EMPLOYMENT TRIBUNALS

Claimant: Phil Driver

Respondents: (1) Thames Spark Group Limited
(2) Brandon Ross

Heard at: London Central (by video)

On: 5, 6, 9 and 10 October 2023

Before: Employment Judge E Burns
Mr Carroll
Mr Secher

Representation

For the Claimant: Bláthnaid Breslin, Counsel
For the Respondent: Linda Lennard

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

(1) The Claimant's complaint against R1 that he was subjected to detriments pursuant to section 44 of the Employment Rights Act succeeds. Specifically, he succeeds in relation to the detriments numbered 14 (iv), (v) and (vi) but not any of the other detriments.

(2) The Claimant's complaint against R1 that he was subjected to detriments pursuant to section 47B(1) of the Employment Rights Act succeeds. Specifically, he succeeds in relation to the detriments numbered 16 (iv), (v) and (vi) but not any of the other detriments.

(3) The Claimant's complaint against R2 that he was subjected to detriments pursuant to section 47B(1A) of the Employment Rights Act succeeds. Specifically, he succeeds in relation to the detriments numbered 16 (iv), (v), (vi) and (xiv) (this latter being his dismissal) but not any of the other detriments. R1 is liable for these detriments in addition to R2.

(4) In light of the decision above, we did not decide the Claimant's complaint that he was automatically unfairly dismissed by R1 pursuant to sections 100, 103A and/or 104 of the Employment Rights Act 1996.

(5) The Claimant's complaint against R1 that he was wrongfully dismissed succeeds.

(6) The Claimant's complaint against R1 that he is owed pension contributions fails.

(7) The Claimant's complaint against R1 that he is owed expenses and holiday pay succeeds by admission.

(8) The Claimant's complaint that R1 was in breach of section 8 of the Employment Rights Act 1998 concerning provision of payslips fails and is dismissed.

REASONS

THE ISSUES

1. This is a claim arising from the Claimant's employment with R1 and his dismissal for gross misconduct on 30 September 2022. R2, to whom we refer in this judgment as Mr Ross, owns and runs R1 and was the Claimant's line manager.

2. Prior to the hearing, a list of issues had been agreed by the parties and was contained in the bundle at pages 83 - 93. The Claimant withdrew reliance on the purported protected disclosures at paragraphs 8(iv - xi) and (xiii). In addition, R1 admitted liability for the Claimant's claims for holiday pay and reimbursement of expenses in principle, although not in any specific amount. This will be decided at the remedy hearing.

THE HEARING

3. The hearing was a remote hearing. From a technical perspective, there were a few minor connection difficulties from time to time. We monitored these carefully and paused the proceedings when required. The participants were told that it was an offence to record the proceedings.

4. The Claimant gave evidence. For the Respondents, Mr Ross gave evidence. The Respondents also provided two written witness statements for witnesses who were not called to give evidence. To the extent the evidence in the written statements was disputed, we have not given it any weight. We explained the reason for this to the Respondents, namely because the evidence was not able to be tested by cross examination.

5. The Claimant had prepared a comprehensive trial bundle. The Respondents had also prepared their own bundle, the entirety of which was included in the Claimant's bundle. We therefore used the Claimant's bundle during the hearing as this was easier for everyone present. We admitted some

additional documents into evidence during the course of the hearing with the agreement of the parties. We read the evidence in the bundle to which we were referred and refer to the page numbers from the Claimant's bundle of key documents that we relied upon when reaching our decision below.

6. We explained the process carefully as we went along and also our commitment to ensure that the Respondents were not legally disadvantaged because they were not professionally represented.

7. We were grateful to both parties for providing helpful written submissions. The closing submissions provided on behalf of the Respondents contained new evidence and referred to without prejudice material which we disregarded.

8. We note that the Respondents' closing submission began with a complaint about Ms Breslin's cross examination of Mr Ross. Specifically, it said, "*we found Ms Breslin's form of questioning, badgering and haranguing. She went out of her way to way make things as confusing as possible, whizzing through pages at breakneck speed*." We were accordingly invited to disregard some of the answers given by Mr Ross.

9. We consider it important to note that do not agree with these observations of Ms Breslin's cross-examination. Where any questions were not clear, Mr Ross and Ms Lennard raised an objection at the time and the questions were rephrased either by Ms Breslin or by the Judge. No objection was raised during cross examination that Ms Breslin was going too fast or that her question asked anything inappropriate or was being put in an inappropriate tone.

FINDINGS OF FACT

10. Having considered all the evidence, we find the following facts on a balance of probabilities.

11. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

Background

12. R1, the company, was incorporated in December 2019. It was founded by Mr Ross, an electrician and he is the sole director and shareholder of the R2.

13. The Claimant commenced employment with R1 as an Electrician on 15 October 2020. The Claimant met Mr Ross when they previously both worked together for a larger company. Before becoming an employee of the Company, the Claimant had done bits and pieces of work for R1 on occasional Saturdays.

14. The Claimant and Mr Ross considered themselves to be friends as well as work colleagues and Mr Ross was pleased to be able to offer the Claimant employment.

15. The Claimant was the first person to be employed by R1. The consequence of this was, understandably, that the company had very little if anything in place for employees by way of administrative processes.

16. The Claimant was, however, issued with a written contract of employment.

17. Two provisions of the Claimant's contract of employment are relevant to these proceedings.

18. The first are the notice provisions in paragraphs 36 - 40 These provide for termination without notice "*where there is just cause for termination*" or alternatively for either party to give to the other "*the greater of two weeks or any minimum notice required by law*." (98)

19. The second are the provisions about pension found in paragraph 14 which say "*The Employee will not be automatically enrolled in the following pension scheme Occupational pension. The Employee may opt in to the pension scheme as described in the Pensions Act 2008 or successor legislation and Employee Handbook*." (95)

20. We note that the Claimant did not, at any time during his employment, ask the Respondents if he could opt-in to its pension scheme. The Respondent did not enrol the Claimant into a pension scheme and did not pay any employer pension contributions into a scheme on his behalf, within three months of him reaching the age of 22.

21. There was a dispute between the parties as to whether or not the Claimant was given an Employee Handbook at the same time as he was given his contract of employment. The Respondents told us that he was, albeit that the Handbook he was given was for an entirely different company. Much later, a new cover was added to that handbook so that it had R1's name on the cover and an introduction written by Mr Ross. The Claimant said he was only given a Handbook at the hearing dealing with the appeal against his dismissal on 24 November 2022.

22. We prefer the Claimant's evidence on this point and find that he was not issued with the Handbook. In reaching this conclusion we have relied on the fact that the contract of employment says that the Employee Handbook is available on request (102). Based on this factual finding, the contents of the Handbook are not relevant to any of our considerations.

23. The Claimant was provided with a company vehicle, a van, in early 2021. The van had some damage to it that had occurred when Mr Ross had been using it.

24. The Claimant was not required to keep a record of his mileage. Instead, he submitted receipts to Mr Ross whenever he filled the vehicle with diesel.

Understandably, because he was the only employee of the company, the process he followed was very informal. There was no expenses claim form that he had to complete. Instead, it was acceptable for him to send Mr Ross photos of his receipts via WhatsApp and make his claims by simply listing amounts in the messages. In response, Mr Ross would transfer money to the Claimant or occasionally give him cash. The same process occurred when the Claimant bought materials. This process appeared to be perfectly acceptable to Mr Ross who did not question the Claimant's claims until 26 May 2022, a matter to which we return below.

25. R1 took on more employees after the Claimant including some apprentices. It reached a maximum number of six employees around the time of the Claimant's dismissal. WhatsApp was an important method of communication for Mr Ross and his employees and there was a Whatsapp Group chat set up between them to discuss work matters and assignments to particular jobs.

26. R1 did not introduce a policy dealing with Health and Safety when it grew to around six employees. Mr Ross told the tribunal panel that he was aware that the legal obligation to have a Health and Safety Policy was triggered when a company has five employees. He said he was in the process of introducing a policy, but had found it difficult to find time to do this and deal with the current tribunal claim. His employee numbers have since dropped.

27. The Claimant used his van for all work-related journeys. As well as the van, he had his own car and used this when undertaking personal journeys. The Claimant lived with his mum, but would also regularly stay with his long term girlfriend. When doing this he drove the van to her house and set off from there to wherever he was working that day. The Claimant accepted that he did not expressly tell Mr Ross that this was what he did, but he had no reason to think he needed to do this. Mr Ross was aware that the Claimant was in a long term relationship and he thought Mr Ross realised this was what he did and did not have any difficulty with it.

Fanshaw Street Site, Shoreditch

28. In April 2021, R1 began working at a site in Fanshaw Street, Shoreditch. R1's client was converting the building into flats and had builders working at the site. Ther was a significant amount of work that needed to be done on each floor of the property, including in the basement.

29. The Claimant's evidence was that he first visited the site on 21 April 2021 with an apprentice. He says that on this occasion he raised a concern verbally about the possibility of asbestos being in the basement and said he did not want to work there until he was reassured that this was not the case. The Respondents deny the Claimant raised this issue.

30. At this time, there was plenty of work to do elsewhere in the property. It was not until early the following year that work in the basement was required. During the period between April 2021 and January 2022, work was carried out to clear the basement of any asbestos. We find it likely that the Claimant did raise a concern about the possibility of there being asbestos in the

basement, but this was not treated as a significant issue because all involved in the project at that time recognised that it was possible that there was a need for the basement to be cleared. Mr Ross told us that, without any prompting from the Claimant and under his own initiative, he raised the possibility of there being asbestos in the basement with his client at around this time.

31. The Claimant says he repeated his concerns about the possibility of there being asbestos in the basement in or around January/February 2022 when work in the basement was required. Again the Respondents deny this, but we find that the Claimant did say something at this stage. Mr Ross asked the client to provide evidence that the basement was clear of asbestos at around this time and we consider he did this because he shared the Claimant's potential concerns.

32. As a result, R1's client arranged for testing to take place. The testing was undertaken by a specialist company who collected two samples from the basement and tested them on 11 March 2022. The results came back as negative. Mr Ross shared this with his employees. We note that the testing did not include air testing. Nevertheless Mr Ross was satisfied that it was safe for his employees to work in the basement on receipt of the test results.

33. The Respondents say that the Claimant accepted at his appeal hearing in November 2022 that he had not raised any issues about asbestos prior to March 2022. They rely on the notes made at that hearing as evidence of this (506). We do not agree. Our finding is that there is nothing in the way the Claimant is recorded as having answered the relevant questions that contradicts our finding that he raised some concerns in a low key way about asbestos in the basement before March 2022.

15 March 2022

34. Before we turn to what happened on 25 March 2022, we deal first with a conversation that Mr Ross says took place between him and the Claimant on 15 March 2022. Mr Ross says that on this date, which he recalls with confidence because it was his birthday, the Claimant asked him to transfer some cash to him saying that he needed it to fill up the van and had not got enough funds in his bank account. Mr Ross said he was surprised at the request because the Claimant "*had already put in over £300 of fuel*" as at that date. He said he had questioned him about this and the Claimant had no satisfactory answer. Mr Ross says that his reaction to the Claimant's request triggered a deterioration in the relationship between the Claimant and himself.

35. The Claimant denies this conversation ever took place. He agrees that there was a deterioration in the relationship between him and Mr Ross from March 2022 onwards, but he says it started from 25 March 2022 and was triggered by the events of that day rather than the earlier date of 15 March 2022.

36. Our finding is that the conversation did not happen. This finding is based on the fact that Mr Ross could not have known how much fuel the Claimant had put in his van as at 15 March 2022 as the Claimant did not submit his

expenses claim until 25 April 2022. In addition, as at the start of 15 March 2022, the Claimant's bank balance was around £900 suggesting that the Claimant could pay for any fuel he needed. Also, he did not fill up the van until 20 March, some 5 days later after the alleged conversation. Finally no transfers were made by Mr Ross to the Claimant's bank account at any point in March 2022.

25 March 2022

37. Returning to the issue of asbestos in the basement of the site on Fanshaw Street, following receipt of the negative test results for asbestos on 11 March 2022, the Claimant and one of the Company's apprentices were asked to commence work in the basement on Friday 25 March 2022.

38. Instead of working in the basement that day, the Claimant purported to take a sample from it which he then took to the same testing company as the client had used to get it tested. The test came back positive for asbestos. The Claimant emailed the test results to Mr Ross and said he was not prepared to work in the basement.

39. The Claimant accepts that he is not able to provide any evidence, other than his oral testimony, to confirm that the sample was taken from the basement that day. He did not photograph himself taking the sample and had asked the apprentice who was with him not to accompany him while he took the sample. He did however borrow the apprentice's phone to take pictures and video of the basement.

40. Despite the lack of corroborative evidence, our finding is that the Claimant has been entirely truthful about the sampling process he undertook and that he did indeed take the sample that was subsequently tested from the basement. The reason we make this finding is because we find the idea that the Claimant went to work on 25 March 2022 with a sample of asbestos already on his person so that he could fabricate a test simply to avoid working in the basement entirely implausible.

41. The Respondents have invited us to find that the Claimant did indeed do this and that his motivation for doing so was in order to deliberately set them up for a subsequent whistleblowing claim. In our judgment this is too far-fetched to be believable.

42. Instead, we find that the Claimant was not satisfied that the test results supplied by the client demonstrated the basement was safe. He considered the only way to demonstrate this was to do his own test, which he could then use to try and persuade Mr Ross to reconsider.

43. We find that when raising his concerns about there being asbestos in the basement the Claimant was doing so in his own interests and also in the interests of his colleagues. He was genuinely concerned about exposure to asbestos and the risks that this presented.

44. The Respondents also dispute that the Claimant shared the test results with Mr Ross on 25 March 2022 and say this was not done until 27 March 2022.

This is surprising because Mr Ross wrote his own account of what happened in a letter to the Claimant dated 17 December 2022 (578). In this account he confirms receipt of the test by email on 25 March 2022. He also says that he initially "*accepted Phil's view and proceeded to cease works until I had spoken with the client and had completed my investigation*." and that "*Phil was then moved to complete another project until this was sorted out and we had completed our due diligence*". The account goes on to explain that as a result of his investigations, Mr Ross considered that the sample provided by the Claimant was void. He then records in the account that the Claimant did not return to the Fanshaw site after taking the sample saying this was because he was needed on other projects.

45. When cross-examined about this written account, Mr Ross agreed that it was accurate. We were later, however, invited by Ms Lennard, to treat that concession as unreliable. We have not. Our finding is that the account written by Mr Ross accurately records his view of what took place.

46. The account also explains that on Saturday 26 March 2022, the Claimant and Mr Ross spoke about the issue on the phone. The reference in the account to an investigation explains why on Sunday 27 March 2022, Mr Ross asked the Claimant a number of questions via WhatsApp about the sample and the certificate he had sent him, adding that the company's clients were asking. The Claimant explained what he had done and also asked the apprentice to send the videos and photos he had taken using his phone to Mr Ross.

47. The account also ties in with what happened next. No-one worked at the Fanshaw Street site on Monday 28 March 2002. That evening, having discussed the position with R1's client, Mr Ross messaged his staff on the group WhatsApp and assigned the Claimant to work on a different project and said he would meet him there. Mr Ross instructed two other members of staff to work at the Fanshaw site instead. When the Claimant questioned anyone working at that site, Mr Ross replied to say that the site was being re-tested and he would explain further when he saw the Claimant (218).

48. Accordingly, a meeting took place between Mr Ross and the Claimant on Tuesday 29 March 2022 at the new site. The Claimant says that during this conversation, Mr Ross questioned why he had felt the need to go behind his and the client's backs to get this sample tested. According to the Claimant, Mr Ross told him that, because of his actions, the client had asked for someone else to take over the project and he had made things awkward in the relationship between Mr Ross and the client. Although Mr Ross denies this, we find this conversation did occur at the date stated by the Claimant. The asbestos issue was not the only matter Mr Ross discussed with the Claimant that day. The client had expressed some other concerns about the Claimant's work including in particular his timekeeping. These were concerns shared by Mr Ross and Mr Ross also discussed these matters with the Claimant.

Expenses Claim

49. The Claimant submitted an expenses claim for March and April 2022 by WhatsApp on Monday 25 April 2022 shortly before he went away on holiday. The claim was for fuel, materials, holiday pay and overtime. In addition, in 2001, the Claimant had had an accident in the van and had agreed to contribute to getting the damage fixed. No amount had been agreed at this time. In the WhatsApp message he suggests that he should pay £700 towards the van repairs. (224)

50. The Claimant provided receipts that confirmed that he had bought fuel on five occasions in March 2022 as follows:

    1 March - £105.04
    7 March -£114.49
    12 March -107.36
    20 March -£90.13
    30 March -£118.36

51. Mr Ross replied by Whatsapp on Wednesday 27 April 2022 (227) to say he had paid the Claimant £550. There followed a brief exchange whereby Mr Ross explained that he had created a spreadsheet to keep track of the Claimant's claims and that he would pay the rest once R1 had received some outstanding income and that they would sort out the van damage when the Claimant was back from holiday. Mr Ross told us that he created the spreadsheet because he was suspicious about the Claimant's claims, but this does not come across in his messages. In our judgment, the creation of the spreadsheet was a sensible administrative step to take and this was really all he was thinking at this point in time.

May 2022

52. On 12 May 2022 the Claimant asked for his payslip from April via the group WhatsApp (232). The apprentice made the same request. The payslip was provided on 17 May 2022 (234).

53. At around this time, the Claimant was also pressing Mr Ross to pay his outstanding expenses via personal WhatsApp messages (233- 234) as he owed money to his mum. This included the amounts still owed from his claim of 25 April 2022 and others he had made subsequently. Mr Ross paid him £200 for fuel on 14 May 2022.

54. On 17 May Mr Ross invited the Claimant for a meeting that Thursday (19 May 2022) so that they could "sort it". (234) The meeting did not take place because Mr Ross cancelled it. It is notable that Mr Ross says nothing in his message inviting the Claimant to a meeting that suggests he has any concerns about the Claimant's claims. Understandably, the Claimant believed that the only issue was the amount to be agreed for the van damage.

55. The Claimant continued pressing Mr Ross to sort out his expenses. Mr Ross invited him for a further meeting on Wednesday 25 May 2022 (236) which again did not take place because of Mr Ross being unavailable.

56. On Thursday 26 May 2022, at 17:20 Mr Ross sent the Claimant an email attaching the spreadsheet he had created of the Claimant's expenses. In the email he said:

"Please find attached the breakdown of expenses, I'm not too sure why the van was filled up 5 times in March surely this isn't correct can you please review and come into the office for a discussion either tomorrow or Monday" The spreadsheet total suggested that the Claimant owed the company £895.59 taking into account a payment of £1,000 for the van damage" (237 – 238).

57. In response, within 10 minutes of receiving the email, the Claimant sent Mr Ross his timesheets for March on WhatsApp with a message saying, "*that's where I was in march, did shit loads of driving*" (239). Although Mr Ross had requested a meeting with the Claimant, the meeting did not take place. Again this was because Mr Ross was not available to hold it.

58. A couple of days later, on 27 May 2022, the Claimant queried the amount he was said to owe R1 on the spreadsheet in a Whatsapp message. Mr Ross replied to confirm the amount was owed when the van damage was taken into account.

July 2023

59. Nothing further happened about the outstanding April expenses until July.

60. On 3 July 2023, the Claimant asked Mr Ross for his most recent payslip. Mr Ross replied to say it would be sent the next day, but it was not and the Claimant repeated the request on 5 July and 6 July (244). The requests were made using the Group WhatsApp chat. The Claimant also requested a copy of his May payslip. Mr Ross provided the payslips to the Claimant on 7 July 2022 (247)

61. A short time after this an issue arose about the company van that the Claimant was using. The Claimant believed that the van had not been serviced for over a year and that its MOT had run out on 28 June. On 11 July 2022, the Claimant messaged Mr Ross on his personal WhatsApp to say that the MOT on the company van he was using expired on 28 June 2022 (248). Mr Ross replied to say he knew and it was booked in for the end of the week.

62. On Sunday 17 July 2023, the Claimant also replied to Mr Ross's email of 26 May 2023. He attached an updated version of the expense's spreadsheet created by Mr Ross to his email. In the email, he explained what additional expenses he thought he was owed. He suggested that introducing a fuel card might be helpful as he was finding it difficult to pay for fuel upfront and wait to be reimbursed (251 – 253). The Claimant sent Mr Ross a personal WhatsApp message at the same time to say he had just sent him a running

total and asked him to have a look at it and get back to him as soon as possible. (254)

63. In his email, the Claimant also said, "*I understand you are busy; however, can you please make more of an effort now to get our payslips to us before, or on pay day, which is a legal requirement."*

64. In relation to the van, he said: "*I understand the damage at the back of the van needs fixing. However, I shouldn't have to pay for this, as this is a company vehicle and should be covered by company insurance. Can I remind you that the damage to the lower part of the back of the van was from the accident outside KFC where me, you and Charlie where in the van?"*

65. He highlighted some minor mechanical issues with the van and mentioned that he thought the van had not had a service since he had been using it. He suggested it made sense to do everything, service and repairs in one go. He did not mention the MOT.

66. The Claimant concluded the email saying:

"I know we have organised a meeting a couple of times that have fallen through, I'm willing to have this meeting still but I have sent you this email in case we don't get round to doing so."

67. Mr Ross replied to the Claimant's WhatsApp message at 22:42 that night to say that he had seen the email and would review it. He added that he thought they should have a meeting as soon as possible (254).

68. As the van had not had its MOT, the Claimant chased Mr Ross about it on 19 July 2022 by personal WhatsApp (249). Mr Ross replied that he needed the Claimant to drop the van in to his house that night as the van was going into the garage on Thursday 21 July 2023. The Claimant delivered the van to Mr Ross ahead of 21 July 2023.

69. Mr Ross did not return the van to him and from this date onwards the Claimant had to use his own car for business use. Mr Ross told us that the reason he did not return the van to the Claimant was because the Claimant was not looking after it well enough.

70. On 21 July 2022, the Claimant contacted Mr Ross about a job that he had been asked to do. Mr Ross asked him to re wire a fuse cartridge which appeared to contain asbestos flash guards and he was concerned that he had not been issued with the correct PPE to work on it. The WhatsApp exchange between them (255 – 259) confirms that the Claimant raised a concern about possible exposure to asbestos saying:

"It's wrong you keep putting us in these situations without the valid training, you know how I feel about this. The client said that you were made aware of the [asbestos] flash guards and you still sent us here with nothing, you could have done this one yourself if your happy to deal with it" (257)

71. Mr Ross replied to say that the Claimant should have asbestos training at college. He added:

"I have dealt with these fuse carriers multiple times and so have other electricians I have worked with and seen how they are dealt with. Theya re 10% asbestos fibre and you won't disturb it by putting the fuse as its situation behind the fuse. As long as you wear PPE and follow the HSE guidelines you will be fine."(258)

Mr Ross also told the Claimant to buy PPE at the local hardware shop (258)

72. On Sunday 24 July the Claimant messaged Mr Ross on his personal WhatsApp to ask if the van's MOT had been done. He also asked Mr Ross some other questions. Mr Ross answered the other questions, but did not answer the question about the MOT. On Monday 25 July, the Claimant again asked about the MOT. Mr Ross answered saying: "*Been done already going in for remedials Wednesday*."

73. This was not true. We note that in the grievance outcome response Mr Ross later sent to the Claimant, he acknowledged that the van's MOT had expired on 28 June 2022. That letter confirms that the MOT was undertaken on 4 August 2022, but the vehicle did not pass until 18 August 2022. He says *"I made a mistake in saying to you that it had been MOT'd"* (579).

74. On Thursday 28 July 2022, the Claimant messaged Mr Ross, using the Group WhatsApp to ask if meetings were being held the following day. Mr Ross replied saying, "*I will let you know when your meeting is booked in Phil.*" (263)

75. On Wednesday 3 August 2022, the Claimant drove passed Mr Ross's house and saw that he was using the van. He checked on the gov.co.uk website site to see of the van had had its MOT and could see that it was still showing as having expired on 28 June 2020. (323)

76. The Claimant sent Mr Ross a long WhatsApp message at 14:55. He began his message saying that he would be seeking legal advice and therefore not attending work the following day, but taking holiday instead. He then listed his concerns. They included the following:

- *The meeting to address the following issues has been repeatedly cancelled*
- *We are not receiving payslips on a regular day of the month until after constantly having to chase you up for it*
- *The vehicle has not had an MOT since the 28th June*
- *The vehicle has not been serviced since I have had the vehicle, which is way over a year.*
- *I am in debt which I struggle to pay off due to money coming out of my account for materials, parking and fuel for tour company*

- *You are asking me again to out in my money to repair the current damage on the company van. This should be covered by company insurance*
- *Our relationship has deteriorated since I refused to work in an environment with hazardous materials. Which you was aware of then and now, yet still send your boys to work in.*

He concluded his message saying, "*I didn't think I would be in this position working for you, nor did I want to be. I've always looked forward to working with you and for you and have a lot of high expectations for future*." (264 – 266).

77. The Claimant also sent Mr Ross a message on the Group WhatsApp that day, at 16:50, asking for his payslip. (263)

78. Shortly after sending the message, although we are not sure precisely when, the Claimant and Mr Ross agreed that the Claimant should take paid additional leave while the issues were resolved.

August 2022

79. On 7 August 2022, R1's apprentice messaged the Claimant saying:

"He's still trying to send us in the basement, I just messaged him saying I don't mind going in flats but not the basement" (793).

In our judgment, this is obviously a reference to the basement at Fanshaw Street and is in connection with the asbestos risk.

80. On 7 August 2022, the Claimant emailed Mr Ross. He explained that he spoken with Citizens Advice who had advised him to send Mr Ross full details of all the monies that he considered were outstanding. The letter contained that detail. He concluded it by saying:

"*Hopefully all of this can be resolved amicably. Failing this CAB have advised ACAS and small claims court.*

Please advise a date and time of meeting, which I will record, as I will need time to think about what is said to come back with an answer.

Looking forward to hear back from you." (268)

81. On Wednesday 10 August 2022 at 11:51, Mr Ross emailed the Claimant two letters. The email informed the Claimant that he was being invited to a disciplinary meeting two days later on Friday 12 August 2022 (294).

82. The attached letters were dated 5 and 8 August 2022 (295 – 307 and 308 – 319) and contained a series of disciplinary allegations against the Claimant. When giving his evidence to us, Mr Ross said that the date on the first letter was not correct, but was unable to explain what the correct date should have been. We find the letter was indeed written on 5 August 2022.

83. The Claimant requested more time before disciplinary hearing and it was postponed to instead take place on 18 August 2022. He sent a written response to the allegations on 17 August 2022 (328 – 331) and on the same date raised a formal grievance (324 – 331).

84. The Claimant also made a formal subject access request on 18 August 2022 (339). The Respondent did not provide him any documents in response. On 16 September 2022 (395 – 396), Mr Ross replied saying that he believed the request was manifestly unfounded or excessive, but R1 would keep working on it and needed additional time.

85. In the meantime, on 18 August 2022, the disciplinary hearing was conducted by Mr Ross. He was accompanied by a note taker and notes were taken on the meeting (332 – 338). During the disciplinary hearing Mr Ross informed the Claimant that the issues in his grievance would be addressed.

86. One of the disciplinary allegations concerns the Claimant's claim for fuel for March 2022. In the letter inviting the claimant to the disciplinary hearing, the issue was put as follows:

"In March you submitted a fuel expense claim more than £500. Upon recent inspection of this claim, which was paid, and the work you were allocated to, this claim is above what could be reasonable expected. The Company considers the deliberate falsification of records such as expense claims as Gross Misconduct under the Company's Rules and Disciplinary Procedures."

87. The discussion in the disciplinary hearing about this issue was extremely cursory (336 -337). Mr Ross presented the Claimant with no evidence to support the allegation. He incorrectly alleged that the Claimant had not produced receipts for all his March fuel purchases. In addition, he said that he would expect the Claimant to have spent no more than £10 per day on fuel in March and therefore have claimed no more that around £200.

88. The Claimant's defence was to say that he had done a lot of travelling that month and that fuel prices had increased. He also described having to collect and drop off the apprentice and occasions when he was carrying rubble. Mr Ross said he would review the claim and the Claimant would be paid what he was owed.

89. Following the disciplinary hearing, Mr Ross agreed that the Claimant would remain on paid leave. On 21 August 2022 Mr Ross removed the Claimant from the work group WhatsApp chat.

90. The Claimant emailed Mr Ross on 22 August 2022 (351) asking for a copy of any evidence that Mr Ross was relying on and making a number of additional points. He chased a copy of the minutes of the disciplinary hearing on 31 August 2022 (360). The Claimant also chased his pay for August 2022. Due to a software error, no-one employed by R1 got paid on time that month. Everyone had their pay delayed until 2 September 2023 (363).

91. On 21 September 2021, Mr Ross emailed the Claimant to asking him to provide an image of his bank cards for evidential purposes (397). The Claimed replied on 23 September 2022 questioning the need for this (412 – 427) and sending up marked up notes of the disciplinary hearing (417 – 424). He also raised the fact that his grievances had not been addresses (398 – 400)

92. On 28 September 2022, Mr Ross asked the Claimant to confirm that his bank account was registered only to him (675 – 676) and also to confirm the additional mileage of his return trip to London after dropping the apprentice off.

93. The Claimant replied on 29 September 2022 (432 – 433) confirming his bank account was a sole account in his name only and providing evidence of this. He added,

"It will be very difficult for me to calculate my additional mileage as this is some 7 months ago now and I was not instructed to record mileage at the time.

Can I remind you of some of the journeys I had to do in March,

• To and from work, picking up and dropping home apprentices on the days I had them.
• I would not always be coming from my address; on occasions I would have been travelling to and from Windlesham where I was also staying at the time.
• Trips to various wholesalers, on more than one occasion on some days.
• Delivering materials to site at Sabichi House after picking them up from wholesalers.
• Clearing site of materials and tools at Sabichi House
• Clearing site of Rubble from Sabichi House, taking an extremely heavy load back to the skip at yours.
• An additional journey on one occasion from Fanshaw street to the Asbestos lab in Basildon, and then back home.
• On nearly every job, I would take the boys I had with me on the day to get their lunch
• We did not always take the same route. Longer routes were taken on occasions, which made or a quicker journey as a result of missing the traffic.

Can I also remind you that for the majority of March, a lot of our work was in London and surrounding areas, I do not need to remind you of the traffic in these areas and how the stop/start driving will use more fuel.

It feels very much like you are making serious allegations to find a reason to dismiss me when we both know that the real reason is that I have made a protected disclosure and that I have not done anything untoward."(431-432)

94. Mr Ross did not reply. Instead, he emailed the Claimant on 30 September 2022 at 10:56 attaching a letter confirming the Claimant's employment was being immediately terminated (434 – 438). In his letter he explained that the reason for dismissal was:

"In relation to the allegation that in March 2022 you submitted a fuel expense claim in excess of £500, which was paid to you, but which was not justified by the work you were allocated and which significantly exceeds what could be reasonably expected, I have considered the information you submitted at the hearing.

I have taken into account the journeys from Addlestone to New Haw to collect the apprentice, including the time when you had to return the apprentice to New Haw and then go to AEW, the journey from Wembley to Wraysbury with rubble and the daily journeys to and from London, including Putney, Wembley and Shoreditch.

However, as I explained to you during the hearing, having attempted to verify the expense claim against reasonable mileage calculations using the RAC's fuel calculator (copies of which are attached), there is simply no way I can reconcile the sums you have claimed against the mileage that would be required to carry out your duties, even with a reasonable allowance for the exceptional trips you mentioned in relation to collecting apprentices and a full/heavy load in the van.

You also claimed at the hearing that the expenses were due in part to the rise in fuel prices, yet the expenses pre-dated such rise. Your evidence on this point was simply not credible.

Even generously allowing for expenses of £200 per month plus the exceptional items, there is simply no way a claim in excess of £500 would be justified. The only possible explanations are therefore either that you have been using the Company vehicle for personal trips and claiming back the cost of fuel for the same, which is not permitted as you are fully aware, or expenses have been falsely claimed using amounts paid for elsewhere/by third parties.

The Company considers the deliberate falsification of records such as expense claims as gross misconduct under the Company's Disciplinary Rules and Disciplinary Procedures and I therefore find that this constitutes gross misconduct on your part under the Company's Rules and Disciplinary Procedures. As your conduct amounts to gross misconduct, the Company hereby dismisses you with immediate effect on and from the date of this letter on the grounds of gross misconduct."(437)

95. Mr Ross sent subsequent emails at 11:01 am and 11.22 am attaching mileage calculations he had done on the RAC website. There was just three of these, two showing calculations for a one way journey the Claimant likely undertook, and one showing a calculation for another journey that could not be identified. Two of the calculations were for a petrol engine vehicle rather than a diesel engine (441 – 444). We consider that if Mr Ross had genuinely

done more detailed calculations, he would have sent these to the Claimant on the date of his dismissal.

96. Mr Ross told us that he had done far more detailed calculations at this time. He said these were the ones that were contained in the bundle at pages 65 -69 but we find that this was not the case. Our finding is that the more detailed calculations were created in connection with the Claimant's appeal and did not exist at this time.

97. The Claimant was not paid in respect of his outstanding untaken holiday on termination. He was also not paid his outstanding expenses.

Appeal and Grievance

98. The Claimant submitted an appeal against his dismissal on 7 October 2022 (455-467). He enclosed a news report confirming that fuel prices had risen throughout the month of March 2022.

99. The Claimant also noted that he was still waiting for his grievance to be addressed (461). He chased a response to this on 21 October 2022 (470). In response, he was invited to a grievance hearing on 15 November 2022 (491 – 493) and received a grievance outcome letter on 17 December 2022 (575 – 584). Although he asked if he could appeal against the grievance outcome no appeal was conducted.

100. An appeal hearing against the Claimant's dismissal was arranged for 24 November 2022. The appeal hearing was conducted by Sarah O'Meara (499 – 513). During the course of the hearing, she told the Claimant that he would need to substantiate his milage claims for March 2022 with evidence, notwithstanding that he had never previously been asked to record his mileage.

101. On 28 November 2022, Ms O'Meara wrote to the Claimant to tell him that her appeal outcome was not going to be ready until 19 December 2022.

102. On 28 November 2022, a detailed spreadsheet was created on the Respondent's system which made some attempt to calculate the Claimant's likely fuel costs based on the timesheets he had submitted. This showed his expected fuel costs would have been in the region of £327.26. These detailed calculations were never shared with the Claimant and omit a significant proportion of the journeys the Claimant did that month.

103. The Respondents included a copy of an appeal outcome letter dated 7 December 2023 (61-64) in the bundle. Mr Ross told us that this letter was sent to the Claimant and for approval to his solicitor on 7 December 2022. The Claimant denied ever receiving this letter.

104. We prefer the Claimant's evidence on this point for three reasons. We do not believe that Mr Ross would send a draft for approval to his legal advisor at the same time as sending it to the Claimant. In addition, R1 sent an outcome letter to the Claimant by email on 24 December 2022 in which no mention of the earlier letter is made. Had there been an earlier letter, the

relationship between the earlier and later letter would have needed to be explained, but it was not. In addition, Ms O'Meara had said the earliest the Claimant should expect to hear from her was 19 December 2022.

105. On 9 December 2020, the Claimant undertook his own milage calculations which he sent to Ms O'Meara (540 – 574). He explained that he had done his best to work out his mileage for March, but there were still significant gaps for which he could not fully account. However, the total he reached was £485.01 against the amount of diesel he claimed for the relevant period of £539.39. We find that the Claimant's calculations are reliable.

106. The Respondents did not consider the Claimant's calculations. Ms O'Meara sent the Claimant the outcome of the appeal on 24 December 2022. She did not uphold his appeal against his dismissal for gross misconduct consisting of fraud.

THE LAW

Health and Safety Complaints under the Employment Rights Act

107. Section 44 of the Employment Rights Act 1996 gives both employees and workers the right not to be subjected to a detriment where they have taken certain steps to protect himself in dangerous situations. In this case, the Claimant as an employee can benefit from all the sections because as an employee he is a worker. By virtue of section 44(4), The right to protection from dismissal for employees is found in section 100 of the Employment Rights Act 1996 which uses almost identical language to that found in section 44.

Although the Claimant is relying on three sub-sections from section 44 and the equivalent sub-sections from section 100 in this case, we set out the sections in full for sake of ease of reference.

44 Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

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

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),

(c) being an employee at a place where—

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

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

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

(1A) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that—

(a) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or

(b) in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.

(2) For the purposes of subsection (1A)(b) whether steps which a worker took (or proposed to take) were appropriate is to be judged

by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) A worker is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1A)(b) if the employer shows that it was (or would have been) so negligent for the worker to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.

(4) This section does not apply where the worker is an employee and the detriment in question amounts to dismissal (within the meaning of Part X).

Section 100 - Health and safety cases

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

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

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c) being an employee at a place where—

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

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

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

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

108. When considering claims under these sections, the starting point (stage one) is to examine if the requirements that are described in section 44 and 100 are made out. By this we mean we need to go through the requirements in the relevant subsection to decide if the Claimant's conduct was in line with the relevant section and took place in the circumstances described there.

109. Judicial consideration has been given to these sections in various cases. Essentially the decisions tell us that each case turns upon its own facts, but the relevant tests incorporate a requirement to identify the Claimant's subjective belief and then to examine whether it was objectively reasonable for him to hold that belief, based on his circumstances and his knowledge and experience and the advice available to him. We do not need to make a finding that there were circumstances which were harmful or potentially harmful to health or safety (sub-section 44(c) and sub-section 100(c)) or that the employee was in serious and imminent danger (sub-section 44(1A) and sub sections 10(1)(d) and 10(1)(e) for an employee to succeed in a claim.

These may, however, be relevant matters in determining the objective reasonableness of the employee's belief.

110. We also need to determine if the treatment that the Claimant says he was subjected to by the Respondent actually occurred and, in a detriment case, decide if that treatment constituted a detriment (stage two).

111. The term "detriment" is not defined in the Employment Rights Act 1996. Tribunals have therefore looked to the meaning of detriment established by discrimination case law when considering cases under section 44. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 it was held that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. This is the way we have applied the term.

112. It is not sufficient, however, for the Claimant to succeed at stage one and stage two, as there is a third stage. The Claimant must show a causal link between his conduct and the treatment by the Respondent. If there is another reason why the Respondent treated the Claimant in the way it did, the claim will not succeed. This requires an enquiry into what facts or beliefs caused the decision-maker to act.

113. There are different tests for causation in detriment and dismissal cases. For the detriment complaints in this case, the test we considered applied is whether the Claimant's has materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the employee. This is based on the case law authority of *NHS Manchester v Fecitt and others* [2012] IRLR 64, CA. Although a protected disclosure case, we considered the principle stated in it also applied to complaints pursued under section 44.

114. Causation in a complaint of dismissal is determined by the wording of section 100 which requires the Claimant's conduct to be "the principal reason" for the dismissal. This is a more onerous requirement than "material influence".

115. There is also a fourth stage in cases involving section 44(1A)(b) and section 100(1)(e) which requires the tribunal to examine whether, even if the requirements of the section are met and the Claimant was subjected to a detriment or dismissed because of the actions he took, the employer has a defence. The employer will have a defence if it can show that the employee's behaviour was 'so negligent' that the steps the employer took were justified.

Claims Based on Protected Disclosures under the Employment Rights Act 1996

116. Section 47B ERA 1996 gives an employee the right not to be subjected to a detriment on the ground that he has made a protected disclosure. Further information about the legal test as to what constitutes a protected disclosure is set out below.

Section 47B in full says the following:

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

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker ….. is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

117. Where an employee is bringing a claim for a detriment against his employer, this is pursued under section 47B. However, here the detriment complained of is dismissal, the employee must pursue the complaint against his employer as one of automatic unfair dismissal by virtue of section 47B(2).

118. This is done under Section 103A of the Employment Rights Act 1996. It provides that **"***An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure*".

119. Claims based on the making of a protected disclosure can also be brought by employees against their work colleagues by virtue of section 47(1A). Section 47(1B) tell us that an employer is also vicariously liable for the detriment meted out by any of its employees, subject to the provisions of sub-sections 47(1C) to (1E).

120. The additional sub-sections potentially give the employer and separately the work colleague a defence to being held liable. For the employer, the defence arises where the employer can show it took all reasonable steps to stop the work colleague from acting as they did. For the work colleague, the defence relies on them being able to say they were following their employer's instructions and it was reasonable for them to do so.

121. In common with the situation that arises where there are claims for detriment under section 44 and dismissal under section 100, where there are claims for detriment and dismissal on the ground of a protected disclosure, a different legal test applies when establishing causation.

122. In a detriment case under section 47B(1) or (1A), the test is whether the employee's protected disclosure materially influenced the treatment of the employee, whether this the treatment by the employer or work colleague. Where the claim is one of dismissal under section 103A, the test is whether the protected disclosure was the principal reason for the employer's decision to dismiss the claimant. as noted above, the causation test in a detriment case under section 47B is less onerous than that in a dismissal case.

123. As explained above, however, where the detriment complained of against an individual respondent is dismissal, this continues as a detriment claim under section 47B(1B). The causation test that is applied is the less onerous test of material influence. This means the employer will be liable, for dismissal if the case is made out on the less onerous tests of causation and there is no defence under section 47B(1D).

What Constitutes a Protected Disclosure?

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

125. Section 43B(1) says a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

Disclosure of Information

126. There must be a disclosure of information. In *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, the EAT held that to be protected a disclosure must involve information, and not simply voice a concern or raise an allegation.

127. The court of appeal has subsequently cautioned tribunals against treating the categories of "information" and "allegation" as mutually exclusive in the case of *Kilraine v London Borough of Wandsw*orth [2018] EWCA Civ 1436. At paragraphs 30 -31, Sales LJ says:

"*I agree with the fundamental point …….. that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. …….Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. ……*

On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision."

128. He goes on to say at paragraph 35:

"*In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection [43B](1).*"

129. A disclosure may concern new information, in the sense that it involves telling a person something of which they were previously unaware, or it can involve drawing a person's attention to a matter of which they are already aware (section 43L(3), ERA 1996).

130. It is important that the tribunal take into account what was said as a whole, rather than take a fragmented view of individual communications (Norbrook Laboratories (GB) Ltd v Shaw 2014 ICR 540, EAT).

Reasonable Belief

131. It is not necessary for it to be true that the relevant failure that is the subject of the Claimant's protected disclosure needs to have occurred, be occurring or be likely to occur (*Darnton v University of Surrey* 2003 [ICR] 615, EAT; *Babula v Waltham Forest College* [2007] ICR 1026, CA).

132. The test is whether the Claimant reasonably believes the information shows this. The requirement for reasonable belief requires the tribunal to identify what the Claimant believed and to consider whether it was objectively reasonable for the Claimant to hold that belief, in light of the particular circumstances including the Claimant's level of knowledge. (*Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4, EAT).

Public Interest Test

133. The leading case dealing with when the public interest test is met is *Chesterton Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2017] EWCA Civ 979. The Court of Appeal confirmed that where a disclosure relates to a breach of the worker's own contract of employment, or some other matter under section 43B(1) where the interest in question is personal in character, there may be features of the case that make it reasonable to regard the disclosure as being in the public interest as well as in the personal interest of the worker.

Asserting a Statutory Right Under the Employment Rights Act 1996

134. Section 104(1) to 104(3) of the Employment Rights Act 1996 say:

> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—*
>
> *(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*
>
> *(b) alleged that the employer had infringed a right of his which is a relevant statutory right.*
>
> *(2) It is immaterial for the purposes of subsection (1)—*
>
> *(a) whether or not the employee has the right, or*
>
> *(b) whether or not the right has been infringed;*
>
> *but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.*

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

135. Section 104(3)(a) tells us that relevant statutory rights for the purposes of this section include any right conferred by the Employment Rights Act 1996 which can be pursued as a claim in an employment tribunal whether by way of a complaint or a reference. This would include the right to a pay statement referred to below.

The Right to a Pay Slip

136. Under the Employment Rights Act 1996, employees are entitled to be given a pay slip. The terminology in the legislation is to a pay statement but it amounts to the same thing.

137. The basic right is found in section 8(1) and says:

(1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

138. The rest of section 8 sets out what information the pay statement should include.

139. A failure by an employer to provide a pay slip can be pursued as a claim to an employment tribunal, but not by way of a complaint. Instead, section 11, where this matter is covered, gives employees the right to pursue a claim by way of a reference.

140. Specifically, the section says:

(1) Where an employer does not give a worker a statement as required by section ….8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.

(2) Where—

(a) a statement purporting to be ….a pay statement or a standing statement of fixed deductions purporting to comply with section 8 …., has been given to a worker, and

(b) a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part,

either the employer or the worker may require the question to be referred to and determined by an employment tribunal.

Pension Contributions Claim

141. A claim that pension contributions should have been paid into a pension scheme on behalf of an employee has to be pursued a claim of breach of contract. Whether the employee has a contractual right to pension membership and pension contributions will be key.

142. Under the Pensions Act 2008 employers are obliged to set up pension schemes for employees and automatically enrol them into the scheme if they are earning above a set threshold. Enrolment should take place either within three months of the employee's start date or their twenty- second birthday whichever is later. Once automatically enrolled, the employer and employee are required to pay set pension contributions into the scheme.

143. Where an employer fails to automatically enrol an employee into its pension scheme, the employee's remedy, as set out in the Pensions Act, is to pursue a complaint to the Pension Regulator. The only complaints that can be pursued in an employment tribunal are complaints under section 55 or section 57 of the Pensions Act 2008, namely the right not to suffer a detriment or be dismissed because the employee makes a complaint to the Pension Regulator.

Wrongful Dismissal

144. A claim of wrongful dismissal is simply a claim that an employee's contract of employment has been terminated in breach of the terms of that contract.

145. In a case such as this where no notice of termination has been given, the employer may be relying on the express provisions of the contract which enable termination without notice or an inherent right to terminate the Claimant's employment because the Claimant's conduct amounts to a repudiatory breach to a repudiatory breach of the contract of employment entitling the respondent to terminate that contract without notice.

146. When considering a claim for wrongful dismissal, the tribunal must ask itself was the Claimant actually guilty of the conduct leading to the termination. We must be satisfied, on the balance of probabilities, that the Claimant's behaviour was within the express terms of the contract or was so serious that there was an actual repudiatory breach by the Claimant. It is not enough for the respondent to prove that it had a reasonable belief that the Claimant was guilty of such serious misconduct.

147. We must also be satisfied that the Respondent did not choose to waive its right to terminate through delay. This will not arise, however, in a case where there is a delay between the conduct and the termination, where the Respondent has sufficiently reserved its position with regard to the right to terminate summarily.

Time Issues

148. The normal time limit for a claim of detriment under sections 44 and 47B of the Employment Rights Act 1996 is found in section 48(3) of the same act. That section says:

An employment tribunal shall not consider a complaint under this section unless it is presented—

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

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

149. Section 48(4) adds that for the purposes of subsection 48 (3):

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

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer …..shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

150. The extension to time test is a strict two stage test. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the Claimant.

151. The factors that can be taken into account will vary from case to case (*Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470).

ANALYSIS AND CONCLUSIONS

Introduction

152. The Claimant has brought various and, in some cases, overlapping complaints. We therefore gave careful consideration to how best to approach the complaints and in what order.

153. The largest part of his claim was that he was subjected to treatment (detriments and dismissal) by the Respondents as a result of him having taken certain actions in the interests of health and safety (which we have called his health and safety actions for the sake of ease of reference) and/or making disclosures (protected disclosures) which gave him legal protection and/or because he asserted the statutory right to receive a payslip at the time he received his monthly salary.

154. His complaints could only succeed if he established the following:

    (a) Whether he actually the health and safety actions and/or made the relevant disclosures he says he made, and if so, whether the strict conditions in sections 44, 100, 43 and 104 of the Employment Rights Act 1996 were made out;
    (b) The treatment (detriment/dismissal) he complained about actually occurred and constituted a detriment; and
    (c) There was a causal link between the actions and/or disclosures he took or made and the treatment he suffered.
    (d) The Respondents could not reply on any defences provided for in the relevant sections.

155. We began our analysis by first deciding the first part set out in (a). We then considered (b) and (c) together differentiating between detriments and dismissal because of the different causation tests involved. Where required, we then also considered (d).

Analysing if the Requirements of Sections 44/100 and 47B/103 of the Employment Rights Act 1996 were met – Issues 5, 8 and 11

156. There was significant overlap between the Claimant's complaints under sections 44/100 and 47B/103 of the Employment Rights Act 1996, regarding the purported disclosures at paragraphs 5(a)(i) – (iii) and 8(a)(i) – (iii). There was further overlap regarding the disclosures and the Claimant's actions referred to in paragraphs 5(b)(i) - (ii) and 5(c) (i) –(iii) and in relation to the disclosure at paragraph 8(a)(xiii) and the assertion of a statutory right set out in paragraph 11. We therefore considered all of these complaints together, albeit that when doing so, we were mindful of the different legal tests that applied.

157. We found that the most logical way to approach the various matters was to consider them separately by subject matter. This left us with three broad subject areas: asbestos, the company van and pay slips.

Asbestos

158. We took judicial notice of the considerable dangers of exposure to asbestos, although we did not believe this was a matter that was in principle disputed by the Respondents. Our understanding is that such exposure is potentially lethal and therefore it is not unreasonable for a worker to believe that they would be in serious and imminent danger if they were asked to work at a site where exposure was likely.

159. We found that the Claimant informed Mr Ross on 25 March 2022 that he had taken a sample from the basement at Fanshaw Street which had tested positive for asbestos. He sent Mr Ross the test results by email that day. They spoke about the test by telephone and WhatsApp messages in the following days and then in person at the new site where Mr Ross asked the Claimant to work.

160. Having obtained a positive asbestos test result, there is no doubt in our mind that the Claimant genuinely believed that he was making a disclosure of information to Mr Ross that tended to show that the health and safety of an individual was at risk, namely someone required to work in the basement. Such a belief was reasonably held in our judgment, because of the positive test result. This was notwithstanding that the test result he had obtained was contradicted by the test results he had seen dated 11 March 2020. Having taken the sample carefully himself, he knew where it had come from, and he trusted the testing company he had used.

161. We also found that he made the disclosure in the public interest. He was concerned for his own position, but also for his colleagues employed by R1 and the other people working on the project. We therefore found that the Claimant made a qualifying protected disclosure as per paragraph 8(a)(i) in the list of issues.

162. The same action by the Claimant was argued to be protected pursuant to section 44(1)(c)/100(1)(c) as per the issue in paragraph 5(a)(i). The gateway provision for this section was met as there was no health or safety representative or committee in R1. We were therefore required to consider whether the Claimant, brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

163. When considering whether the test was met, however, we could not ignore the circumstances of how the test result came to be in the Claimant's possession. This was not simply a case of the Claimant coming across information that he shared with his employer, but a case where the Claimant actively acted behind his employer's back to get the testing done. This overlapped and in our judgment was effectively subsumed by issue 5(c)(iii).

164. The legal test engaged by issue 5(c)(iii) is found in section 44(1A) (b) /100 (1)(e) Employment Rights Act. It is met if, in circumstances of danger which the Claimant reasonably believed to be serious and imminent, he took appropriate steps to protect himself or other persons from the danger.

165. In light of the overlap between the issues and the sections, we first asked ourselves whether the Claimant reasonably believed that working in the basement presented a serious and imminent danger to himself or others and if, so, was taking a sample himself an appropriate step in the circumstances. Had we not found in his favour applying this test, we would have further considered whether the test in section 44(1)(c)/100(1)(c) was met. In our judgment, however, having answered the first question positively we did not consider we needed to separately answer the second question.

166. The reason our decision was that the test in section 44(1A)(b)/100(1)(e) was met was because of the particular circumstances in this case. We add that, we anticipate it would only be in the rarest of circumstances that a tribunal would endorse a worker taking their own sample to be tested. Even where a company is small and lacks health and safety procedures such as here with R1, we would normally expect a worker to raise the issue as a concern and ask their employer to undertake testing.

167. Our reasoning is underpinned by our view that being asked to work in an environment where there is likely to be asbestos will always present serious and imminent danger. Our focus in this case was on how reasonable it was for the Claimant to believe that asbestos was present in the basement and the appropriateness of the step he took in light of the background facts.

168. In this case, the Claimant's concerns about the potential for asbestos in the basement had been held for a considerable period of time. He had raised concerns in April and December 2021. We add that we do not find that the manner in which he raised these concerns leads us to conclude that the legal test for issue 5(b)(i) is met. This would have required us to make a factual finding that the Claimant actively refused to work in the basement prior to March 2020 which was not the case. Instead, we found that there was an ongoing discussion about the possibility of there being asbestos in the basement. The Claimant did not have to take a dramatic stance however, and the matter did not come to a head as Mr Ross shared this general concern and there was other work to be done at the property.

169. The matter did come to a head, however, when Mr Ross was sent the test results by his client on 11 March 2022. At this point, Mr Ross was satisfied that it was safe to work in the basement, but the Claimant was not.

170. In light of the earlier test results, we have given careful consideration to the question of whether it was reasonable for the Claimant to continue to believe that the basement was likely to contain asbestos. He held this view because everyone had agreed at the earlier stages that there was a possibility of finding asbestos given the history of the building. In addition, the Claimant, based on his own observations of the state of the basement, was not convinced that the attempt to clear the basement had been conducted effectively. He expected to see more than the basic test results provided by the client. We consider that his view that the test results only meant that the two samples that had been tested were clear of asbestos and that this could not be extrapolated to the whole basement, was a reasonable one for him to hold in our judgment.

171. We found that the Claimant sought to discuss his concerns with Mr Ross prior to going behind his back to take the sample, but Mr Ross was not receptive to further discussions and so the Claimant needed to present him with some proof. In such a circumstance and given that there is no legal bar to an individual taking their own asbestos sample, we find that the step he took was appropriate in the particular circumstances.

172. Thereafter, nice he had obtained the positive asbestos result, it was reasonable for the Claimant to believe that the basement contained asbestos and that therefore working in it would put himself in circumstances of imminent and serious danger. The Claimant did refuse to work in the basement from then on and so issues 5(b)(ii) and (c)(ii) are made out.

173. On 21 July 2022, the Claimant was faced with a new scenario of working with possible asbestos without the correct PPE. He objected to this and made it clear that his objection was made out of health and safety concerns. The circumstances were such that it was reasonable for the Claimant to conclude that there was a risk of exposure to asbestos as he was not in advance told that the flash guards contained asbestos, Mr Ross had not checked that he had been trained on dealing with such flash guards before sending him to do the job and the Claimant was sent to the job without Mr Ross ensuring he had the correct PPE.

174. We find that when the claimant raised this matter via WhatsApp on 21 July 2022 in the terms he did, he was making a qualifying protected disclosure. The issue at 8(a)(ii) is therefore made out as well as the issue at 5(a)(ii).

175. Finally, in his communication of 3 August 2022, the Claimant included a clear disclosure that he considered that his relationship with Mr Ross had deteriorated since he raised concerns about working in the basement at Fanshaw Street. He was aware that work was ongoing in the basement and raised this as one of the points in this email. We find that the meaning of his comment was clear based on the background. This was a qualifying protected disclosure and therefore the issues at 5(a)(iii) and 8(a)(iii) were made out.

Vehicle Concerns

176. The Claimant first raised the fact that the company van he was using had not an MOT on 11 July 2022. On h17 July 2020 e raised the fact that the van had not been serviced for a lengthy period of time. Strictly speaking, he did not raise the issue of the MOT on 17 July 2022, but that communication did reference the lack of a service and his 3 August 2022 communication covered both matters.

177. His concerns were in part related to health and safety, because he obviously did not want to be driving a vehicle that was unsafe, but were also raised because of concerns about the implications for him if he was caught by police driving a vehicle without a valid MOT. The fact that he had another concern and was not purely driven by health and safety, does not prevent the circumstances meeting the legal test in section 44(1)(c) / 100(1)(c). We therefore found that issues 5 (a)(iv) – (v) were made out.

178. We did not, however, find that issue 5(a)(vi) was made out. The claimant did raise the fact that the company vehicle had been damaged from an accident where Mr Ross was the driver in his communications with Mr Ross on 17 July 2022 and 3 August 2022. The reason he did, this was because he considered it was unfair to require him to pay for all the damage to the company van. He did not raise this because of any health and safety concern.

Payslips – Issues 8(a) (xii) and 11

179. Employees have a statutory right to be provided with an itemised payslip at the time they are paid under section 8 of the Employment Rights Act 1996. This is primarily to enable them to understand what deductions have been made to their gross pay.
180. The Claimant raised the fact that he had not received his payslip at the time of receiving his wages several times. Our finding, however, was that it was only on two occasions, namely 17 July 2020 and 3 August 2022 that he asserted that by not providing him with a payslip, the Respondent was acting in breach of a legal obligation to its employees. We consider what he said on these two occasions amounted to him asserting a statutory right.

181. In addition, we found that on these two occasions, the Claimant, also made a protected disclosure. The Claimant raised the issue on his own behalf, but also on behalf of his employed colleagues. We therefore considered the public interest test was met in this case.

Detriments - Issues 14, 15, 16 and 17

182. We next considered whether the treatment alleged to have taken place actually occurred and, if so, whether it was to the Claimant's detriment. Where we found that it was, we considered, what led to the treatment and whether the Claimant's health and safety actions and/or his protected disclosures materially influenced (in the sense of being more than a trivial influence) that treatment.

183. Because the relevant tests the materially influenced test, we consider this allows for there to be potentially more than one material influence.

184. Having adopted a subject matter approach to the Claimant's health and safety actions and disclosures, we cautiously retained that approach here. In determining whether there was a causal link between the Claimant's actions and disclosures, we were mindful of the need to consider what was in the mind of Mr Ross at the relevant time. We considered it unlikely that he separated out the things that the Claimant did from his disclosures, but that instead in his mind he was most likely thinking of the Claimant's in relation to the three subject areas. We did not close our minds to the differentiation between the actions and the disclosures, however, and kept this in mind. It was also necessary for us to retain this distinction because of the need to consider the operation of sub-section 44(3) where relevant.

185. For the most part, however, we did not need to consider the subtle nuances of causation as were able to make clear findings that the purported detriments were wither because of the Claimant's conduct or disclosures or for entirely different reasons.

Issues 14(i), 16(a)(i)

186. The Claimant was instructed to work in the basement at Fanshaw street in March 2020. This would have been to his detriment had he actually worked in the basement, because it appears that there may have been asbestos in the basement. However, having provided the test sample results to Mr Ross, he was not asked to work in the basement and so this detriment did not arise. In any event, the instructions to work in the basement pre-dated any of his health and safety actions, based on our conclusions about them, or protected disclosures. The complainants about this detriment therefore fail.

Issues 14(ii), and 16(a)(ii)

187. On around 22 July 2022, the Claimant was told that the MOT on the company vehicle would be done that weekend, but it was not. This was to his detriment because he had left the vehicle with Mr Ross for the purpose of getting the MOT and he was expecting to get it back, to use in his work within a short time frame.

188. We find that the reason Mr Ross misled the Claimant about the MOT was because Mr Ross had not booked the MOT and did not want to admit this to the Claimant. The failure to book the MOT was not linked to the Claimant's health and safety actions or his protected disclosures, but instead arose because Mr Ross was busy and did not prioritise the MOT.

189. This complaint therefore fails.

Issues 14(iii) and 16(b)(iii)

190. It is factually correct that from 23 July 2022, until the termination of his employment on 30 September 2022, the Claimant was required to use his own vehicle for work purposes as the company vehicle was unavailable. It is important to note that the Claimant stopped carrying out any work for R1 from 3 August 2022 and so he only had to use his own vehicle for the period between 23 July and 3 August 2022. This was to his detriment, however

191. We find that the reason the Claimant was unable to use the company van was because it did not have a valid MOT. It was not because of his health and safety actions or his protected disclosures.

192. This complaint therefore fails.

Issues 14(iv) and 16(b)(iv)

193. It is factually correct that on or around 19 May 2022, 25 May 2022 and 26 May 2022, meetings between the Claimant and Mr Ross were cancelled by

Mr Ross. This was to the Claimant's detriment because he was owed money by R1 and wanted to get the matters resolved.

194. We find that Mr Ross cancelled the meetings in part because he was busy with work. A significant reason however was because he was materially influenced by the Claimant's asbestos-related health and safety actions and protected disclosures. Mr Ross was particularly unhappy about the Claimant having taken the asbestos sample behind his back and the difficulties this had caused him to have with his client at the Fanshaw Street property. This was why he had moved the Claimant. This had caused a deterioration in their relationship, which had been one of friendship, and led to Mr Ross avoiding meeting with the Claimant.

195. The Respondents did not advance any argument that when taking the asbestos sample, the Claimant acted so negligently that it was appropriate for them to take this action pursuant to section 44(3) of the Employment Rights Act 1996. In our judgment, even if they had such an argument would have failed in relation to this detriment. We could envisage the Respondents potentially successfully arguing that disciplinary action it had taken against the Claimant for his conduct might be justified under section 44(3), but such argument could only really work in connection with a detriment of that nature. We have therefore not felt it necessary to consider sub-section 44(3) in relation to any of the other detriments.

196. This complaint therefore succeeds.

Issues 14(v) and (vi) and 16 (v) and (vi)

197. R1 sent the Claimant two letters, one dated 5 and one dated 8 August 2022 making disciplinary allegations against him and instigating a disciplinary process against the Claimant. The allegations were not well founded, as demonstrated by the fact that they were not upheld, save for the expenses matters about which we have reached our own conclusion below. In our judgment, the treatment was to the Claimant's detriment, albeit that he was to be given an opportunity to respond to the allegations before any disciplinary action would be taken.

198. We consider that the actions of R1 were a direct response to the deterioration in the relationship between Mr Ross and the Claimant which had begun with the asbestos matter in March 2022. The letter that the Claimant sent to Mr Ross on 3 August 2022 contained a number of complaints and was not solely focussed on raising asbestos-related or vehicle-related health and safety concerns.

199. In our judgment, the Respondents' reaction, namely, to initiate a disciplinary process, was a reaction to the letter in its entirety. It arose primarily because Mr Ross was unhappy about the Claimant having escalated his concerns about various matters to a more formal level. He considered their relationship had deteriorated to the point it had become unsustainable.

200. In our judgment, however, the causal link between the Claimant's asbestos -related health and safety actions and protected disclosures is sufficient for

the materially influenced test to be met and therefore for the Claimant to succeed with these overlapping complaints.

201. These complaints therefore succeed.

Issues 14(vii) and 16(b)(vii)

202. It is factually correct that R1 did not hear the Claimant's grievance in full prior to dismissing him. The grievance was submitted on 17 July 2022. The Claimant was not invited to a grievance hearing until much and did not receive a grievance outcome until mid December 2022. If the Claimant had been in a position to pursue a claim of ordinary unfair dismissal, this is a matter that would have concerned us from a procedural perspective, but we do not consider it added an extra detriment in the current case. The Claimant's did receive an outcome to his grievance. Given that Mr Ross was responsible for making the decision to dismiss the Claimant and deciding his grievance, our view is that changing the order in which he did these things was unlikely to make any difference.

203. This complaint therefore fails as there was no detriment.

Issues 14(viii) and 16(b)(viii)

204. It is factually correct that on or around 21 August 2022 R1 and R2 removed the Claimant from the work group WhatsApp chat. We do not consider this was a detriment to the Claimant at the time as he was on paid leave and so did not need to have access to the group's messages about work.

205. This complaint therefore fails as there was no detriment.

Issues 14 (ix) and 16(a)(ix)

206. It was factually correct that the Claimant received his August 2022 a few days later than they should have been paid. This was true for all of R1's employees and was due to a mistake having been made by R1's accountant.

207. These complaints therefore failed.

Issues 14(x) and 16(b)(x)

208. From approx. April 2022, R1 and/or R2 did not reimburse C for outstanding expenses which C claims he reasonably incurred in carrying out his duties (paragraph 5(a)-(c)). On 25 April 2022, C sent R2 (via WhatsApp) a list of what was owing to him (£1,813.01). On 27 April 2022, R2 paid C £550. On 12 May 2022, C sent further receipts on further expenses (another £186.88 on materials and £133.95 on fuel).

209. The Respondent admits that it has failed to pay the Claimant expenses that it owed him on termination. There were several reasons why the Respondents did not make payment to the Claimant. At the start of the relevant period, Mr Ross did not want to pay the Claimant until he had had

an opportunity to make a proper record of what he was claiming. This was a legitimate action for him to take and overdue in our judgment. He was also having some cash flow issues as evidenced in his message to the Claimant when he said he needed to get some invoices paid before he could pay the Claimant. Finally, the Claimant and Mr Ross had not agreed the amount that should be deducted for the van damages and this meant that the amount Mr Ross owed the Claimant was not clear. From the point of the Claimant having been dismissed, the reason changed and became because of the claim and ongoing tribunal procedures.

210. Although, this latter issue in particular is an unsatisfactory explanation for the Respondents conduct, we find that it is a legitimate explanation and was not materially influenced by the Claimant's health and safety actions or protected disclosures.

211. This complaint therefore fails.

Issues 14(xi) and 16(b)(xi)

212. It is admitted that the Respondents did not pay the Claimant in respect of accrued, untaken holiday on termination. The Respondents' explanation was that they intended to pay the Claimant's holiday pay on termination, but failed to do so for the same reason as they failed to pay the Claimant's outstanding expenses, namely because he then commenced the Acas conciliation process and issued proceedings against them. Although, as above, this is an unsatisfactory explanation for the Respondents conduct, we find that it is a legitimate explanation and was not materially influenced by the Claimant's health and safety actions or protected disclosures.

213. This complaint therefore fails.

Issues 14 (xii) and (xiii) and 16(b)(xii) and (xiii)

214. The Claimant made a subject access request on 18 August 2022. On 17 December 2022. R1 did not respond until 17 December 2022. In that response, R1 said that it considered the request was manifestly unreasonable and it would not be sending the Claimant any documents.

215. We do not consider this was because of the Claimant's health and safety actions or disclosures. Our finding is that the Respondents were unfamiliar with dealing with subject access requests and did not know what was required.

216. These complaints therefore fail.

Dismissal – Issues 7, 7a, 10, 13, 16(b)(xiv), 17

217. Turning to the issue of the reason for the Claimant's dismissal, our decision is that Mr Ross was materially influenced by the Claimant's protected disclosures when deciding whether or not to dismiss him. Neither Respondent argued that R1 should not be held liable for the dismissal or that Mr Ross should not be held personally liable. Given the relationship

between Mr Ross and R1, we cannot see that such an argument would have succeeded in any event. Liability for the dismissal therefore rests with both R1 and Mr Ross.

218. The reason we are reached this decision are because of the close proximity in time from the Claimant's last protected disclosure on 3 August 2022 and the decision to initiate a disciplinary process against him. Although as noted above, we consider Mr Ross was not solely motivated to commence disciplinary process by the Claimant's earlier protected disclosure, the legal threshold for establishing a causative link between them and the process is made out.

219. Having initiated that process, we consider it was a forgone conclusion that Mr Ross would take the decision to dismiss the Claimant. The Claimant was able to defend himself against most of the allegations made against him. However, the nature of the allegation relating to his March expenses and the manner in which it was put, were inherently unfair.

220. The Claimant had never been required to keep a record to his mileage and had not been given any written policy relating to expenses. However, several months after he submitted a claim that he understood to be approved, he was suddenly, out of the blue, faced with having to justify his conclude against an extremely serious allegation. This meant that the Claimant was least able to defend himself. Mr Ross relied on the flimsiest of evidence to justify termination of the Claimant's employment and gave no consideration to the defence he offered. The appeal conducted by Ms O'Meara was, in our judgment, designed to try and make the dismissal appear fair, but failed to give any genuine consideration to the arguments the Claimant was making. This leads us to believe that all Mr Ross and Ms O'Meara cared about was trying to establish a justification for termination.

221. Having found in favour of the Claimant in relation to this compliant, it has not been necessary for us to consider his other complaints relating to his dismissal.

Wrongful dismissal – Issues 19 and 20

222. Under the Claimant's contract of employment, R1 was only entitled to terminate his employment without notice where these was just cause. Without just cause it needed to give the Claimant two weeks' notice.

223. The Respondent's case was that just cause existed because it found the Claimant guilty of gross misconduct.

224. Having reviewed the evidence available to us at the hearing, our decision is does not support a finding of gross misconduct. Our decision is that there was no evidence that the Claimant's claims for fuel for March 2022 were made fraudulently.

225. We find that the Claimant submitted fuel receipts for each occasion that he filled up the company van. The Respondent presented no evidence to us

that the Claimant did not use the fuel he bought for any reason other than to drive to and from work and for work-related journeys. Although the Claimant's own mileage calculations did not cover the entirety of the amount he claimed, he only undertook these calculations in early December 2020 relying on his memory to try and reconstruct the journeys he had undertaken some nine months earlier. In our judgment, the calculations were sufficient for us to treat as evidence that his mileage claims were genuine and therefore that he was not guilty of any fraudulent or dishonest behaviour.

226. He was therefore wrongfully dismissed as he was entitled to two weeks' notice of termination under his contract of employment, but was not given this.

Pension Enrolment – Issue 21

227. We have decided that the tribunal does not have jurisdiction to decide this issue. This is because the enforcement of compulsory enrolment in pension schemes in individual cases is a matter that comes under the remit of the Pensions Regulator.

Failure to provide a payslip - Issues 26 and 27

228. The Claimant accepted in evidence that he received all his payslips from R1, albeit that some of there were provided a few days after he was paid.

229. As noted above, employees are entitled to an itemised pay statement under section 8 of the Employment Rights Act 1996. Section 11 of the same Act, allows employees to bring a claim in connection with an employer's failure to provide an itemised payslip. The relevant provisions are set out above in the section on the law.

230. In our judgment, they are very specific and only allow an employee to ask the employment tribunal to decide what a pay slip, that has not been provided at all, or has been provided but does not contain the correct information, should have included. There is no separate standalone right that is relevant to a case such as this where the Claimant's complaint is about his payslips being slightly delayed. This therefore complaint does not succeed.

Time

231. Based on our findings in relation to the detriment complaints, the only detriment complaint that has succeeded that is potentially out of time is the detriment numbered 14(iv) and 16(iv). Our finding is that the failure by Mr Ross to hold the meetings he had proposed on 19, 25 and 26 May 2022 was directly linked to the subsequent disciplinary process and dismissal. It therefore forms part of a series of detriments which ended with the dismissal. The Claimant's complaints about this detriment is therefore in time.

_____

Employment Judge E Burns
24 November 2023

Sent to the parties on:

.24/11/2023

For the Tribunals Office