EMPLOYMENT TRIBUNALS

Claimant: Graham Marsh

Respondent: Openreach Limited

Heard at: Manchester

On: 3, 4, 5, 6, 7 and 10 July and 18 December 2023 with parties, 24 October and 3 November 2023 panel only in chambers.

Before: Employment Judge Cookson
Mr B Rowen
Mr A J Gill

REPRESENTATION:

Claimant: Mr A Marshall (Counsel)
Respondent: Miss M Martin (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of being subjected to detriment for making a protected disclosure contrary to s47B of the Employment Rights Act 1996 is not well-founded and is dismissed.

2. The complaint of failure to make reasonable adjustments for disability in accordance with s20 and 21 of the Equality Act 2010 is not well-founded and is dismissed.

3. The complaint of unfair dismissal contrary to s103A of the Employment Rights Act is not well-founded and is dismissed.

4. The claimant was unfairly dismissed contrary to s94 of the Employment Act is well founded.

5. The complaint of breach of contract in relation to notice pay is well-founded.

REASONS

Introduction

1. These reasons explain why the Employment Tribunal determined its judgment in this case.

2. Unusually the tribunal notified the parties of its decision on 18 December 2023 but did not give any oral reasons. The reason for that was that the judge had technical difficulties with her laptop leaving her unable to retrieve her notes. The parties were informed what the panel had determined in relation each to each complaint. The judge apologises to the parties for the convenience the technical difficulties caused.

3. The claimant in this case, Mr Marsh, is 61 years of age. He is referred to as "the claimant" throughout these reasons. He was employed by the respondent from September 1999 until 27 July 2021, latterly as a Hoist Operator. On 24 August 2021 he began early conciliation following his dismissal and an ACAS certificate was issued on 1 October 2021. A claim was lodged with the Employment Tribunal on 26 October 2021 against the respondent bringing complaints of (as recorded in the agreed list of issues):

    a. Automatically Unfair Dismissal on the grounds of making a qualifying disclosure S103A ERA 1996
    b. In the alternative Unfair dismissal pursuant to S95 and S98 ERA 1996
    c. Failure to make reasonable adjustments pursuant to s.20 EqA 2010;
    d. Detriment contrary to S47B ERA 1996
    e. Wrongful dismissal

4. The respondent denies all claims. It asserts that the claimant was dismissed for a fair reason, namely gross misconduct, which entitled the respondent to summarily dismiss the claimant.

5. In terms of the disability claim, the respondent has accepted that the claimant was a disabled person at the material time by reason of degenerative changes in his right knee and it also accepts that it had knowledge of the claimant's disability at the material time.

Documents considered in reaching our judgment

6. In reaching our judgment the Employment Tribunal has considered:

    (1) A joint bundle of documents prepared by the respondent which runs to some 580 pages to which a small number of additional documents were added in the course of the hearing;

    (2) Evidence in witness statements and given orally for the respondent by:

(a) Mr Graham Prior, a Patch Manager;

(b) Mr John Davison, a Patch Manager; and

(c) Bradley Jobson, a Senior Manager.

(3) The evidence given in the claimant's witness statement and orally by him;

(4) Written and oral submissions from the respondent and oral submissions from the claimant.

7. There had been a case management hearing in this case on 5 August 2022. The summary of that hearing notes that the parties had agreed a List of Issues and Employment Judge Leach had directed them to make some amendments to the list presented but he had otherwise been satisfied to leave the completion of the List of Issues to the parties. Unfortunately, the List of Issues presented to this Tribunal was not helpful and did not appear to correctly record the potential claims. After some discussions about the relevant claims the Tribunal undertook its reading and counsel for the parties were able to agree a List of Issues overnight. It is that List of Issues which we used to determine this claim. For ease of reference, it is included in the Annex to these Reasons.

The Relevant Law

The Equality Act 2010 complaint

Failure to make reasonable adjustments.

8. The Equality Act (EqA) imposes a duty on employers to make reasonable adjustments for disabled people. The duty comprises three requirements. In this case it is the first requirement that is relevant. This is set out in sub-section 20(3) and references to A are to an employer.

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

9. Paragraph 20(1)(b) of Part 3 of Schedule 8 of the Equality Act says that the duty to make reasonable adjustments does not arise if the employer: "does not know and could not reasonably be expected to know –

(b) …that an interested person has a disability and is likely to be placed at the disadvantage referred to…

10. S21 of the Equality Act provides

"Failure to comply with duty

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

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

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

11. It is for the claimant to show that the "provision, criterion or practice" (a "PCP") it is alleged they have been subject to. The term is not defined in the EqA. However, some assistance as to the meaning of 'PCP' is afforded by the EHRC's Employment Code, which states that the term 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A [PCP] may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision' (para 4.5).

12. Where a disabled person claims that a practice (as opposed to a provision or criterion) puts him or her at a substantial disadvantage, the alleged practice must have an element of repetition about it and be applicable to both the disabled person and his or her non-disabled comparators. It is common for complaints to be raised about decisions where it might not be clear whether this part of a "practice".

13. ***Ishola v Transport for London*** 2020 EWCA Civ 112, CA, is a case about a claimant who argued that requiring him to return to work without a proper and fair investigation into his grievances was a PCP which put him at a substantial disadvantage in comparison with persons who are not disabled. An employment tribunal found that this was a one-off act in the course of dealings with one individual and not a PCP. After that was upheld by the EAT, the Court of Appeal looked at the extent to which all "one-offs" could be said to be practices.

14. Lady Justice Simler accepted that the words 'provision, criterion or practice' were not to be narrowly construed or unjustifiably limited in their application, but she identified that it was significant that Parliament had chosen these words instead of 'act' or 'decision'. Her explanation is helpful. *"As a matter of ordinary language, it was difficult to see what the word 'practice' added if all one-off decisions and acts necessarily qualified as PCPs. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The act of discrimination that must be justified is not the disadvantage, but the PCP. To test whether the PCP is discriminatory or not it must be capable of being applied to others. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words 'provision, criterion or practice' all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would*

be treated if it occurred again. Although a one-off decision or act can be a practice, it is not necessarily one."

15. In terms of how we should assess whether an adjustment is reasonable for not the statutory Equality Act 2010 Code of Practice relating to discrimination in the workplace. The Code of Practice says this,

"What is meant by 'reasonable steps'?

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25 Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff –and so may still be a reasonable adjustment to have to make.

…..

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- *whether taking any particular steps would be effective in preventing the substantial disadvantage*
- *the practicability of the step;*
- *the financial and other costs of making the adjustment and the extent of any disruption caused;*
- *the extent of the employer's financial or other resources;*
- *the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*
- *the type and size of the employer.*

6.29 Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

Can failure to make a reasonable adjustment ever be justified?

6.30 The Act does not permit an employer to justify a failure to comply with a duty to make a reasonable adjustment. However, an employer will only breach such a duty if the adjustment in question is one which it is reasonable for the employer to have to make. So, where the duty applies, it is the question of 'reasonableness' which alone determines whether the adjustment has to be made."

The complaints under the Employment Rights Act 1996 (" the ERA")

Protected Interest Disclosures "Whistleblowing" (Section 43A of the Employment Rights Act 1996)

15 A protected disclosure is a 'qualifying disclosure' (a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'relevant failures' set out in section 43B has occurred, is occurring or is likely to occur); which is made in accordance with one of six specified methods of disclosure set out in sections 43C to 43H.

16 In this case the claimant says that he made qualifying disclosures that he reasonably believed to be disclosures of information that were made in the public interest and tended to show the relevant failures set out in subsections 43B(1) (d) that is "that the health or safety of any individual has been, is being or is likely to be endangered".

17 The method of disclosure relied on by the claimant is section 43C, this section provides that a qualifying disclosure is a protected disclosure if it is made to the worker's employer.

18 Section 43B(1) requires both that the worker has the relevant belief, and that their belief is reasonable. This involves a) considering the subjective belief of the worker and also b) applying an objective standard to the personal circumstances of the worker making the disclosure.

Unfair dismissal – s94 and s98 and s103A

Reason for dismissal

19 Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of a complaint to the Tribunal under section 111. An employee must show that they were dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant within section 95(1)(a) of the ERA.

20 It is for the employer to show that it had a potentially fair reason for dismissal in any case where a dismissed employer has more than 2 years continuous service.

21 Section 98(1)

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

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

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

22 Valid reasons include that it relates to the employee's conduct or capability. If those, or some other substantial reason, is shown, s98(4) is engaged:

"Where an employer has fulfilled the requirements of subsection (1), the determination of .. whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

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

Automatically unfair dismissal – "whistleblowing"

23 Section 103A Employment Rights Act 1996 ("Protected disclosure") provides

"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."

24 Section 103A ERA recognises that there may be more than one reason for a dismissal. An employee will only succeed in a claim of unfair dismissal under s103A if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure. The principal reason is the reason that operated on the employer's mind at the time of the dismissal. The question of whether the principal reason for dismissal was a protected disclosure is a question of fact. As a tribunal we must ask ourselves why did the person responsible for dismissal act as they did? What, consciously or unconsciously, was their reason and in that context, it is helpful to bear in the guidance provided to the tribunals in relation to victimisation under discrimination legislation which is also relevant in this case (and in particular ***Chief Constable of West Yorkshire Police v Khan*** 2001 ICR 1065, HL).

25 In terms of the burden of proof, the position under S.103A is the same as that which applies to other automatically unfair reasons for dismissal. The primary burden is on the employer to show the reason for dismissal for the claimant in this case who has more than 2 years' service. In most cases, the employer seeks to discharge this by showing that, where dismissal is admitted, the reason for it was

one of the potentially fair reasons under S.98(1) and (2) ERA. Usually it is the employee who argues that the real reason for dismissal was an automatically unfair reason. That means the employee acquires an evidential burden to show, but without having to prove, that there are facts which suggest that the real reason is the automatically unfair reason advanced. However, once the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer, which must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal — ***Maund v Penwith District Council*** 1984 ICR 143, CA (a case of automatically unfair dismissal for trade union reasons).

26 The burden of proof under S.103A was considered by the Court of Appeal in ***Kuzel v Roche Products Ltd*** 2008 ICR 799, CA. This confirms there is no burden of proof on the claimant to show that their making of protected disclosures was the reason for dismissal. However, if a tribunal has rejected the reason for dismissal advanced by the employer, it is not bound to accept the reason put forward by the claimant. We should adopt a three-stage approach to S.103A claims:

(a) first, the employee must produce some evidence to suggest that his or her dismissal was for the principal reason that he or she had made a protected disclosure, rather than the potentially fair reason advanced by the employer. This is not a question of placing the burden of proof on the employee, merely requiring the employee to challenge the evidence produced by the employer and to produce some evidence of a different reason;

(b) having heard the evidence of both sides, it will then be for the employment tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or reasonable inferences, and

(c) finally, the tribunal must decide what was the reason or principal reason for the dismissal on the basis that it was for the employer to show what the reason was. If the employer does not show to the tribunal's satisfaction that it was its asserted reason, then it is open to the tribunal to find that the reason was as asserted by the employee. However, this is not to say that the tribunal must accept the employee's reason. That may often be the outcome in practice, but it is not necessarily so.

"Ordinary" unfair dismissal

27 In all cases where an employee has more than two years' service, first the employer must show that it had a potentially fair reason for dismissal under section 98(2). In this case the respondent says it dismissed the claimant because it believed that he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2), although of course the reason for the claimant's dismissal was in dispute in this case.

28 If the respondent shows that it had a potentially fair reason for dismissal, the Tribunal must consider whether the respondent acted fairly or unfairly in dismissing for that reason.

29 s98(4) says

"Where an employer has fulfilled the requirements of subsection (1), the determination of .. whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee shall be determined in accordance with equity and the substantial merits of the case."

30 The Tribunal must decide whether the dismissal of the employer was a reasonable response to the misconduct. Reasonable employers will follow principles of natural justice, with decision makers approaching questions in an openminded and fair way, so a decision should not be taken until all the evidence has been considered, decisions must not be pre-judged, and the decision maker must be unbiased and acting as impartially as possible. There should be an impartial appeal. These principles are reflected in the ACAS Code of Practice on disciplinary and grievance procedures.

31 All aspects of the case including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, must be taken into account in deciding whether the employer acted reasonably or unreasonably, and in assessing that the Tribunal must decide whether the employer acted within the range of reasonable responses to the reason for dismissal open to an employer in the circumstances. It is immaterial how the Tribunal itself would have handled events or what decision it would have made, and the Tribunal must not substitute its view for that of the employer.

32 A particular feature of this case was the use of anonymous witness statements. The use of such statements is not dealt with the ACAS statutory code of practice but is referred to in the ACAS guidance on the Code which offers the following guidance to managers preparing for a disciplinary hearing:

"be careful when dealing with evidence from a person who wishes to remain anonymous. In particular, take written statements that give details of time/place/dates as appropriate, seek corroborative evidence, check that the person's motives are genuine and assess the credibility and weight to be attached to their evidence"

33 This broadly reflects the principles set out in ***Linfood Cash and Carry Ltd v Thomson*** [1989] ICR 518, in which the EAT gave obiter guidance on the use of anonymous evidence.

34 The claimant also raises concerns about his suspension. The ACAS code of practice says this about suspension

"8. In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.

Unlawful Detriment

35 The claimant has asserted that he was subject to detriment on the ground of having made a protected disclosure when he was suspended and because he was only contacted once during his suspension.

36 Section 47B of the Employment Rights Act 1996 says

"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."

What does "detriment" mean?

37 The term 'detriment' is not defined in the ERA, but it has a broad scope which has been given extensive consideration in case law and we understand the term to have a similar meaning to the same term in the similar context of the anti-discrimination legislation. ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** 2003 ICR 337, HL tells us that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment, which be applied by considering the issue from the point of view of the worker.

"On the ground of"

38 The test for whether a detriment was done 'on the ground that' the worker has made a protected disclosure or any other protected act, is set out in ***Fecitt and ors v NHS Manchester*** [2012] IRLR 64. What needs to be considered is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the worker. This means in determining the grounds upon which a particular act was done, it is necessary to consider the mental processes both conscious and unconscious of the employer. It is not sufficient to simply apply a 'but for' test to the facts.

39 There must be a causal connection between the employee's protected act or status and the employer's decision. In other word we must ask what was the reason for the employer's act or omission (not the reason for the detriment)? However, the motive behind the employer's act or omission is immaterial, in the sense that it does not matter why the employer should wish to treat a protected employee differently and it does not matter whether there is or is not an intent to discriminate against the protected employee, in the sense that it does not matter whether the employer intended to subject him to a detriment.

The burden of proof in detriment cases

40 This is set out in s48 ERA: Complaints to employment tribunal. Section 48(2) provides

"On a complaint under subsection (1), (1XA), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done."

41 However, s48 does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent must disprove the claim. The

correct approach to drawing inferences in a unlawful detriment claim is set out in ***International Petroleum Ltd and ors v Osipov and ors*** EAT 0058/17:

(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made;

(b) by virtue of s48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does not do so, inferences may be drawn against the employer (or worker or agent);

(c) however, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

42 The tribunal has to determine the reason or principal reason for the detriment on the basis that it is for the employer to show what the reason was. If the employer has not shown to the satisfaction of the tribunal that the reason was that asserted by him, it is open to the tribunal to find that the reason is that asserted by the employee. However, it is not correct to say that the tribunal has to find that if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. It is open to the tribunal to find that the true reason for dismissal was not that advanced by either side. In other words, if a tribunal rejects the reason for dismissal advanced by the employer, a tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party depending of course on the findings of fact made in the case.

Drawing inferences

43 We must be able to draw a causal nexus between the fact of making a protected disclosure and the decision of the employer to subject the worker to the detriment. We recognise that there will often be little or no evidence to show why a worker has been subject to a detriment. Given the importance of establishing a sufficient causal link between the making of the protected disclosure and the detriment complained of, we recognise that it may be appropriate for the tribunal to draw inferences as to the real reason for the employer's (or worker's or agent's) action on the basis of its principal findings of fact. This approach originated in discrimination law (where it has now been replaced by statutory provisions) but has frequently been adopted by tribunals considering claims under S.47B and other unlawful detriment grounds as it fits neatly with the stipulation in S.48(2) that it is for the employer (or worker or agent) to show the ground on which it acted, or deliberately failed to act.

Time Limits s48 Employment Rights Act

(3) 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.*

44 *For the purposes of subsection (3)*

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

(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 do the failed act if it was to be done.

Wrongful dismissal

45 An action for wrongful dismissal is a common law action based on breach of contract. It is very different from a complaint of unfair dismissal. We are not concerned with whether the employer's actions are reasonable. What we have to consider is whether the employment contract has been breached. We must ask ourselves whether the claimant was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?

Our findings in this case

Findings of Fact

46 We made our findings of fact in this case on the basis of the material before us, taking into account contemporaneous documents where they exist. We have resolved such conflicts of evidence as arose on the balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts. We have not made findings of fact about every contested matter of evidence before us but only those which we considered to be relevant and necessary for us to determine the legal claims.

47 As noted, the claimant was a hoist driver. At the time covered by the events in this case he would begin work each day at the Cheetham Hill Telephone Exchange which is relatively close to his home.

48 It was acknowledged by all of the witnesses in this case that the job of hoist driver involves using a potentially dangerous piece of equipment. The hoist drivers support engineers to access telephone lines which are inaccessible – for example because of damage to a pole or obstacles which make it unsafe to use ladders. At the relevant time many of the hoists were attached to vans, but in the claimant's case he had what was described as a "4 x 4 hoist". This meant his vehicle was able to access terrain the ordinary hoist vans would not be able to, for example in

a field, and the claimant also explained that his vehicle was narrower than the ordinary vans which meant his hoist might be useful to access narrow streets and back alleys.

49 All hoist drivers are required to hold particular safety qualifications and accreditations, for example in relation to operating the hoist and managing street safety. They are also provided with safety guidance which was described to us as the "glove box guide". We were told that when a hoist operator arrives at a job they would be required to undertake a risk assessment but no record of that is kept.

50 Precisely how hoist drivers are given work was a matter of some dispute before us, but it was common ground that the hoist drivers and engineers use an internal app called "i-select" which allows a hoist driver to select or pick up work on their smartphones, and another app called "View My Team" which enables engineers and hoist drivers to see their respective locations.

51 There are around 20 hoist drivers across the Manchester and surrounding areas. The claimant was allocated to the North Manchester patch which encompassed Cheetham Hill, Prestwich, Broughton, Collyhurst and Pendleton. The claimant told us that he was mainly expected to provide hoist support to engineers working in that area, but on occasions he might be required to travel outside of his patch. This was perhaps particularly true for the claimant because he had one of the few 4 x 4 hoists at that time. This meant he might be required on occasion to travel outside his patch, including going as far as South Manchester and into Cheshire where the 4 x 4 hoist might be required, for example to access poles in a field.

52 The respondent's witnesses disputed the claimant's description of how work was allocated. The respondent witnesses told us that hoist drivers are expected to work anywhere but Mr Prior who is a Patch Manager, managed engineers within the Cheetham Hill/Swinton patch of Greater Manchester, and he described the claimant as "his hoist operator". The claimant was managed by Mr Prior. Other hoist drivers were managed by other Patch Managers. This supported the claimant's description of hoist drivers largely working within a local area although with a degree of flexibility depending on the work requirements. The hoist drivers who raised a grievance against the claimant: Mr Stuart Collins and Mr James Coffey, were managed by other Patch Managers. Mr Collins was managed by Mr Hudson and was based in Oldham.

The claimant's disability

53 The claimant has experienced degenerative changes in his right knee. As a result, he has received specialist care over a number of years. At the relevant time his symptoms were being managed with steroid injections and anti-inflammatory medication. An Occupational Health report obtained in March 2020 notes that the claimant had been issued with a blue badge because of his mobility difficulties and that the claimant had been told that at some stage he will require a total knee replacement. The Occupational Health report also notes that the claimant has other health conditions, but these were not relied on in terms of the disputes in this case.

The dispute with Mr Collins

54 There was a dispute between the claimant and two of his colleagues, Mr Leigh and Mr Downey on one side; and Mr Collins and Mr Coffey on the other. Mr Collins had previously worked as an engineer but in early 2020 he had been appointed as a permanent member of the hoist driving team. The respondent told us that Mr Collins had been appointed to provide general cover across the whole region, but the claimant told us that Mr Collins was allocated to the Oldham patch. That difference in understanding may explain some of the dispute between the two men, and it is perhaps surprising in light of the events of this case that the line managers never addressed this as it must have been apparent in light of the concerns the claimant raised.

55 We heard conflicting evidence about how work was assigned to hoist drivers each day. What is beyond doubt is that there was a perception on the part of some of the drivers, including the claimant, that Mr Collins was taking more jobs from the app than he should do for his own convenience, essentially creating a list of work he would do over the day rather than taking one job at time. The claimant believed that this meant Mr Collins would allocate work to himself which could be more conveniently taken by other colleagues, and that he perceived Mr Collins was "coming onto his patch" and taking jobs for engineers within the patch that the claimant considered he should have been given. It is clear to the Employment Tribunal that the claimant harboured some resentment of Mr Collins as a result.

56 We had no records to enable us to make findings about precisely what Mr Collins was doing, but it is clear that the managers knew there was this ongoing dispute. It seemed surprising to the tribunal that the patch managers did not take the obvious and straightforward step of getting the hoist drivers together and giving them a management instruction about how the system was supposed to work. For whatever reason however that did not happen.

57 Shortly after Mr Collins began as a permanent member of the hoist team the claimant says that he was contacted by another hoist operator, Mr Bernard Graven, with concerns that Mr Collins seemed to be getting through between 10 and 12 jobs every day, which was far more than any of the other experienced operators on the team. The claimant says that Mr Graven expressed concerns that this could only be explained by Mr Collins failing to undertake proper safety checks and taking appropriate safety measures whilst working. The claimant told us that over the following months he noticed that Mr Collins was undertaking this number of jobs and it caused him to have concerns about whether Mr Collins was adhering to the safety procedures. The claimant expressed his concerns to engineers, other hoist drivers and the managers but the claimant does not rely on any of these as qualifying disclosures.

58 In terms of whether the claimant could reasonably have these concerns there was no common ground between the witnesses about the number of jobs a hoist operator could undertake, and indeed the witnesses agreed that the work of a hoist operator can vary significantly from one day to the next depending on the amount of travel that is required, and the complexity of the work involved. The respondent does not measure the productivity of hoist operators and it seems that no records are kept of the number of jobs which a hoist operator has undertaken

on any one day. The managers knew that the claimant believed Mr Collins was not working safely because of the number of jobs he was doing. He was told however that if he was ging to raise concerns he would have to have evidence. Mr Prior told us he did his own checks to make sure Mr Collins was working safely but he did not tell the claimant he had done that. The tribunal accept that as far as the claimant was concerned, he had a real reason to be concerned because of the dangers of hoist working and that this had not been addressed by the respondent.

The Pilsworth incident

59 The claimant says that his concerns about Mr Collins' adherence to safety protocols were compounded or highlighted by an incident in June 2020. Mr Prior had asked the claimant to attend a job at Pilsworth, just outside Bury. A line from a telegraph pole which connected a United Utilities monitoring station had come down, and because of Covid restrictions in force at the time it was not possible to arrange for a new telegraph pole to be installed so a temporary fix was required. When the claimant arrived on site and spoke to Mr Prior suggested connecting a phone wire to a tree. The claimant concluded this would be unsafe. Mr Prior for his part told us that he had looked at the monitoring station line on Google maps. He had been keen to get the customer back online, if possible, which is why the tree fixing had been suggested. However, he had accepted the claimant's assessment this was not safe in this location.

60 The following day Mr Coffey told the claimant Mr Collins had attended and attached the line to the tree. The claimant says that he had expressed safety concerns about what had happened to senior managers via a trade union representative. Shortly after that the tree line was removed the line. Mr Prior told us that this could have been on safety grounds, or it could have been a quality control issue. The claimant told us that Mr Collins contacted him and said, "It was wrong. I shouldn't have done it". We accept that in the claimant's mind this confirmed that Mr Collins was not working with a due regard to safety matters.

61 The claimant says that over the following months he had growing concerns about Mr Collins' working practices. Those concerns were based on the number of jobs that Mr Collins was doing rather than any other evidence or specific examples of safety, such as the Pilsworth incident. This was in addition to and not helped by the ongoing dispute about Mr Collins taking work in the area covered by Mr Prior which he regarded as his patch. Over the summer the claimant says that he had a number of conversations with Mr Hudson (Mr Collins' manager) and also with Mr Prior, expressing concerns about safety checks not being carried out. The claimant also expressed those concerns directly to the engineers he was working with. It is clear that engineers told Mr Collins they had been told about the claimant's concerns and this led to significant tension between the two men.

62 Mr Prior did not dispute that the claimant expressed safety concerns about Mr Collins, as well as complaining about Mr Collins taking what the claimant regarded as "his work". It is clear that Mr Prior considered this to be rather a petty matter. Mr Prior also being contacted by Mr Collins to complain about the fact that the claimant was telling engineers that Mr Collins was not complying with safety rules

and Mr Collins was also making other criticisms of the claimant to the engineers. Mr Prior told us that in his view both were behaving "like children".

The September emails

63 Things came to something of a head in September. On 11 September 2020 Mr Prior told the claimant that Stuart Collins had made a verbal complaint that the claimant was targeting him and acting in an unreasonable fashion. Mr Prior's witness statement is unfortunately vague about this. He refers to Mr Collins having contacted him to say that he felt he was being bullied, but he attaches no date to that and describes this in his witness statement after reference to an incident which happened in December. However, after hearing Mr Prior clarify matters in cross examination, we are satisfied that the report of bullying referred to by Mr Prior happened shortly before the 14 September email and there were no further incidents after this as Mr Prior's statement might appear to suggest.

64 On Monday 14 September 2020 the claimant emailed Mr Prior. The opening paragraph of that email says this:

"Since speaking to you on Friday I have been thinking about the complaint made by Stuart Collins targeting me for whatever reason as someone being unreasonable towards him. It was also mentioned a complaint has been made by Stuart from other people. The fact is Stuart Collins for some reason is actually being unreasonable towards me and this is not the first time over the years he has done this. The actions of Stuart Collins have made me feel quite uncomfortable and stressed over the weekend knowing that I have not had any contact with him until Friday morning leaving a message on his phone to let him know that a job was on his patch and most of all near to his starting point.

As I have discussed with you before, I don't speak to Stuart Collins very often unlike the rest of the hoist drivers in the Manchester area, because we all work together as a team. I have also been informed that there are 3-4 engineers who would prefer to call Stuart for a hoist assist instead of myself. I don't know who the individuals are but assume it's the engineers who don't like being asked about the reason why they can't climb the pole and require a hoist. If it is anything else at least give me the opportunity to discuss the problem and give me the chance to rectify."

65 The email then goes on to suggest that comparisons are being made between hoist drivers in relation to the amount of tasks that they are completing and the claimant complains that Mr Collins has been picking up multiple jobs on the claimant's patch, which means the claimant in turn has to travel to other areas, something which he says Mr Prior has told him not to do. Mr Prior does not disagree with that statement in his reply. The claimant concludes by saying that he is finding the whole situation extremely stressful and that he intends to seek guidance from his trade union.

66 Pausing there, it is to be noted that the claimant relies on this email in relation to his public interest disclosure complaint. In the List of Issues this email is identified as being a protected disclosure which tended to show that the health and safety of an individual has been or is likely to be endangered. In cross examination the

claimant conceded that this email does not in fact refer to any health and safety concerns in relation to Mr Collins. What is however is that he raised a counter complaint or grievance about Mr Collins that was not investigated or considered further.

67 Returning to the chronology of events, Mr Prior replied to the email shortly after it was received. Mr Prior explained to the claimant that Mr Hudson was on leave, and he was dealing with the matter in the absence of the covering patch lead. Mr Prior identified that:

"Stuart hasn't individually named any engineers as I discussed on Friday but he has sent multiple messages sent from a group chat (by the look of it). All of which are targeting Stuart and it is bullying."

68 It is not entirely clear which messages Mr Prior is referring to. There are some messages in the bundle of documents between a number of individuals and Mr Collins, but none of them appear to have been sent by or to the claimant. The claimant told us that he had never sent any messages to Mr Collins, and we were not shown any evidence that he had. The messages do show Mr Collins and another employee, Mr Leigh exchanging messages which are sometimes abusive on both sides.

69 In his email Mr Prior continued:

"I spoke with you on Friday to tell you to leave him [Stuart] alone and don't speak to him except in a professional manner. This is to protect yourself and Stuart. This has also been passed on to other platform engineers by their managers.

As stated before, this should have been sorted weeks ago when these issues first started. Myself and Steve have offered our services in mediation but as yet none of you have arranged this.

If you would like me to arrange this, then please let me know. I want to try and stop all this going to grievances as at the moment we have a number of upset individuals all claiming to being harassed and bullied at work by each other.

Speak to the CWU and see if they want to arrange their own mediation as you are all members of the CWU. If not give me a call and I'll come and see you and see what we should put in place.

70 *At this moment in time, I have asked you all to only speak professionally with each other and not to look at each other's performance or daily workload as this is for the individual's managers to address and not that of their peers. You have marked this email as private and confidential so I won't cc anyone but if you would like me to pass this on to the CWU or Steve Culshaw so we can assist with this issue then let me know."*

71 Mr Prior told us that because he did not hear back from the claimant about this, he had done nothing about progressing any steps for mediation. What that meant was as the manager he did nothing to address the dispute in the team despite knowing both sides felt aggrieved. Mr Prior told us that he felt he had seen evidence that Mr Collins was being bullied, but also conceded that the text

messages showed that Mr Collins expressing himself in ways which were perhaps rather inappropriate, for example by swearing at the people he was messaging, and he accepted none of them appear to have been sent by the claimant. Mr Prior us that in his view the situation was "six of one and half a dozen of the other".

72 We have no evidence before us of any specific incidents after that until 18 December 2020.

The Incident on 18 December 2020

73 The claimant was asked to support an engineer working on Cheetham Hill Road. We were not provided any evidence from example from call logs to demonstrate the precise time and we accept the claimant's evidence that it was late in the afternoon because he was heading back to the depot. When the claimant received the call, he was near the Ashton under Lyne junction of the M62 and it was already starting to get dark. The claimant told the engineer that it would be too late to work safely and that he would attend the site the next day to complete the work.

74 We accept the claimant's evidence that, given the time of year, it would have been dark on Cheetham Hill Road by late in the afternoon. However, the respondent's position was that it might still be safe to work on the road if street lighting was sufficient. Surprisingly we were not taken to any respondent guidelines about safe working after dark despite it being suggested such guidance exists. Mr Prior and other respondent witnesses appeared to seek to dispute that it would have been dark in any event at the relevant time, but we preferred the claimant's account about that. The claimant gave clear evidence about being on his way home towards the end of the working day and it was almost the shortest day of the year. What is clear is that despite the claimant raising the issue of how dark it was given the time of year and conditions on that stretch that road no steps were ever taken by the respondent during the subsequent disciplinary process to either establish the precise time of the call or how dark it was at the time the work was undertaken nor where any steps taken by the respondent to investigate whether this was a site where it would be safe to work given local street and other lights.

75 Mr Prior told us that he had been contacted by the engineer on site and Mr Collins to say that the claimant and Mr Leigh had told them that it was too dark to work and that the claimant was on his way down to make sure Mr Collins was not going up on his platform. The engineer and Mr Collins told Mr Prior they felt it was safe to work. Mr Collins would later allege that the claimant told him he was going to take photographs of him working unsafely. We accept that Mr Prior told Mr Collins and the engineer to do a risk assessment to make sure safe working was possible and then he called the claimant to tell him what he had said to the others.

76 The claimant said he returned to the depot and on his way home drove via a local DIY store. This meant he drove down Cheetham Hill Road. The claimant says he saw Mr Collins working in the dark over the road. He considered that it was too dark to work safely, he could not see the engineer and he believed the road had not been properly coned off.

77 The claimant says the next morning he rang Nick Hudson, Mr Collins' patch manager, to tell him that Mr Collins had worked in breach of the safety procedures. Mr Hudson told him that he would look into it. We have no evidence that he did and we had no evidence from Mr Hudson at all about what was said. The claimant relies on this conversation as a protected qualifying disclosure of information about a breach of health and safety.

78 The claimant says that Mr Collins subsequently sought "working in hours of darkness training" which in his view showed Mr Collins must not have been confident that he should have worked on the road that evening.

The grievances of Mr Collins and Mr Coffey

79 On 21 December 2020 Mr Collins lodged a grievance making various allegations of bullying and harassment against the claimant and Mr Paul Leigh. It attaches a tabular document with various columns covering the period to 18 December 2020. The grievance makes various complaints about the claimant and Mr Leigh. It also makes what are essentially disciplinary accusations against the claimant – that he had been sleeping in his van at lunchtime and that in the past the claimant had told Mr Collins to "slow down and only do 4 jobs a day". Mr Collins describes the claimant as "lazy and militant".

80 The tribunal noted that the allegations about the claimant made by Mr Collins in the grievance document are vague. It also refers to allegations about Mr Leigh. Mr Collins says that the claimant is gossiping about him and spreading rumours, on one occasion there is reference to the claimant raising the safety concerns, but otherwise precisely what is meant by "gossip and rumours" is not explained. Mr Collins also complains that that the claimant "ridiculed" and "harassed" him, but he does not say what the claimant has done, except to refer to Mr Collins not working safely in June 2020. Most of the incidents Mr Collins complains about are incidents of other people reporting to him things which they say the claimant has said.

81 We found the respondent's evidence about precisely what the grievance was somewhat difficult to follow. The grievance document is very difficult to read. There is text in the different columns which is not aligned at all across those columns – it is very difficult to work out which dates match with which allegations and so on. It was suggested to us that the grievance could be read clearly on screen, but we had only the evidence of the document in the bundle and if the respondent had a clearer document available to it, we saw no evidence of that either in the bundle or more significantly in any analysis of the allegations in the investigation. At no time does any attempt seem to have been made to analyse precisely what it is that the claimant personally was said to have done which is said to be bullying or harassment nor was there any attempt to separate out the conduct of Mr Leigh and the claimant or indeed look at the evidence that they acted jointly or in an organised way.

82 On the same day Mr Coffey also raised a grievance. That is extremely vague. It does not name the claimant at all and says simply he complains about "*being harassed and watched and comments and lies about me in my daily work"*

83 The claimant was not told about the grievances at the time and was unaware it had been lodged. Despite that, it appears that there were no further incidents between the claimant and Mr Collins and Mr Coffey in the months that followed the grievance being raised and the claimant's suspension in late March some three months later.

Incident with the new engineer

84 There was a further incident on 6 February 2021 involving a new engineer which was referred to in due course during the disciplinary investigation. The claimant was going to Oldham to support the engineer, but he was held up traffic and says by the time he arrived the engineer was irate. In the investigation to the Collins/Coffey grievance the engineer raised concerns about the claimant's language and the use of one offensive word in particular, but he seems not to have raised any complaint to his manager or anyone else at the time.

85 The claimant told us he had a difficult trip through traffic and then when he arrived the engineer had been irate and cross with him, but he found that he could not access the pole because of debris in the way of the hoist. He says the engineer should have recognised that this would have been a problem. He disputed using the language described by the engineer although concedes he did swear because he was annoyed with the engineer for wasting his time and because the engineer had been hostile with him.

The disciplinary process

86 In the meantime, the respondent's HR team had decided that a disciplinary investigation should be conducted into the allegations made by Mr Collins and Mr Coffey. We heard somewhat confused evidence from Mr Davison, appointed as the disciplinary investigation manager, about whether the grievances had been considered under the grievance procedure and if not, why that procedure had been bypassed. In any event no steps were taken to investigate the grievance by interviewing any of the protagonists.

87 Mr Davison was a manager from the Northeast region. The covid pandemic was still making matters difficult and as a result he was unable to travel to Manchester to carry out his investigations. Instead, the investigation was conducted by a series of telephone calls. Mr Davison told us that he contacted members of the teams but no record of who was spoken to was made. There are no records of the investigatory calls and no record of the questions asked. Mr Davison asked those he spoke to provide statements to him, although Mr Davison told us that not everyone provided a statement. Mr Davison appeared to have taken into account some of the evidence which is not referred to statements although there is no record of such of that evidence. We have the statements in the bundle – they are either in the form of statements or emails to Mr Davison with the sender's name redacted. The only statements which identify who has provided them are those from Mr Prior and Mr Hudson.

88 Perhaps it is a consequence of the fact the grievance was never looked at in the usual way and went straight to a disciplinary investigation, but Mr Davison appeared to approach the disciplinary investigation on the basis the grievances

were to be taken as well founded. There is no indication that at any stage he asked himself whether there might be two sides to what had happened and that was despite both the managers and some of the engineers referring to both sides bearing some blame for the dispute between those involved.

89 Mr Davison told us that many of the individuals he contacted in the investigation told him they did not want to get involved at all or they wanted to provide evidence anonymously. Mr Davison says he was told that this to be because they felt intimidated by the claimant and Mr Leigh, but he took no steps to investigate why that might be the case or record what was said. It does not seem to have occurred to Mr Davison that individuals saying that may have had their own motives or to explore why they said they had such fears. Mr Davison simply accepted this at face value.

90 In the course of the subsequent investigation report and disciplinary decision, it is said that the evidence gathered by Mr Davison showed that the claimant had been told that his conduct towards Mr Collins must stop by managers at the time but he had nonetheless continued with his bullying behaviour. The evidence given by Mr Hudson and Mr Prior in their statements to Mr Davison as recorded in the bundle did not say that.

91 Mr Hudson barely refers the claimant in his statement other than to record Mr Collins complaining about the claimant to him. Mr Hudson's statement is largely about the conduct of the Mr Leigh. Mr Hudson does at one point refer to messages sent to Mr Collins by the claimant and Mr Leigh, although that was not supported by the evidence of the actual messages which Mr Davison had in front of him.

92 The statement from Mr Prior confirms that the claimant had denied to him ever sending messages and that the claimant had raised concerns about Mr Collins taking work which he should not. His account records that when Mr Collins had complained about reports of the claimant "slagging him off" the claimant had denied that. Mr Prior says that he spoke to the claimant and told him things must stop, and significantly Mr Prior records that the engineers had told him that the claimant had indeed stopped talking about Mr Collins. The only specific incident which Mr Prior refers to which appears to have happened after that instruction in September 2020 is the December incident. He refers to the claimant and Mr Leigh "checking up" on Mr Collins but if Mr Prior intends to refer to something other than the Cheetham Hill incident he does not explain what happened either in the statement given to Mr Davison or his tribunal statement. If anything else had happened after the September intervention, Mr Prior had not taken any action to address it.

93 Mr Davison obtained a further statement from Mr Collins. In that statement Mr Collins complains about the claimant falling asleep while they were working together in 2016. He describes being appointed as a hoist driver in 2020 and says this *"I was determined to provide a safe and reliable service to our SD engineers who have been plagued for years by [the claimant] and PL militant lazy and incompetent work, they treat each job like it's time to talk rubbish and swap gossip and natter away…"*

94 In the section referring to what has happened there are in fact few specific allegations of things the claimant has done, except that Mr Collins says that around June the claimant had told someone that he [Mr Collins] does not do safety checks and Mr Collins had confronted the claimant about that. Mr Collins refers to the claimant's complaints about him picking up work and to being told by a controller or manager to give tasks to the claimant. Mr Collins says that this was because the claimant had "kicked off", although presumably the fact the instruction was given to Mr Collins to transfer a job or jobs to the claimant suggests that whoever gave that instruction had agreed with the claimant that Mr Collins should give up the task in question. Most of the issues raised in the document are in fact allegations of misconduct about the claimant, in particular about him sleeping in his van, rather than conduct being directed towards Mr Collins which could in any way be described as bullying or harassment.

95 In relation to the matter of sleeping in his van, the claimant acknowledged this happened and explained why he had sleeping problems. Mr Prior as the claimant's line manager told us in his view there was nothing wrong with the claimant taking naps in the way described.

96 The further information provided by Mr Collins does not appear to suggest any allegation of inappropriate conduct directed from the claimant to Mr Collins after Mr Prior's September instruction to stop, other than the Cheetham Hill incident.

97 Mr Coffey's statement makes complaints about the claimant saying to him "we only do 4 jobs a day", and "don't let managers tell you what to do just use safety to shut them up". Mr Coffey does not attach a date to these allegations, nor does he say why this is bullying or harassment

98 Looking at the other statements, it is striking that in one a "patch-lead", that is local supervisor, refers to the claimant, Mr Coffey, and Mr Collins, all moaning about each other and said that *"I felt they were all as bad as each other"* echoing the view expressed by Mr Prior. The engineer in questions refers to the claimant checking work done by Mr Collins, but also to Mr Collins spreading rumours that the claimant was lazy and sleeps a lot. In another there is reference to the claimant having made comments about the safety checks which had upset Mr Collins but there also reference to Mr Prior having had a word with the claimant and that that had "put matters to bed" corroborating both Mr Prior and the claimant's evidence about the fact the dispute seemed to have died down after Mr Prior's intervention in September.

The claimant's disciplinary investigation interview

99 The first the claimant knew about the grievances and the disciplinary action was on 29 March 2021, more than 3 months since the grievances had been lodged. He was told to report to the Oldham depot. On arrival he told there was to be a fact find interview with Mr Davison and his trade union representative who had been told not to forewarn the claimant. Mr Leigh and Mr Downey were also interviewed.

100 We have a record of the meeting between the claimant and Mr Davison in the bundle in the investigatory pack prepared contemporaneously by Mr Davison.

The panel concluded from those notes that from the outset Mr Davison approached the questioning of the claimant on the basis that what he has been told by Mr Collins and Mr Coffey was the truth. For example, when he asked the claimant about the allegation that he had told Mr Coffey to only do 4 jobs per day, the claimant denied saying that and told Mr Davison to check his work records which will show he does more jobs than that. Mr Davison shows no interest in that and simply continued to press the claimant about why that was an appropriate comment to make. Subsequent Mr Davison made no attempt to check of the claimant's work records. Throughout the meeting the claimant made repeated denials about things he is alleged to have said and done and explained why he had concerns about Mr Collins. Mr Davison appears to have been indifferent to what the claimant said. The claimant said repeatedly that he had not sent any messages to Mr Collins. It seems clear from the evidence in the bundle that this was correct. Despite the claimant's vehement denials about this issue throughout the process Mr Davison, and subsequently Mr Jobson and Mr McGinlay, accepted that the messages had been sent by the claimant without taking any steps to look at the evidence.

101 The claimant was suspended at the end of the interview. Despite the letter confirming the suspension is required whilst further investigations are carried out and to ensure the integrity of the investigation, there is no evidence of any further investigations being conducted. No attempt was made by Mr Davison to investigate any of the issues raised by the claimant. He did not reinterview Mr Collins or Mr Coffey or make any attempt to check the various matters raised by the claimant.

102 An investigatory report was prepared. In this Mr Davison concludes this "*there was overwhelming evidence of bullying and that whilst conversations have been held on numerous occasions (referenced throughout the fact find) the problems have persisted*." A total of 6 specific incidents are identified as supporting that conclusion. Mr Davison refers to things which happened "*by GM's own admissions*" despite the notes he has referred to recording that the claimant had said "*it's all lies and made up*" and "*people ask me what's going on I say nothing and I am not allowed talk about him*". Mr Davison concluded that the claimant has been spoken to "numerous times" and "*the fact people know bullying is going on leaves me not doubt this falls under GM*", he also referred to the claimant "*showing a lack of remorse and is open about his actions throughout which I feel are against our policies*".

103 Although we had very little evidence at all about the other disciplinary processes, it appears Mr Leigh and Mr Downey were also interviewed and Mr Leigh was suspended. If Mr Davison and subsequently Mr Jobson took into account what had been said by Mr Leigh that evidence was not disclosed either at the time or at this tribunal.

104 Mr Jobson, another North-East Region senior manager, was appointed as the disciplinary officer on 21 June 2021. The disciplinary hearings for the claimant and Mr Leigh were conducted on 6 July 2021. The claimant had prepared a response to the investigatory report which he presented to Mr Jobson at the start of the hearing raising various points about the allegations he was facing. He says that document contains protected disclosures. It also raises concerns about the

investigation, the fact it appears the outcome had been prejudged and the fact that his denials have been ignored. The claimant says that Mr Jobson simply put the document on one side and he did not read it.

105 Mr Jobson denies that, but he did not take any steps to explore any of the issues raised by the claimant in his document after the meeting nor does he appear to attempt to address any of the issues raised in the eventual outcome. The tribunal panel concluded that Mr Jobson paid little or no attention to the document handed to him.

106 The disciplinary hearing was recorded and it had been intended the recorded would take the place of minutes. Unfortunately, it appears that something happened to the recording, resulting in it being corrupted or lost. The claimant is critical of that, but the panel accepts that Mr Jobson could not know that the recording had not worked at time.

107 The disciplinary outcome letter is brief doing little more than confirming dismissal but it includes the rationale for the decision which appears to be a copy of a document sent to HR to explain why a decision to dismiss has been taken. In that document, which runs to some 7 pages, Mr Jobson explains his decision. He told us that he did not simply adopt Mr Davison's reasoning and that he took his own view, although we found little evidence of him applying any critical eye to the investigation report.

108 In explaining why he considered that the claimant must be dismissed, Mr Jobson referred to the facts that did not detect any remorse regret or sympathy on the claimant's part and he drew an adverse conclusion from the fact that the claimant had become angry during the hearing saying that *"it made me appreciate what it would feel like to been on receiving end of intimidation that G has been alleged to have been responsible for*" although Mr Coffey and Mr Collins had not made allegations of aggression, their allegations about harassment were that lies and rumours had been spread. The claimant for his part says that he was upset at the hearing because Mr Jobson would not read his statement and did not seem to be paying attention to what the claimant was trying to say in circumstances where he faced losing his job after a long period of service and at a relatively late stage in his working life.

109 In the outcome Mr Jobson referred to the claimant being motivated by Mr Collins and Mr Coffey "making him look bad" and said that the allegations about Mr Collins not working safely had been made without evidence. The panel found that no manager acting within the range of reasonable response to the evidence available could conclude that. The claimant had raised specific safety concerns about Cheetham Hill incident. The assertion that the claimant had not raised any supporting evidence supports the claimant' belief that Mr Jobson did not pay attention to the points he had raised. Mr Jobson and Mr Davison both told us that they rejected the claimant's concerns about the Cheetham Hill incident because the engineer and Mr Collins had reported that they had done a risk assessment. However, there was no document to support that contention. As was pointed out by Mr Marshall, the engineer and Mr Collins would be unlikely to volunteer that they had been working unsafely. Mr Jobson told us that if the claimant was going to raise safety concerns, he should have evidence to support that, but he also

regarded the steps had taken to get evidence to support his concerns, by driving past Mr Collins and the engineer to check how they were working, as being intimidation.

110 In his witness statement Mr Jobson stated that he was concerned that one of the allegations was that the claimant had told Mr Coffey *"don't let managers tell you what to do*" and that this was corroborated by the fact the claimant had commented on the number of jobs that Mr Coffey and Mr Collins were undertaking. The panel found that hard to follow. We concluded that no manager could reasonably conclude that someone raising safety concerns about the rate someone was working at was corroboration that that person had told someone else not to follow management instructions.

111 Mr Jobson decided to summarily dismiss the claimant who was informed that his last day of employment was 27 July 2021. The letter sets out entitlements to matters such as holiday pay and the claimant's right of appeal.

112 The claimant appealed against his dismissal on 30 July 2020. He also sent the appeal manager, Mr McGinlay, a copy of the document he sent to Mr Jobson and relied on that as his fourth protected disclosure of information.

113 There was an appeal hearing on 2 September 2021 but the outcome was not sent to the claimant until 2 November. There are no minutes of the appeal hearing and we received no evidence from the appeal manager, Mr McGinlay. There is no suggestion that Mr McGinlay carried out any additional investigations of his own.

114 The appeal outcome letter informed the claimant his appeal was not upheld. It was put to the claimant in cross examination that Mr Leigh was reinstated because he showed remorse although we received no evidence at all from Mr McGinlay to explain his decision and Mr Leigh is not referred to in the appeal rationale. The only evidence of his reasons is the document recording the reasons for rejecting the appeal other than in the document recording his reasons. However there appears to be no dispute that Mr Leigh was reinstated to his role.

115 The claimant said this about his appeal decision *"it seemed to me that Paul McGinlay' decision simply rubber stamped. Once again Openreach had simply accepted Stuart Collins' Version of events and that of the so-called "witnesses" without ever investigating any of the points I had raised or the explanations that I had provided".*

116 The rationale document suggests that Mr McGinlay had read the claimant's grounds of appeal and had spoken to Mr Jobson, but it is not suggested that he took any steps to investigate or to require the investigation of the substantive issues raised by the claimant about the Davison investigation.

CONCLUSIONS AND DISCUSSION

Failure to make reasonable adjustments – S20 EQA 2010

117 It is accepted that the claimant is disabled by his knee condition and that the time of the alleged discrimination the respondent had knowledge of the claimant's disability.

118 The claimant relies upon two PCPs:

(a) A requirement to work at speed ('PCP One'); and

(b) A one-off management decision not to address derogatory remarks made by Stuart Collins about the claimant's working speed ('PCP Two')

PCP 1 A requirement to work at speed ('PCP One')

119 We found no evidence to support that any such PCP has been applied to the claimant and his fellow hoist operators.

120 As noted in our factual findings, all of the witnesses in this case agree that the job of hoist driver involves using a potentially dangerous piece of equipment. Precisely how hoist drivers are allocated work was a matter of some dispute before us, but we attach no significance to that.

121 It was a striking feature of the evidence that the witnesses could not even agree what a typical number of jobs to be undertaken by a hoist driver. That dispute arises not least from the fact there is no record keeping in relation to the number of jobs undertaken and the productivity of hoist drivers is not measured. The absence of any record keeping about that strongly suggests that the number of jobs being done by hoist drivers is not regarded as material issue.

122 It is clear that there was something of a dispute between the claimant and others and another employee about how quickly each was working, and we understand that the claimant was aggrieved by the terms of Mr Collins grievance referring to his work speed, especially as this is not something which Mr Collins could reasonably expect to be considered as a grievance. However, that is not the same as there being any practice being applied by the respondent in that regard. There was no suggestion that there was concern on the part of the claimant's managers about his work speed nor did we receive evidence from the claimant about Mr Prior or any other manager pressure on him to work at a particular speed or get through a particular number of jobs per day.

123 We determined that no such practice criterion or practice was applied to the claimant and the complaint is not upheld.

PCP 2: A one-off management decision not to address derogatory remarks made by Stuart Collins about the claimant's working speed ('PCP Two')

124 The respondent disputes this was a PCP at all.

125 Ms Martin drew our attention to the guidance in the ***Ishola v Transport for London*** 2020 EWCA Civ 112, CA, case referred to in the section about the law above. Applying that we concluded the claimant's case about the respondent's approach to Mr Collins' grievance was not a complaint about a provision criterion or practice. It was a complaint about a one-off situation – in essence the decision taken by Mr Davison and Mr Jobson to take Mr Collin's grievance at face value without considering the appropriateness of how the grievance had been expressed.

126 The tribunal panel agreed with the claimant that no proper attention was given at all to how Mr Collins' grievance had been expressed and the concerns which the claimant raised about that, but we accept the respondent's submissions that the claimant has not shown to us there was any practice of ignoring grievances. In essence this complaint about a one-off act of unfairness directed at the claimant.

127 Our conclusion was that the claimant had not established that his complaint was well founded.

The Whistleblowing Claims

128 The claimant relies on four protected disclosures:

(a) PID 1 In writing to his Line Manager, Graham Prior, on 14th September 2020 (page 413).

(b) PID 2 Verbally to Nick Hudson (Stuart Collins' Line Manager) regarding Stuart Collins working in the dark contrary to the Respondent's policies on 21st December 2020

(c) In writing to Brad Jobson at the Disciplinary Hearing on 6th July 2021 (pages 491 & 493)

(d) In writing to Paul McGinlay at the Appeal Hearing on 28th September 2021 (pages 491 & 493)

129 We had to determine the following matters:

(a) In respect of each of the claimant's disclosures, were they disclosures of information?

(b) Did the claimant believe that his disclosure(s) tended to show that the health or safety of any individual has been, was being or was likely to be endangered?

(c) If yes, was that belief reasonable?

(d) Did the claimant believe that his disclosure(s) were in the public interest? The claimant contends that the failure of a member of the Respondent's staff to comply with the Respondent's specific safety procedures in the use of a mobile hoist platform created a greater danger than that associated with the normal use of the aforesaid mobile hoist platform.

(e) If yes, was that belief reasonable?

PID 1: In writing to his Line Manager, Graham Prior, on 14th September 2020

Is there disclosure of information or an allegation?

130 The claimant conceded in his cross-examination that the email of 14 September does not mention health and safety. Whilst the tribunal does not doubt that the claimant had raised concerns about whether Mr Collins was complying with safety

rules with Mr Prior at various times, but he did not so in this email. This meant we did not need to consider matters further; this was not a protected disclosure.

PID 2 Verbally to Nick Hudson (Stuart Collins' Line Manager) regarding Stuart Collins working in the dark contrary to the Respondent's policies on 21st December 2020

Is there disclosure of information?

131 We heard no evidence from Mr Hudson about what was said to him. Ms Martin submitted that the claimant had failed to show that a disclosure of information had been made but we do not accept that is the case. In his witness evidence the claimant says this *"I called Nick Hudson and asked why Stuart Collins had been working on a main road in the dark with no barriers or warning signs, all of which was in breach of our own procedures and health and safety policies".*

132 Ms Martin argued that this evidence is insufficient for us to reach a conclusion that there had been a disclosure of information because it is not sufficiently clear precisely what was said to be clear there was disclosure of information and the fact that it was framed as a question means it cannot have been a disclosure.

133 We do not accept that submission. We accept that the claimant raised concerns with Mr Hudson that Mr Collins had not been working safely in the dark and that he disclosed information about why he believed that to be the case because of the absence of barriers and warning signs.

Did the claimant believe that his disclosure(s) tended to show that the health or safety of any individual has been, was being or was likely to be endangered? If yes, was that belief reasonable?

134 Ms Martin submitted that the claimant could not believed there had been a breach of health and safety rules or that raising those concerns were in the public interest because if he had seen something which genuinely poised a risk, he would have acted straight away to prevent a life-threatening situation to continue.

135 We do not accept that submission. There is nothing in the legislation which requires an individual to act immediately, nor do we accept that because the claimant waited until the next morning this makes his evidence about this belief less credible. The claimant had raised concerns with Mr Prior the evening before. He raised concerns with the respondent via Mr Hudson the following morning. We found the claimant's expression of his concerns to be genuine. We did not find his actions inconsistent with a reasonable belief that there had a breach of safety rules and that had created a risk to the health and safety of road users.

Did the claimant believe that his disclosure(s) were in the public interest? If yes, was that belief reasonable?

136 We accept the claimant had a reasonable belief that he raised the disclosure in the public interest. We also accept that the claimant did that at least in part because he was concerned about the dangers which Mr Collins' actions could posed to members of the public. It seemed likely to us that part of the reason this was raised was that the claimant hoped disciplinary action of some sort would be

taken against Mr Collins that that is not inconsistent with a belief that the disclosure if also in the public interest.

137 We find that PID2 was a qualifying protected disclosure,

PID3 – the claimant relies on pages 491 and 493 of the document submitted to Mr Jobson at the disciplinary hearing

Is there disclosure of information or an allegation?

138 Page 491 refers to the claimant having concerns about Mr Collins working without a ground support person, no coning off and working in the dark and that he was working at such a pace it could not be safe. It seems clear to us that this was a disclosure of information about adherence with rules put in place to ensure the safety of the hoist driver and colleagues and members of the public.

139 Page 493 refers to the possibility of making a report to HSE and to the claimant's belief that he is being disciplined for raising safety concerns, but it does not make disclosures of information that tend to show that the health or safety of any individual has been, is being or is likely to be endangered. This was not a disclosure of information.

Did the claimant believe that his disclosure(s) tended to show that the health or safety of any individual has been, was being or was likely to be endangered? If yes, was that belief reasonable?

140 It is accepted by the respondent that hoist working is potentially dangerous to the public and the disclosure suggests that a danger is being raised. We accept that the claimant reasonably believed this tended to how health and safety being endangered.

Did the claimant believe that his disclosure(s) were in the public interest? If yes, was that belief reasonable?

141 We accept that the claimant had a reasonable belief that it was in the public interest to make that disclosure, even if part of the reason he made the disclosure may also have been to cause trouble for Mr Collins. The disclosure related to a risk to the road users, it was clearly a matter of public interest.

142 We find that p491 was protected disclosure.

PID 4 – the submission of PID3 to the appeal

143 PID4- this is the same document that was sent to Mr Jobson, but it also said to be a disclosure when the claimant sent it to Mr McGinlay.

144 Our rationale for PID3 applies here. The disclosure about working without a ground support person and so on was a protected disclosure of information, the disclosure about reporting that HSE was not. However, this document was submitted to Mr McGinlay after the claimant had been dismissed and he makes no complaints about detriments which happened after that document was submitted. We did not consider this document further.

The detriment claim

145 The detriment we had to consider was that "being suspended for a long period of time which led to [the claimant] being isolated from colleagues and he was only contacted once by the Respondent during the suspension period"

146 The respondent appears to have understood this to an allegation about the reason for the claimant being suspended. Ms Martin made submissions to us that this complaint was raised outside of the statutory time limit of three months adjusted for the early conciliation process.

147 Mr Marshall's submissions were about that the detriment was not only about the decision to suspend but the about the absence of contact with the claimant during this suspension – a failure which continued until the disciplinary hearing.

148 The claimant was suspended on 29 March 2021. He was told that the reason was to safeguard the investigation process, but no further investigations were conducted. Mr Jobson had first tried to arrange a disciplinary hearing in May which the claimant and his representatives could not attend so it was rearranged to 6 July 2021. There is no criticism of the fact that the claimant sought to have the hearing rearranged but clearly this was at least part of the reason for the length of the suspension.

149 It was not disputed that the claimant was only contacted once during his suspension, although Mr Prior told us that we because the claimant did not want to communicate with him and wanted all contact to be via his trade union.

150 We accept that the claimant was subject to a detriment by being suspended for some 14 weeks, especially when the respondent did not use the suspension for the suggested purposes (to undertake investigations).

151 We then asked ourselves whether the claimant subjected to that detriment on the ground of his protected disclosure(s)?

152 Although we accepted that the claimant had made a protected disclosure to Mr Hudson on 19 December 2020, we also found that Mr Davison was not aware of that when he took the decision to suspend the claimant. There is no mention of the claimant calling Mr Hudson in Mr Hudson's statement nor does the claimant refer to this call in the course of the meeting with Mr Davison, according to Mr Davison's notes and the claimant's witness statement. It was not suggested in the evidence presented to us that Mr Prior was aware that the claimant had made a protected disclosure to Mr Hudson.

153 The question of causation under S.47B involves an examination of the thought processes of the decision maker. If the decision-maker did not know about and so could not have been influenced by the protected disclosure, that disclosure cannot have been the ground for the detriment in any way.

154 On this basis the reason for suspension, its length, and the reason Mr Prior only contacted the claimant once, cannot be influenced in any way by the protected disclosure to Mr Hudson.

155 Applying the principle in ***Royal Mail Group Ltd v Jhuti*** 2020 ICR 731 the general rule that the decision maker must be aware of the disclosure will be displaced in cases where a manipulator with an unlawful motivation is in the hierarchy of responsibility above the worker subjected to a detriment or is in some way formally involved in the process that leads to the decision, and thereby procures the detriment via an innocent decision-maker. However, it is not suggested to us that this is a Jhutti case. We do we find any suggestion that Mr Prior or Mr Davison were being manipulated by someone above the claimant.

156 We found that the claimant had not established that his complaint that he had been subject to a detriment on the ground that he had made a protected disclosure was well founded. In those circumstances it was not necessary for us to decide the jurisdictional time issue.

Unfair Dismissal – s103A and s.94 and s.98 ERA 1996

157 The first issue we had to determine was what was the reason (or if more than one, the principal reason) for the claimant's dismissal? The Respondent contends that the claimant was dismissed by reason of conduct. The claimant alleges that the reason or principal reason for his dismissal was that he had made a protected disclosure.

158 The claimant contends that he was dismissed by reason of his four protected disclosures. However, as we found the first disclosure is not protected and the fourth post-dated the decision to dismiss, it follows the principal reason would have to be the second or third disclosures, PID2 and/or PID3.

159 The principal reason is the reason that operated on the employer's mind at the time of the dismissal as explained by Lord Denning MR in ***Abernethy v Mott, Hay and Anderson*** 1974 ICR 323, CA. If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under S.103A is not well founded.

160 This is a factual question. The tribunal panel asked itself 'Why did the decision maker, Mr Jobson, act as he did?

161 Again, we recognise that the exception to the usual rule about what is the mind of the decisionmaker is the circumstance identified by the Supreme Court in *Jhutti*. We considered the possibility that this was a so called "Jhutti" case. However we agree with Ms Martin that it is not. This is not a case where it is suggested there has been an attempt by any wrong-doer above the claimant to manipulate the process. The claimant suggests, in essence, that Mr Collins lodged a grievance about him knowing it was likely that the claimant would raise safety concerns about the Cheetham Hill Road incident, but that does not make this a "Jhutti" case

162 We were therefore concerned with why Mr Jobson made the decision he did.

163 Mr Marshall had suggested to us that the flaws in the investigatory and disciplinary process which he highlighted, the failure to precisely identify the bullying allegations, the failure to investigate the claimant's case, the failure to look at contrary evidence, the failure to follow the *Linfood* guidance on the use of anonymous witness evidence, the failure to look at the mitigation of the claimant's

service history and unblemished disciplinary record, all pointed to the claimant been regarded as a thorn in the respondent's side because he had raised safety concerns when the respondent's managers were prepared to turn a blind eye to such safety issues.

164 We recognised that it is unlikely there would be direct evidence of any unlawful reason for Mr Jobson's decision. We did not have to decide whether the fact that the claimant had raised safety issues with the respondent generally over a period of time was the reason for his dismissal. We had to determine if the principal reason for the claimant's dismissal was PID2 or PID3.

165 Having heard the evidence of Mr Davison, Mr Jobson and the claimant, the tribunal has concluded that Mr Jobson's reason for dismissing the claimant was not that the claimant had made a protected disclosure to Mr Hudson or to Mr Jobson as set out at p491.

166 Mr Jobson knew the claimant had raised safety concerns about Mr Collins with engineers and he thought that was inappropriate. The respondent's managers knew the claimant had safety concerns about Mr Collins. However, neither Mr Davison nor Mr Jobson knew about the specific disclosure to Mr Hudson. The disclosure to Mr Hudson simply could not be the reason for the claimant's dismissal.

167 We found that Mr Jobson had failed to give any proper attention at all to the document the claimant gave him at the disciplinary hearing. That was PID3. Mr Jobson's failure to have regard to the document is one of the reasons why we concluded that his decision to dismiss the claimant fell outside the range of reasonable responses of a reasonable employer to the circumstances, explained further below, but our finding was that Mr Jobson gave no regard to what the claimant said, not that what the claimant had said and done by raising a disclosure had led Mr Jobson to dismiss him.

168 We found that the reason why the claimant was dismissed was that Mr Jobson believed that the claimant had told colleagues to do no more than 4 jobs a day, had said to use safety as a reason to put off managers and that having formed a negative view of the claimant about that these things, he had concluded that the claimant, along with Mr Leigh had bullied Mr Collins and Mr Coffey.

169 On this basis we concluded that the s103A complaint was not well-founded.

Had the respondent shown a fair reason for dismissal?

170 We recognise that it in relation to establishing the reason for dismissal, it is still common for the test to be cited as formulated in ***British Home Stores Ltd v Burchell*** 1980 ICR 303, EAT, that is that the employer must show that:

(a) it believed the employee guilty of misconduct

(b) it had in mind reasonable grounds upon which to sustain that belief, and

(c) at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

171 However, this test was formulated when the employer bore a burden of proof not only to show the reason for dismissal, but also that it had acted reasonably. The legislation has now changed, and we must approach the Burchell test with caution. The burden on the employer under s98 is to prove the reason for dismissal. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the tribunal to assess when considering the question of reasonableness.

172 We accepted that Mr Jobson's reasons for dismissing the claimant – that the claimant had told colleagues to do no more than 4 jobs a day, had said to use safety as a reason to put off managers and, along with Mr Leigh, had bullied Mr Collins and Mr Coffey, were reasons related to his conduct which is potentially a fair reason for dismissal under s98(2)(b). We then had to decide if Mr Jobson had acted reasonably in determining that reason and treating that as sufficient reason for dismissal.

Fairness of the decision to dismiss (s98(4))

173 The respondent can establish a fair reason for dismissal by showing that Mr Jobson believed the clamant was guilty of misconduct. However in order to determine whether Mr Jobson acted within the range of reasonable responses in in forming and responding to that belief, we considered whether Mr Jobson had reasonable grounds upon which to sustain his belief in misconduct and at the stage at which that belief was formed on those grounds, as much investigation into the matter as was reasonable in the circumstances had been carried out.

174 We have reminded ourselves that it is important that when we assess whether Mr Jobson's decision fell within the range of reasonable responses. We were concerned with Mr Jobson's belief in facts based on the evidence available to the respondent at the time of dismissal. We recognise that this means it is not relevant for us to ask if we would have made the same decisions – for example if Mr Jobson decided that he preferred the credibility of one witness over another it would not matter if the panel would have reached a different conclusion. What matters is that the decisions he reached fell within the range of reasonable responses to the evidence available to him.

175 In this case we found that the investigation conducted by Mr Davison fell outside the range of reasonable responses to the circumstances for the following reasons:

(a) Mr Davison did not approach the meeting with the claimant impartially. It is clear from his questioning that he did not question whether Mr Collins and Mr Coffey's grievances were well founded. He approached the investigation on the basis that they had been bullied or harassed. Perhaps because of that, Mr Davison failed to analyse what the allegations of bulling and harassment actually were. Through the process there are reference to these terms without any reasonable attempt to analyse what the claimant was actually said to have done and the resulting in conclusions of wrongdoing by Mr

Davison which are vague and unspecific. We agree with the claimant and Mr Marshall that Mr Davison prejudged the issue of the claimant's guilt before the investigatory meeting but this was not a case where the evidence was clear cut. The claimant had not been caught red handed and he had not admitted his guilt. This was not a reasonable approach to the investigation.

(b) The claimant denied all of the significant elements of the allegations against him. He told Mr Davison that there were things he could look at to show that he was telling the truth, but Mr Davison failed to undertake any further investigations at all. Mr Davison did not go back to any of the witnesses to see how they responded to the claimant's denials. He did not investigate if the evidence of the text messages suggested that text messages had been sent by the claimant in the face of these denials. He did not look at any records to see if the claimant was telling the truth when he said he would do more than 4 jobs a day which might suggest it was unlikely he had made the alleged comments to Mr Coffey, and he did not go back to the managers of the protagonists to investigate the truth of what the claimant said.

(c) Ms Martin argued that it was unnecessary for the "4 jobs a day issue" to be investigated because the claimant was not dismissed for performance reasons, but it is clear that both Mr Davison and Mr Jobson attached some significant weight to this allegation from Mr Coffey, whilst taking no steps to investigate evidence the claimant presented which he said would show Mr Coffey was being untruthful. It is the weight that Mr Davison gave to this issue in his evidence which makes it relevant. A reasonable employer will not attach weight to something but refuse to look at evidence which is relevant to establishing the truthfulness of the allegation. We accepted Mr Marshall's submission that Mr Davison failed to take steps to consider or investigate any matters which might have pointed to the claimant's innocence of some, or all, of the allegations made by Mr Collins.

(d) Mr Davison did not follow the ACAS guide in relation to witnesses who wished to remain anonymous or to investigation the motives of those who alleged they would not give a statement for fear of intimidation or did not want to put their names to their statements. Not only that he failed to consider at all whilst attaching significant weight to the fact some witness wanted to give evidence anonymously or not at all citing fears about repercussions. The ACAS guidance says this "employers should take written statements, seek corroborative evidence, check that the person's motives are genuine, and assess the credibility and weight to be attached to their evidence". That is to ensure the investigations comply with the Code of Practice to carry out necessary investigations to establish the facts of the case, inform employees of the basis of the problem and give them the opportunity to put their case in response before decisions are made.

(e) We did not accept Ms Martin's submissions that the *Linfood* guidance is irrelevant in this case. Mr Davison did not consider the question of motive but concluded the fact that witnesses wanted to give evidence anonymously was evidence of the claimant's guilt of the allegations against him without considering at all the weight that should be attached to that evidence. Perhaps even more significantly he attached weight to the fact some people

did not want to give evidence at all without telling the claimant who those individuals were or considering whether it was fair and reasonable to attach weight to that. The claimant did not know what evidence was taking into account against him or to fully answer the allegations.

(f) In circumstances where the claimant so vehemently denied the allegations, we concluded that no manager acing within a range of reasonable responses to the allegations against the claimant and facing the evidence in this case, could reach a conclusion of a disciplinary case to answer on the basis of the evidence before Mr Davison.

176 In reaching his decision that the claimant was guilty of gross misconduct and that he should be dismissed, we found that Mr Jobson had acted failed to act within the range of reasonable responses to the evidence available to him in concluding that the claimant should be dismissed. We reached that conclusion because Mr Jobson adopted Mr Davison's flawed investigation. A reasonable belief in guilt could not be based on that investigation. The claimant's document submitted at the disciplinary hearing raised reasonable concerns with the investigation. It raised points no reasonable decision maker could ignore, but Mr Jobson failed to have any regard to those matters in reaching his conclusions about the claimant's guilt.

177 Ms Martin submitted to us that that Mr Jobson's conclusion about the claimant's guilt was reasonable because Mr Leigh and Mr Downey "had admitted the truth of the allegations" and Mr Leigh had confirmed that the claimant was involved. However, if that was evidence on which Mr Jobson based his belief the claimant's belief it was not evidence to the claimant to enable him to answer the case against him. No employer acting within the range of reasonable responses can conclude that an employee with many years of service is guilty of gross misconduct on the basis of evidence which is not disclosed at all for the accused employee to answer – that is inconsistent with the principles of natural justice. Indeed precisely what that evidence is not even referred to in Mr Jobson's statement.

178 Ms Martin submitted that it would be artificial to suggest that the claimant's case should be looked at in solation from the cases of Mr Leigh and Mr Downey but, with respect to Ms Martin, that is precisely how the respondent has presented its evidence about its decision in this case. We were presented with a such a paucity of evidence in relation to Mr leigh and Mr Downey we were unable to reach any conclusions about the cases against them and indeed why it was that those individuals are still employed by the respondent when the claimant is not.

179 In his witness statement Mr Jobson does not refer to Mr Leigh at all expect in reference to a "serious incident" when the claimant had attended for a job but had not completed that because of third party lights on a pole. We were told that the presence of third-party lights, ie that a householder or someone else has attached electric lines to a pole, could make a job unsafe. Mr Jobson says in his evidence that the claimant told him the reason was that he had not requested a fast test on the line, but Mr Leigh had called him to request a test go ahead. Mr Jobson neglects to tell us what the claimant said about that but he concluded this meant the claimant "waited to prove engineers were working unsafely". There is nothing in that which explains to this panel how Mr Jobson could conclude from this

evidence that the claimant was bullying or being involved in the bullying of others or guilty of other misconduct. If the engineers were indeed working unsafely that does not seem to be of concern to Mr Jobson. The respondent failed to show us why this was a reasonable consideration in the circumstances or indeed what its relevance was.

180 We concluded that Mr Jobson did not reasonable grounds to conclude that the claimant was guilty of gross misconduct and that he acted outside the range of reasonable responses to the evidence available to him. He failed to give due consideration to the claimant's case before deciding his guilt.

181 The failures in the procedural aspects of this case are particularly serious bearing in mind that the size and resources of the respondent. We were told it employees somewhere in the region of 30,000 staff. It has a dedicated HR department but perhaps surprisingly neither Mr Davison nor Mr Jobson had received training on the ACAS Code of Practice and managing dismissals in a fair way. We appreciate the process during the covid pandemic, but we do not accept that would explain the fundamental failings to apply principles of natural justice and fairness to the dismissal of an employee with many years of good service.

182 Little was made of the appeal stage by either side in this case. Of course, flaws in an unfair process can be corrected at the appeal stage but that is not argued here. We note only that in terms of compliance with the ACAS Code of Practice, the claimant was allowed a right of appeal to a senior manager.

183 We concluded that the claimant had been unfairly dismissed.

Wrongful Dismissal

184 This is a common law complaint. An employee is wrongfully dismissed if their dismissal was in breach of the contract of employment, that is it without giving the contractual notice they are entitled to. The respondent in this case says that the claimant's conduct entitled Mr Jobson to end his employment summarily.

185 The respondent bore the burden of proof to show that it was entitled to dismiss without notice because the claimant had committed a repudiatory breach of his contract of employment. We found that it had not discharged that burden. The respondent says that the claimant was in fundamental breach of his contract. Mr Jobson in his decision records that the gross misconduct is the claimant had "invested in a campaign of bullying and intimidation towards [Mr Coffey and Mr Collins].

186 Based on the evidence before this tribunal we conclude that before September 2020, there had been a dispute between the claimant and Mr Collins, but we find there is no evidence that what the claimant had done was conduct fundamentally breaching either express or implied terms of his contract. He had told engineers that he had safety concerns about how Mr Collins worked unsafely, based in part on the Pilsworth incident when he believed Mr Collins had done something which was unsafe, and he had complained about Mr Collins' way of picking up work. Mr Collins for his part had made insulting comments about the claimant and told the engineers the claimant was lazy. The dispute was known to the men's managers

who regarded it as childish and somewhat trivial. This was a dispute between colleagues but not conduct which can be described as damaging or destroying the employment relationship. It is worth recording that despite the conclusions of Mr Jobson that the claimant had bullied Mr Coffey, even on Mr Coffey's account there was no hostile conduct from the claimant towards Mr Coffey at all.

187 Even if we are wrong that, Mr Prior was aware of the claimant's conduct towards Mr Collins by September 2020 and had decided it warranted no more than warning that if things did not stop, he would initiate disciplinary action. If the claimant had repudiated his contract at any earlier point in time, that informal warning waived the breach. The respondent's failure to take any further action and continuing the claimant's employment affirmed the contract.

188 The only conduct which happened after the September informal warning which could be said to amount to gross misconduct, that is a repudiatory breach by the claimant, was the incident on Cheetham Hill Road. There is no suggestion that the claimant was in breach of his contract by refusing to take that job when the engineer contacted him. The claimant did not think it was safe to work given light conditions at the time and it has never been suggested that refusing to take that job was an act of gross misconduct. The claimant had gone back to the depot, dropped off his van and finished work. When the claimant drove past Mr Collins, on a public road, he had already finished work. Taken at its height Mr Collins' allegation was that while still at work the claimant had told him he was going to drive past to take a photograph of Mr Collins working unsafely. If Mr Collins was indeed working safely, it is difficult to see what he could have nothing to fear from that. The respondent described the claimant driving along the public road past Mr Collins and the engineer as "intimidation". The claimant had not spoken to Mr Collins as he drove past with other members of the public. It is not suggested he gesticulated or shouted at Mr Collins. He had simply driven along the road. Intimidation is usually accepted to mean "frightening or threatening someone, usually in order to persuade them to do something"[1]. This panel does not accept that the claimant's actions on that evening could be described as frightening or threatening in any way.

189 We concluded that the respondent had failed to show that the claimant had breached his contract of employment in such a way that entitled the respondent to terminate it without notice.

190 Accordingly, we find the claimant's complaint of breach of contract by not giving him proper notice, commonly called wrongful dismissal, is well founded.

Conclusion

191 We found that the claimant had been unfairly and wrongfully dismissed but we did not find that the reason for his dismissal was that he had a protected public interest disclosure, nor was he subject to a detriment on that ground. His complaints of disability discrimination were also not well founded.

[1] Jowitt's Dictionary of English Law 5th Ed. Defines Intimidation as "the use of violence or other threats to compel a person to behave in a particular way".

192 At the conclusion of the evidence and submssions at the liability hearing it was agreed with the respective representatives that we would not make any findings about contributory conduct or any other reason to reduce compensation but instead we would hear further submissions from counsel about that once our liability findings had been provided to the parties.

Employment Judge Cookson
Date: 5 January 2024

REASONS SENT TO THE PARTIES ON
11 January 2024

FOR THE TRIBUNAL OFFICE

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Annex – Parties' Agreed List of Issues

The Claimant pursues clams for:

1. Automatically Unfair Dismissal on the grounds of making a qualifying disclosure S103A ERA 1996
2. In the alternative Unfair dismissal pursuant to S95 and S98 ERA 1996
3. Failure to make reasonable adjustments pursuant to s.20 EqA 2010;
4. Detriment contrary to S47B ERA 1996
5. Wrongful dismissal

Jurisdiction – Time Limits

6. Were the reasonable adjustment claims brought within the period of 3 months starting with the date of the act to which the complaint relates?

7. If no, was the claim brought within such other period as the Tribunal thinks just and equitable?

8. Was the detriment claim brought before the end of the period of 3 months beginning with the date of the act to which the complaint relates?

9. If no, was it reasonably practicable for the complaint to be brought before the end of that period of 3 months?

10. If no, was the claim brought within such further period as the Tribunal considers reasonable?

11. The Respondent accepts that the unfair dismissal claim was brought in time.

Disability – S6 EQA

12. The Respondent accepts that the Claimant was a disabled person at the material time by reason of degenerative changes in his right knee.

13. The Respondent accepts that it had knowledge of the Claimant's disability at the material time.

Failure to make reasonable adjustments – S20 EQA 2010

a. The Claimant relies upon two PCPs:
    i. A requirement to work at speed ('PCP One'); and

    ii. A one-off management decision not to address derogatory remarks made by Stuart Collins about the Claimant's working speed ('PCP Two')

b. Did the Respondent apply either of those PCPs?

c. Did PCP One place the Claimant at a substantial disadvantage in comparison with persons who are not disabled in that he was 'unable to work at the speed that Stuart Collins could.'

d. Was there an adjustment which would have avoided the disadvantage? The Claimant contends that the adjustment would have been for the Respondent to require Stuart Collins not to make comparisons between his working speed and the Claimant's.

e. Was that adjustment reasonable?

f. If yes, did the Respondent fail to make that adjustment? The Claimant contends that the adjustment should have been made in December 2020 / January 2021.

g. Did PCP Two place the Claimant at a substantial disadvantage in comparison with persons who are not disabled in that his 'feelings were injured as a result of being described as 'slow' and 'lazy' and the Respondent's failure to deal with that'?

h. Was there an adjustment which would have avoided the disadvantage? The Claimant contends that the adjustment would have been for the Respondent to admonish or inform Stuart Collins of the Claimant's disability and if necessary take disciplinary action against Stuart Collins.

i. Was that adjustment reasonable?

j. If yes, did the Respondent fail to make that adjustment? The Claimant contends that the adjustment should have ben made in December 2020 / January 2021.

14. Did the Respondent have knowledge that the PCPs relied upon placed the Claimant at the substantial disadvantage relied upon?

15. If not, could the Respondent reasonably have been expected to have such knowledge?

Unfair Dismissal – s.95 and s.98 ERA 1996

16. What was the reason (or if more than one, the principal reason) for the Claimant's dismissal? The Respondent contends that the Claimant was dismissed by reason of conduct. The Claimant contends that the Claimant was dismissed by reason of his four protected disclosures.

17. In the circumstances, did the Respondent act reasonably in treating the Claimant's conduct as a sufficient reason for dismissal?

18. Did the decision to dismiss the Claimant fall within the band of reasonable responses open to a reasonable employer? The Claimant contends that the Respondent failed to carry out a reasonable investigation and failed to consider or investigate the defences advanced by the Claimant.

Whistleblowing

19. The Claimant relies on four protected disclosures:

a. PID 1 In writing to his Line Manager, Graham Prior, on 14th September 2020 (page 413).

b. PID 2 Verbally to Nick Hudson (Stuart Collins' Line Manager) regarding Stuart Collins working in the dark contrary to the Respondent's policies on 21st December 2020

c. In writing to Brad Jobson at the Disciplinary Hearing on 6th July 2021 (pages 491 & 493)

d. In writing to Paul McGinlay at the Appeal Hearing on 28th September 2021 (pages 491 & 493)

20. In respect of each of the Claimant's disclosures, were they disclosures of information?

21. Did the Claimant believe that his disclosure(s) tended to show that the health or safety of any individual has been, was being or was likely to be endangered?

22. If yes, was that belief reasonable?

23. Did the Claimant believe that his disclosure(s) were in the public interest? The Claimant contends that the failure of a member of the Respondent's staff to comply with the Respondent's specific safety procedures in the use of a mobile hoist platform created a greater danger than that associated with the normal use of the aforesaid mobile hoist platform.

24. If yes, was that belief reasonable?

25. Has the Claimant been subjected to the following treatment?

a. Being suspended for a long period of time which led to him being isolated from colleagues and he was only contacted once by the Respondent during the suspension period?

26. Was that treatment a detriment?

27. Was the Claimant subjected to that detriment on the ground of his protected disclosure(s)?

Remedy

28. Should any deductions or reductions be applied to any compensation awarded to the Claimant? In particular:

a. Would it be just and equitable to reduce any award of compensation because of any blameworthy or culpable conduct by the Claimant prior to his dismissal;

b. Should there be a Polkey deduction; and

c. If the ET finds that any of the protected disclosures were made in bad faith, should a reduction of damages of up to 25% be made?