the respondent, it did not act reasonably in treating the misconduct as a sufficient reason for dismissal under section 98(4) Employment Rights Act 1996 and its decision to dismiss the claimants was outside the range of reasonable responses.

214 The Respondent did not follow a fair procedure in dismissing the claimants for the reasons set out. Throughout the process the claimants were represented and accompanied, and there was no breach the ACAS Code of Practice in relation to this. The respondent was in breach of the ACAS taking into account the time it took and failures to provide the claimants with all the relevant information gathered during the disciplinary process.

Contributory fault and the no difference rule in Polkey: *Polkey v A E Dayton Services Ltd [1987] IRLR 503, HL*.

215 It was agreed the Tribunal would deal with these issues at liability stage. The Tribunal heard submissions on the issue of contributory fault and Polkey. With reference to the issue, namely, whether the claimants employment would have been terminated in the event of a fair procedure having been followed (*Polkey v AE Dayton Services Ltd [1987]);* the Tribunal found that the procedural and substantive unfairness went to the heart of this case, and it was unable to conclude that the claimants employment would have been dismissed on any future date had a fair procedure taken place. The Tribunal was satisfied, on the evidence before it, that the claimants would not have been dismissed for the misconduct alleged given what had been said by the witnesses at the time. It will need to hear further volunteered for early retirement taking into account the second claimant's evidence that had he not been suspended he would take early retirement, as this may affect the Tribunal's analysis of his future loss.

216 Under section 122(2) of the ERA a Tribunal may reduce a basic award where it considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such as it would be just and equitable to reduce or reduce further the amount of the award to any

extent. Under section 123(6) where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable. Mr Lassey submitted that to fall into this category, the claimant's conduct must be 'culpable or blameworthy'. In respect of the compensatory award, such conduct must cause or contribute to the claimant's dismissal, rather than its fairness or unfairness. Such conduct need not amount to gross misconduct (Jagex Ltd v McCambridge UKEAT/0041/19).

217 With reference to the issue of whether there was any contributory conduct on the part of the claimants; the Tribunal found that there was no culpable behaviour on their part that attracted a reduction in damages for contributory fault. The Tribunal considered whether Andrew Rothery's response "some snitch is going to make me lost me job for fuck sake" points to the possibility of fear and intimidation of employees on the part of the second clamant as submitted by Mr MacNaughton. The Tribunal concluded the words used were not an admission, was not treated as such at either disciplinary and appeal stage and were said in anger at being disciplined on the basis of rumours and an anonymous letter. The Tribunal concluded in the circumstances of this case, it was not just and equitable to reduce the second claimant's damages for contributory conduct.

218 With reference to the ACAS uplift the Tribunal requires further submissions. In theory the Tribunal is minded to increase the award of each individual claimant by ten percent reflect the failures on the part of the respondent against a backdrop of a large degree of compliance with the ACAS Code, however it does not include this in the judgment pending further submissions. This figure is not binding on the parties but referenced as an aid should the parties wish to enter settlement discussions and avoid the 2-day remedy hearing. The Tribunal found there was an unacceptable delay to dismissal, Mr Lassey submits that the disciplinary officer only conducted one further interview in her role of disciplinary officer and as a consequence she failed to comply with the Code. The Tribunal found Diane Miller had a difficult task, the documents were extensive, the claimants correspondence lengthy and it took Diane Miller time to understand the position relevant to three different people, all of which contributed to delay. Diane Miller also met the claimants on the 19 October, 14 November and 6 December 2018. As submitted by Mr Lassey, Diane Miller was unable to give any convincing explanation for all the delay, however, she had a difficult task made complex by the lack of a reasonable investigation and the delay was not solely attributable to her actions. The Tribunal concluded that there was a breach of the ACAS Code in respect of the time it took the respondent to deal with the dismissal, 5 months with a 3 week gap for shutdown. However, there was an attempt to comply with the ACAS Code in respect of the disciplinary process generally, and it is theoretically just and equitable to assess the uplift at 10 percent.

219 In conclusion;

219.1 The first, second and third claimant were unfairly dismissed, their claim for unfair dismissal brought under sections 94 and 98 of the Employment Rights Act 1996 are well-founded and adjourned to a remedy hearing listed for **6 & 7 December 2023** at Liverpool Employment Tribunals, 35 Vernon Street, Liverpool, L2 0NH to start at 10am each day.

219.2 the second claimant did not suffer trade union detriment and his claim brought under sections 146(1)(a) and 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 is dismissed.

219.3 The first claimant's claims for alleged detriments that occurred prior to 10 December 2018 were presented to the Tribunal outside the statutory limitation period allowing for early conciliation, there were no similar acts or failures and it was reasonably practicable for the claim to have been made to the Tribunal within the time limit. The Tribunal does not have the jurisdiction to consider the complaints brought under section 47B(1) of the Employment Rights Act 1996 as amended which are dismissed. In the alternative, the respondent did not subject the first claimant to any detriment as claimed and the claims for detriment brought under section 47B(1) of the Employment Rights Act 1996 is dismissed.

219.4 The first second claimant's claims for alleged detriments that occurred prior to 10 December 2018 were presented to the Tribunal outside the statutory limitation period allowing for early conciliation, there were no similar acts or failures and it was reasonably practicable for the claim to have been made to the Tribunal within the time limit. The Tribunal does not have the jurisdiction to consider the complaints brought under section 47B(1) of the Employment Rights Act 1996 as amended and section 146(1)(a) and/or (b) of the Trade Union and Labour Relations (Consolidation) Act 1996 which are dismissed. In the alternative, the respondent did not subject the second claimant to any detriment as claimed and the claims for detriment brought under section 47B(1) of the Employment Rights Act 1996 and section 146(1)(a) and/or (b) of the Trade Union and Labour Relations (Consolidation) Act 1996 are not well-founded and dismissed.

219.5 The third claimant's claims for detriment that allegedly occurred before 9 January 2018 were presented to the Tribunal outside the statutory limitation period allowing for early conciliation, there were no similar acts or failures and it was reasonably practicable for the claim to have been made to the Tribunal within the time limit. The Tribunal does not have the jurisdiction to consider the complaints brought under section 47B(1) of the Employment Rights Act 1996 as amended and which are dismissed. In the alternative, the respondent did not subject third claimant to any detriment as claimed under issue 16(aa) to

16(at) and the claim for detriment brought under section 47B(1) of the Employment Rights Act 1996 is not well founded and dismissed.

219.6 The first and second claimant were not automatically unfairly dismissed under sections 152(1)(a) and 152(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 and their claims for automatic unfair dismissal are not well founded and dismissed.

219.7 The first, second and third claimant were not automatically unfairly dismissed under section 103A of the Employment Rights Act 1996 as amended, and their claims for automatic unfair dismissal are dismissed.

Case management orders leading to the remedy hearing.

220 The parties will agree a list of issues and if required prepare witness statements dealing with any remedy issue that has not been covered in the statements already before the Tribunal, for example, the effect of the second claimant's evidence that he would have taken early retirement had he not been suspended. The list of issues and witness statements will be prepared and exchanged no later than 31 November 2023. The remedy bundle will be prepared by the second and third respondent, it will include a schedule of loss and counter-schedule of loss, and be agreed by all parties with electronic and hard copied provided to the Tribunal 2-days before the remedy hearing.

Employment Judge Shotter

24.11.23

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

24 November 2023

FOR THE SECRETARY OF THE TRIBUNALS