EMPLOYMENT TRIBUNALS

Claimant Mr Caspar Sayany

Respondent Kensa Contracting Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Exeter **On** **10 April 2024**
(remotely)

Before: **Employment Judge Goraj**

Appearances
For the Claimant: **Miss J Sayany, Lay Representative**
For the Respondent: **Ms A Chute, Counsel**

RESERVED JUDGMENT FOLLOWING A PRELIMINARY HEARING

THE JUDGMENT OF THE TRIBUNAL IS THAT:-

1. The claimant's protected public interest disclosure claim relating to Disclosure number 7 (the claimant's alleged verbal disclosure to Mr M Fontaine on 24 May 2022) is dismissed upon withdrawal by the claimant.

2. The claimant has failed to establish that he made disclosures and /or qualifying disclosures for the purposes of section 43B of the Employment Rights Act 1996 in respect of his remaining alleged disclosures (namely disclosures 1-6 and 8-9).

3. The claimant's complaints of detriment and unfair dismissal pursuant to sections 47B and 103 A of the Employment Rights Act 1996 are therefore dismissed.

4. The claimant's remaining claims will proceed as separately directed.

BACKGROUND

(a) By a claim form presented to the Tribunals on 28 February 2023 the claimant brought complaints of :- (a) unfair dismissal (contrary to sections 103 A and /or 94/ 95 (1) (c) of the Employment Rights Act 1996 ("the 1996 Act") (b) detriment on the grounds of having made a protected public interest disclosure (contrary to section 47B of the 1996 Act) and /or (c) discrimination because of race (direct discrimination and/or harassment contrary to sections 13 and/or 26 of the Equality Act 2010).

(b) ACAS Early Conciliation commenced on 19 December 2022 and a certificate of Early Conciliation was issued on 30 January 2023.

(c) The allegations are denied by the respondent including that the claimant made any protected public interest disclosures.

(d) The matter was the subject of case management hearings on 14 September 2023 ("the Order dated 18 September 2023" (at page 119 – 122 of the bundle) and on 20 November 2023 ("the Order dated 28 December 2023") (at pages 146 – 169 of the bundle).

(e) In the Order dated 28 December 2023 it was directed that the matter be listed for a Preliminary Hearing for two days to :- (a) determine the preliminary issue of whether the claimant had made any protected public interest disclosures and (b) undertake case management of the remaining claims including the listing of the matter for final hearing.

(f) The Order dated 28 December 2023 provided for oral evidence to be given at the Preliminary Hearing in respect of one aspect of the claimants alleged disclosures and also in respect of (a) the claimant's reasonable belief as to whether the information provided tended to show that the health and safety of an individual had been, was being or was likely to be endangered or that a person had failed was failing or was likely to fail to comply with any legal obligation and (b) whether any disclosures of information were in the public interest.

(g) It was also subsequently directed that the further matters identified in the respondent's application dated 5 April 2024 be considered at the Preliminary Hearing.

(h) There was a discussion at the commencement of the Preliminary hearing as to whether the issue of whether the claimant made protected public interest disclosures would be dealt with by way of oral evidence or by way of representations only. The respondent indicated that it understood that it had been directed at the case management hearing on 20 November 2023 that the matter would be dealt with by way of representations only- which was disputed by the claimant.

(i) After discussion with the parties (and also an adjournment to allow them to consider their respective positions), it was agreed that the determination of the issue of whether the claimant had made any protected public interest disclosures would be dealt with by way of oral evidence (as directed in the Order dated 28 December 2023) from the claimant, who had served a witness statement, with the respondent having an opportunity to cross examine. It was further agreed that the claimant would have an opportunity to give oral evidence on all aspects of his contention that he had made the protected public interest disclosures identified in the Order dated 28 December 2023.

(j) In the light of the decision to determine the issue of whether the claimant had made any protected public interest disclosures by way of oral evidence, it was recognised/ agreed that:- (a) there would be insufficient time for the Tribunal to deliberate on whether the claimant had made any protected public interest disclosures and that such decision would therefore be reserved and (b) there would also be insufficient time to deal with any other remaining issues apart from those of case management and that any outstanding remaining issues would therefore be dealt with at a further Preliminary Hearing as separately directed by the Tribunal.

(k) The Tribunal was provided with a witness statement from the claimant together with an agreed bundle of documents (albeit that the respondent queried the relevance/ the claimant's reliance on the documents at section K which had been inserted at the request of the claimant (and as was clarified further below). The Tribunal was also provided with a separate bundle of interlocutory orders. Both parties provided written and oral submissions. The respondent's written closing submissions were served before the service of the claimant's witness statement.

THE ALLEGED DISCLOSURES

Disclosure 1

1. **Alleged protected public interest disclosure 1 ("D1) - on 21 March 2022 – in writing to Mr Matthew Fontaine (the respondent's Design Department Manager and the claimant's Line Manager).**

2. Sources :-

2.1 Paragraph 3.1.1 of the Order dated 28 December 2023 (pages 159 – 160 of the bundle).

2.2 Paragraph 8.1.2 of the claimant's particulars of claim ("POC") attached to the claimant's claim form (background at paragraph 8.1 and 8.1.1 of the POC (pages 21 -22 of the bundle).

2.3 The relevant document is at page 170 of the bundle – email from the claimant to Mr Fontaine dated 22 March 2022 entitled "Interview Tomorrow with A (name redacted by Tribunal) in which the claimant says :-

"Hi Matt
As requested I have reviewed A's CV, and have provided my opinion below.

- The candidate has 20 years experience in architecture, including surveying experience.
- The candidate is not suitable for any of the posts currently advertised by KCL.
- The interview should be cancelled with an apology to the candidate for the misunderstanding.
- In future, it would be useful to review CV's before offering interviews.

Kind regards
Caspar"

2.4 The claimant also identified that he relies on the document at K6 in Section K of the bundle ("K) (at pages 293 – 294 of the bundle), the Royal Academy of Engineering and Engineering Council 2017 Joint Ethical Statement in support of D1 and all other alleged protected public interest disclosures.

2.5 The claimant provides further support for his contentions regarding D1 including in :-

2.5.1 His witness statement (pages 361- 373 of the bundle) including at:-

(a) paragraphs 1-5 regarding general background to the respondent.

(b) further relating to the alleged unsafe condition of the Design Department "by spring 2022" (paragraph 5 – page 362 of the bundle) for the reasons given at paragraphs 5.1 – 5.55) including in respect of Mr Fontaine's alleged lack of technical ability to conduct and manage the recruitment process.

(c) At paragraph 6.1. (pages 364 – 365) regarding all aspects of D1.

2.5.2 The claimant's written closing submissions on all aspects of the definition in respect of D1 (in pages 2 – 8 of closing submissions) and in his further oral closing submissions.

2.6 The respondent's position:-

2.6.1 The respondent denies that D1 was a protected public interest disclosure.

2.6.2 At paragraph 46 of the amended grounds of resistance (AGOR")(page 131 of the bundle) the respondent acknowledges that the claimant provided his feedback on the proposed candidate but otherwise denies that the email constituted a protected public interest disclosure (page 131 of the bundle).

2.6.3 The respondent provided further grounds for its denial at paragraphs 44 – 60 of the respondent's skeleton argument at pages 333- 335 of the bundle and in its further oral closing submissions.

Disclosure 2

3. Alleged protected public interest disclosure 2 ("D2") – on 23 March 2022 – in writing to Mr Lee Danysz (Operations Director).

4. Sources :-

4.1 Paragraph 3.1.2 of the Order dated 28 December 2023 (page 160 of the bundle).

4.2 Paragraph 8.2 of the POC (page 22 of the bundle). The claimant refers to the email to Mr Danysz on 23 March 2022 together with Mr Danysz's stated reply on 24 March 2022 namely, "I've offered my help but also I will be having a separate chat with [Matthew Fontaine] on things in general".

4.3 The relevant correspondence is at pages 171-173 of the bundle. Mr Danysz's stated reply of 24 March 2022 is not in the bundle.

4.4 The claimant wrote to Mr Danysz on 23 March 2022 as follows:-

"Hi Lee,

I think you should know how it's going in the Design Department.

Matt asked me to assist him in interviewing a candidate. The interview was scheduled for Tuesday 22nd March. I was provided with the candidate's CV on the afternoon of Monday 21st March. This was the third in a series of five interviews. The following correspondence relates to this third interview"

The claimant then pasted into his email to Mr Danysz his previous exchange of emails with Mr Fontaine on 21 March 2022

concerning the then forthcoming interview on 22 March 2022 with A (the prospective candidate referred to above in D1) in which the claimant raised concerns regarding the lack of information provided to him/ preparation for the interview with A and, in response to Mr Fontaine's request to the claimant to take some time to review A's CV and prepare questions for the interview, responded with the email dated 22 March 2022 upon which the respondent relies as D1 above. The claimant also pasted into his email to Mr Danysz Mr Fontaine's further response in which he thanked the claimant for his review and input and informed the claimant that having reviewed the candidate's CV he would conduct the interview in the claimant's absence (page 172 of the bundle).

In the final part of his email (pages 172 -173) to Mr Danysz the claimant stated the following:-

- " The first interview was on Wednesday 2nd March. The candidate was not suitable on paper. Matt decided that he and I would interview the candidate anyway. The candidate was not suitable at interview.
- The second interview was on Friday 18th March. The candidate was not suitable on paper. I expressed my doubts to Matt before the interview. Matt decided that he and I would interview the candidate anyway. The candidate was not suitable at interview.
- The third interview took place on Tuesday 22nd March. This is the one detailed above.
- The fourth interview is scheduled for Thursday 24th March at 10am. The candidate is not suitable on paper. Matt has not scheduled an appointment for us to prepare for this interview.
- The fifth interview is scheduled for Thursday 24th March in the afternoon. The appointment has been removed from my calendar. I have not seen the candidate's CV.

I have the day off work today but I will be available from 11.15am".

4.5 The claimant provides further alleged support for its contentions regarding D2 including in :-

4.5.1 His witness statement (pages 361 – 373 of the bundle) including :-

(a) Reliance on the general background and contentions in respect of D1.

(b) At paragraph 6.2 (pages 365 – 366) regarding all aspects of D2 . In brief summary, the claimant contended that Mr Danysz understood the departmental structure as he was

Mr Fontaine's line manager including that technical oversight by Mr Roberts was no longer available. The claimant further contended that the information which the claimant had provided concerning Mr Fontaine's conduct of the interview process showed that he was refusing input from an engineer and that he was pursuing inappropriate hiring decisions even when the candidate's unsuitability had been shown to him and that if inappropriate decisions were made this would place at risk the health and safety of occupiers of buildings into which the respondent's designs were installed. The claimant contends at paragraph 6.2.2 that Mr Danysz's response that he had offered assistance to Mr Fontaine in relation to this and would be having a separate chat with him on things in general, indicated that Mr Danysz was of a similar belief and that the fact that none of the candidates referred to were subsequently hired indicates that the claimant's assessment of their unsuitability was correct (page 366).

4.5.2 The claimant's written closing submissions (in pages 9-11 of the closing submissions) including that the claimant's position is that he did not feel at the relevant time, and still did not feel, that there was any need for him to provide the reasons why an unsuitable candidate for an engineering role would be a health and safety risk because he and everyone else involved (including Mr Danysz who held a senior position of responsibility), knew that hiring an incompetent engineer would result in dangerous designs which would place the health and safety of the people in the buildings to which the designs were installed at risk.

4.5.3 The claimant's further oral closing submissions.

4.6 The respondent's position:-

4.6.1 The respondent denies that D2 was a protected public interest disclosure.

4.6.2 At paragraph 48 of AGOR(page 131 of the bundle) the respondent acknowledged that the claimant emailed Mr Danysz on 23 March 2022 and that Mr Danysz replied on 24 March 2022 but denied the alleged contents of the claimant's email dated 23 March 2022 "in the main".

4.6.3 The respondent provided further grounds for its position at paragraphs 67 – 72 of the respondent's skeleton argument

at pages 336 – 337 of the bundle and in its oral closing submissions.

Disclosure 3

5. **Alleged protected public interest disclosure 3 ("D3") – on 28 March 2022 – in writing to Mr Matthew Trewhella (Chief Executive Officer, formerly Managing Director of the respondent)**

6. Sources :-

6.1 Paragraph 3.1.3 of the Order dated 28 December 2023 (page 160 of the bundle).
6.2 Paragraph 8.3 of POC (page 22 of the bundle). The claimant also says that he received no response from Mr Trewhella.
6.3 The document at page 174 of the bundle – email from the claimant to Mr Trewhella (subject matter – "Your Appointment to CEO") in which the claimant says :-

"Hi Matt

Congratulations on your new role!
I am really looking forward to even greater success for Kensa under your leadership.
Over here in Design, Matt Fontaine's approach to recruitment cannot possibly bring in the people we need.
I can set up the recruitment and training to build the strong Design Department that we will need as grow.

Best wishes

Caspar"

6.4 The claimant provides further alleged support for his contentions regarding D3 including in :-

6.4.1 His witness statement at paragraph 6.3 (page 366 of the bundle) including that he believed that "the information" that Mr Fontaine's approach to recruitment could not possibly bring in the people needed tended to show that the health and safety of individuals was likely to be endangered because there would be a risk to people occupying the buildings in which the respondent's designs were being installed if the respondent recruited an insufficient number of qualified and competent staff into an unstructured and unsupervised engineering department as mistakes would be made if they were working at over capacity / beyond their current competence.

6.4.2 The claimant's written closing submissions on all aspects of D3 is at pages 12 -13 of closing submissions) and in the claimant's further oral closing submissions.

6.5 The respondent's position :-

6.5.1 At paragraph 49 of the AGOR (page131) the respondent acknowledged the letter but contended that it was an expression of dissatisfaction with Mr Fontaine's management style and capability for his role/ that the claimant felt that he could do a better job rather than to raise concerns regarding health and safety or being made in the public interest.

6.5.2 The respondent provided further grounds for its denial at paragraphs 74 -76 of the respondent's skeleton argument at page 338 of the bundle and in its oral closing submissions.

Disclosure 4

7. Alleged protected public interest disclosure 4 ("D4") – on 29 March 2022 verbally to Mr Fontaine during a meeting.

8. Sources :-

8.1 Paragraph 3.1.4 of the Order dated 28 December 2023 (page 160 of the bundle).
8.2 Paragraphs 8.4 –8. 8. of the POC (page 22 of the bundle).
8.3 The transcript of the meeting between Mr Fontaine and the claimant on 29 March 2022 at pages 175 – 203 of the bundle. The claimant relies on the passages highlighted in yellow marker pen (set out below) as the protected public interest disclosure. It became apparent during the hearing that the line numbers in the transcripts were not the same in all copies of the bundle and the alleged disclosures are therefore identified in all relevant transcripts by reference to timings rather than line numbers. CS refers to the claimant and MF to Mr Fontaine.

(a) "CS 04:27
It's]…. Just too little too late Matt. It's, it's…..Nothing's really happening we're, we're pretty much still at square one. We're not progressing". (page 176 of the bundle)
(b) "CS 04:42
"……I'm not being engaged properly in this". (page 176 of the bundle).

(c) “CS 05:14
“…….those conversations should have happened in a much more comprehensive way, a very long time ago. ….”(page 177 of the bundle).

(d) “CS 05:33
“….I’ve helped as much as I can, with the very little information that you’ve given me. What I’m saying is that the process, which has had some input from me, granted , is not on the track, that it needs to be”. (page 177 of the bundle)

(e) “CS 07:01
“….I’m talking more about the design department process, the process that you’ve gone through, when you first got in touch with me in the middle of February, which is now six weeks ago, you said that you had been planning to get in touch with me about recruitment since Christmas. And, in fact, in the middle of February, you responded to a question that I put to you about what’s going on. What I’m saying in terms of too little too late, is that the entire scope of approach is too little too late….” (page 178 of the bundle).

(f) “CS 08:05
“No Matt, it’s your job.”(page 178 of the bundle)

(g) “CS 08:18
“…….I think that the design department needs to take responsibility for its own recruitment process. And if there’s not the expectation in the company, that departments decide how they’re going to recruit staff, then maybe there’s a bigger problem than I thought.” (page179 of the bundle).

(h) “CS 09:17”
“…….I went to Matt Trewhella because I had exhausted possibilities speaking to you.” (page 179 of the bundle).

(i) “CS 09:46”
“…….you can’t decide on how to recruit staff before you’ve worked out where they’re going to go in the company. That’s just Recruitment 101. You can’t recruit someone and then decide what job they’re going to do” (page 180 of the bundle).

(j) “CS 10.37”
“It actually is. That’s …that’s what the designation of senior means,….” (page 180 of the bundle).

(k) “CS 11.55”
“ …. this is a big issue. There are a number of problems (page 181 of the bundle).

(l) "CS 12:33"

"…….we spent a huge amount of time discussing the first candidate who was quite clearly not suitable" .(page 181 of the bundle).

(m)"CS 13.45"

"…..if you were making the right judgments, Matt, I wouldn't be worried. But you're not. You're getting this wrong – a lot……."(page 182 of the bundle).

(n) "CS 14:00

"…….I know what this department needs, because I did the job from assistant all the way up to senior. And I have developed the processes to a very high degree in the department in terms of the tools that we use, and the approaches that we take to lots of the design work. I understand about the education that the recruits that we need will have gone through. I know what we are looking for and where to find them" (page 183 of the bundle).

(o) "CS 15.24"

"…… I was expecting to be involved in the recruitment in a kind of meaningful way. And it's…. it's kind of …. I've kind of worked out, as we've gone along that, uhm, you've wanted to stay quite protective of the recruitment process and keep the decisions to yourself and keep the information to yourself as well." (page 183 of the bundle).

(p) "CS 18.58"

"……. the type of engagement that you'd requested from me made it very difficult for me to provide any useful advice, because, you know, I didn't, I didn't have enough information to see what needed to be done"(page 184 of the bundle).

(q) "CS 20:58"

"……. a completely bizarre situation that we would be, uhm, you know, writing a job description, let alone, uhm, let alone interviewing people before deciding who they're going to be managed by" (page 185 of the bundle).

(r) "CS 21:26"

"So the, the live job advert for the graduate design surveyors, southwest and southeast, both say that the... that position reports to the senior design surveyor..... what I was expecting is at some point before we end up interviewing people, that you make me aware that that's what you are expecting of me. You can't be telling the candidates that they're going to be reporting to the senior design surveyor and be telling me that the candidates are going to be recruiting to the design manager"(page 186 of the bundle).

(s) "CS 22.14"
"……. when I asked you who these people will be reporting to you, you didn't say that they will be reporting to you. You said you hadn't decided yet. I am saying that this is a problem."(page 186 of the bundle).

(t) "CS 24:14"
"…….. that's not how recruitment processes go. They don't start with interviewing candidates, then deciding who the interview panel is going to be, then deciding who's going to manage them."(page 188 of the bundle). (second section of the transcript timings start again)

(u) "CS 08:57"
"…….. when they're as critical as, you know, the entire future development of the department, then, in my position as a senior member of this department, I have to you know voice some concern, and that's what I've done."(page 196 of the bundle).

8.4 The claimant also identified during the hearing that he relies on the following documents from Section K of the bundle ("K") in support of D4 :-

8.4.1 K1 – the respondent's recruitment process (undated) at page 279 of the bundle.

8.4.2 K 4 – copy of lecture slides (undated)entitled Professional Ethics Competence and Commercial Awareness from the claimant's University course, at pages 282 – 291 of the bundle. The claimant also confirmed during his oral evidence that he also relied upon K4 in support of all of his alleged protected disclosures.

8.4.3 K5 – photograph of the claimant's University Grades Transcript dated 5 July 2019 at page 292 of the bundle.

8.4.4 K6 - RAE and EC 2017 Joint Ethical Statement (undated) pages 293- 294 (for engineers). The claimant also confirmed during his oral evidence that he also relied upon K6 in support of all his alleged protected disclosures.

8.4.5 K7 – Email from Angela Baigent to "Everyone" RE:Duties for Recruitment dated 21 February 2021 (page 295 of the bundle).

8.4.6 K8 – Email from the claimant to Mr M Fontaine RE: Sam Loader dated 4 March 2022 (page 296 of the bundle)

8.4.7 K9 – Sam Loader interview record dated 22 March 2022 (page 297 of the bundle).

8.5 The claimant provides further alleged support for his contentions regarding D4 including in his :-

8.5.1 His witness statement at paragraph 6.4 (pages 366 – 368 of the bundle) including that it tended to show that Mr Fontaine was in charge of a recruitment process which he was not competent to carry out and was not willing to accept input from someone who was competent to do so. Further the claimant asserts that he believed, in the context of the department being improperly structured and supervised that the information tended to show that designs issued by the department may be inadequate and occupiers of buildings into which they were installed would not be safe.

8.5.2 The claimant's written closing submissions at pages 13-15 and in his oral submissions. The claimant requested in is written submissions that the Tribunal should consider D 1 -4 not only individually but also in aggregate in accordance with the Judgment in **Norbrook Laboratories (GB)Ltd v Mr Shaw [2014] ICR 540.EAT**

8.6 The respondent's position :-

8.6.1 The respondent denies that D 4 was a protected public interest disclosure.

8.6.2 At paragraphs 51 – 55 of the AGOR (pages 131 – 132 of the bundle). The respondent rejects the claimant's characterisation of the recruitment process including that the claimant was excluded from the processes and contends that Mr Fontaine had overall responsibility for the relevant process and that the claimant's behaviour during the relevant process was adversarial and not collaborative or constructive.

8.6.3 The respondent provided further grounds for its denial at paragraph 82 to 88 of the respondent's skeleton argument (pages 342 – 343 of the bundle) and in its closing oral submissions.

Disclosure 5

9. Alleged protected public interest disclosure 5 ("D5") – in writing to Mr David Broom(the Managing Director of the respondent) on 27 April 2022.

10. Sources :-

10.1 Paragraph 3.1.5 of the Order dated 28 December 2023 (page 160 of the bundle).

10.2 Paragraph 9.2 of the POC (page 23 of the bundle).

10.3 The document at pages 204 – 205 of the bundle – the email from the claimant to Mr Broom dated 27 April 2022 in which the claimant says :-

"Dear David

A technical committee will flourish most effectively when the genuine role of engineering in Kensa Contracting is recognised and given its own leadership.

Now is the time for Kensa Contracting to nominate the design facility for what it is. It is no longer necessary to be considered a Design Department. Engineering designs are mediated and produced as a matter of fact in this functional area of Kensa for accurate fulfilment in response to the creation of precise sales contracts. It has thereby grown from humble beginnings to become the department of Engineering. No more and no less than what an Engineering Department does best.

For Sales, professional recognition and qualified departmental leadership given to Engineering- to call it by its name- will better enable Kensa to capitalise in full on an impressive track record of hard -won innovative contracts.

I am concerned, for example, by the loss of potential relating to a recent project requiring domestic cooling solutions that was let down by Design overreaching itself to tackle R&D.

In a similar way, closer and more proactive engagement from the Design Department could have gone a long way towards identifying potential shortfalls and alleviating recent pressures in Operations.

Sales and Operations will then have accomplished, in closer formation with a professionally recognised centre of engineering, the solid technical and marketing foundation required to maximise the success of Kensa's management.

I would like to draw attention to the Design Manager for the positive contribution of the engineering skills he has developed. However, it would be unfair as well as unsafe to call upon a non-engineer to lead an Engineering Team.

The details of how to recognise, fully develop and exploit the professionalism of Engineering for Kensa Contracting will follow if interest can be raised towards this aim. The aim is that of recognising the rise of Engineering from within the dated misnomer of Design Department. It may seem to be quite a paradigm shift from the old skin to the new, but once the move is made it will fall into view as perfectly sensible.

The final word is safety. The engineering of Kensa's projects must lead to efficient, safe implementations and therefore such activities require the support of engineering teamwork. I am looking forward

to being part of the Kensa Contracting Engineering Team informed by industry- standard levels of professionalism, recognised by authorities such as the Engineering Council and guided by training and development schemes such as that of CIBSE.

Kind regards

Caspar"

10.4 The claimant provides further support for his contentions regarding D4 including in :-

10.4.1 His witness statement (pages 364 and 368 – 369 of the bundle) at paragraphs 6.1.2 and 6.5.

10.4.2 The claimant's written closing submissions(pages 15 and 16) including his reliance upon matters already raised in respect of D1 and further that the references to " it would be……unsafe to call upon a non- engineer to lead an Engineering Team " (page 205 of the bundle) together with the references to safety in the final paragraph of the email related to the existing situation rather than some unspecified time in the future as contended by the respondent.

10.4.3 The claimant's oral closing submissions.

10.5 The respondent 's position:-

10.5.1 The respondent denies that D5 was a protected public interest disclosure.

10.5.2 At paragraphs 56- 60 of the AGOR (page 132 of the bundle) the respondent denied in particular that the claimant had emailed Mr Broom in order to raise concerns about health and safety/ believed the email to be in the public interest and contended in summary , that the purpose of the email was to express dissatisfaction with Mr Fontaine's management style and capability.

10.5.3 The respondent provided further grounds for its denial at paragraphs 91 – 96 of the respondent's skeleton argument at pages 344 – 345 of the bundle and in its oral closing submissions.

Disclosure 6

11. Alleged protected public interest disclosure 6 ("D6") – email from the claimant dated 10 May 2022 to Ms Caroline Hampton (recruitment co-ordinator with the respondent) and to Mr M Fontaine at pages 206-207 of the bundle).

12. Sources:-

12.1 Paragraph 3.1.6 of the Order dated 28 December 2023 (pages 160 – 161 of the bundle).

12.2 Paragraphs 10.1 – 10.4 of the POC (pages 23- 24 of the bundle).

12.3 The document at pages 206- 207 of the bundle – the email from the claimant to Ms Hampton and Mr Fontaine dated 10 May 2022 entitled “RE review for Graduate Design Surveyor South West and Sout East” together with an attached document (at page 208 of the bundle) entitled “KCL Design Department Role Evaluation”

12.4 In the Order dated 28 December 2023 the Tribunal recorded that the claimant relied upon the following sentences from the email dated 10 May 2022 as protected disclosures as set out below (the Tribunal has set out below the wording from the email in the event of any discrepancies between the wording in the Order dated 28 December 2023 and the wording in the email) :-

12.4.1 (paragraph 3.1.6.1)

“…. I need to draw attention to the next step in terms of improving our level of capacity and capability within the team”.

12.4.2 (paragraph 3.1.6.2)

“ It is actually more of a problem that we are calling ourselves surveyors when we aren’t, than that we are not calling ourselves engineers when we are. It implies a level of professionalism in the Design Department that is not being achieved”.

12.4.3 (paragraph 3.1.6.3)

“Kensa Contracting is also tasked with exemplifying to the industry how to organise a medium to large scale contracting company, capable of handling multi- million – pound contracts from the point of view of :

- Safety and efficiency on site
- Technical excellence
- Client satisfaction”.

12.4.4 (paragraph 3.1.6.4)

“We must recognise that high quality staff with appropriate engineering skills are proving to be few and far between” and,

12.4.5 (paragraph 3.1.6.5)

“If we compete for the very best graduates – high achievers who are on track with the appropriate IPD- we will be able to train them rapidly on all we have learned together about working on complex GSHP installation projects.”

12.5 The Order dated 28 December 2023 recorded that in respect of paragraph 3.1.6 (erroneously referred to in the Order dated 28 December 2023 as 4.1.6) the claimant relied upon the alleged

breach/likely of a legal obligation by the respondent pursuant to section 43 B (1) (b) of the 1996 Act rather than in respect of the endangering / likely endangering of the health and safety of an individual (pursuant to section 43 B(1) (d) of the 1996 Act as was the case in respect of all the other alleged protected public interest disclosures.

12.6 The claimant identified during the hearing that he also relied on the following documents from Section K of the bundle in support of D6:-

12.6.1 K3 – the claimant's profile (undated)at page 281 of the bundle in respect of the alleged disclosures at paragraphs 3.1.6.1 and 3.1.6.3 of the Order dated 28 December 2023.

12.6.2 K10 – Transcript of meeting between the claimant and Mr Broom on 3 May 2022 at pages 298 – 317 of the bundle .The claimant relies in particular on pages 301/302 in respect of 3.1.6.2 (breach of legal obligation).

12.6.3 K11 – KCL Design Department Recruitment Outcomes Summary V1 dated 3 May 2022 at pages 318 of the bundle.

12.6.4 K 13 – email from claimant to Mr Fontaine RE: Recruitment dated 7 April 2022 at page 320 of the bundle.

12.6.5 K14 – email from the claimant to Mr M Fontaine ,RE Recruitment dated 31 May 2022 at pages 321 – 322 of the bundle.

12.7 The claimant provided further alleged support for his contentions regarding D6 including in:-

12.7.1 His witness statement at paragraph 6.6 (pages 369- 370 of the bundle).

12.7.2 The claimant confirmed in his witness statement (as clarified further at the hearing) that the relevant legal obligation upon which he relies for the purposes of paragraph 3.1.6.2 is Regulation 3 of the Business Protection from Misleading Marketing Regulations 2008 (2008 No 1276). The claimant states in his witness statement (paragraph 6.6.2) that the alleged legal obligation was not to mislead potential clients by misrepresenting the Design department as being more competent and professional than it really was / by giving a false impression of quality to potential and existing clients in order to win work (page 369/370 of the bundle). The claimant also relies in his witness statement (paragraph 6.6.2.3 – page 370 of the bundle) in support of his contended reasonable belief that the respondent was in breach of the above-mentioned legal obligation on extracts from a transcript of a meeting between

the claimant and Mr Broom on 3 May 2022 (at pages 298 - 317 – and in particular at pages 302,303 and 309).

12.7.3 The claimant's written closing submissions at pages 16 -19 (including his explanation of why, in his reasonable belief he concluded that the respondent had breached its legal obligations under the above-mentioned Regulations.

12.7.4 The claimant's further oral closing submissions.

12.8 The respondent's position:-

12.8.1 The respondent denies that D6 (or any part of it) is a protected public interest disclosure.

12.8.2 At paragraphs 61- 63 of the AGOR the respondent acknowledged paragraphs 10.1 and 10.4 of the claimant's POC but denied paragraphs 10.2 and 10.3 thereof.

12.8.3 The respondent provided further grounds for its denial at paragraphs 96 – 109 of its written closing submissions. At the time that the respondent's written submissions were produced the claimant had not however identified the 2008 Regulations upon which he now relies in relation to paragraph 3.1.6 of the Order dated 28 December 2023. The respondent also relies on its oral closing submissions.

Disclosure 7

13. **On 24 May 2022 – an alleged disclosure to Mr M Fontaine (paragraph 11.2 of the POC in which the claimant alleges that he told Mr Fontaine that to pursue a generalised approach to fire stopping solutions was an unsafe practice and circulated a link to a one- day training course on FPA fire stopping (paragraph 3.1.7 of the POC).** This alleged protected public interest disclosure, which was denied by the respondent (paragraph 65 of the AGOR), was withdrawn by the claimant at the Hearing. There is however some overlap with documentation relied upon by the claimant in respect of this former alleged protected public interest disclosure (at pages 209 – 231 of the bundle) and D8 referred to below. The respondent seeks to rely on the claimant's transcript of the firestopping meeting on 24 May 2022 (pages 211 – 231) in its defence of D8.

Disclosure 8

14. **Alleged protected disclosure 8 ("D8")-on 26 May 2022 in writing to Mr D Broom.**

15. Sources :-

15.1 Paragraph 3.1.8 of the Order dated 28 December 2023 (page 161 of the bundle).

15.2 Paragraph 12.1 – 12.4 of the POC (paragraph 25 of the bundle).

15.3 Email from the claimant to Mr Broom entitled Design Department Recruitment dated 26 May 2022 at page 232 of the bundle together with the following attachments :

15.3.1 Attachment 1 - the claimant's notes on fire- stopping from Team Meeting on 24 May 2022 (page 233 of the bundle) (which was also relied upon by the claimant in respect of former D7).

15.3.2 Attachment 4 – Email chain between claimant, Ms C Hampton and Mr M Fontaine RE: CV review for Graduate (Part 1)(pages 234 – 236 of the bundle).

15.3.3 Attachment 5- Email chain between the claimant, Ms C Hampton and Mr M Fontaine RE:CV review for Graduate Design Surveyor South West and South East (Part 1) (pages 237 -240 of the bundle).

15.3.4 Attachment 6 – Email chain between claimant, Ms Hampton and Mr M Fontaine RE: CV review for Graduate design Surveyor South West and South East (Part 2) (pages 241 – 244).

15.4 The email from the claimant to Mr Broom dated 26 May 2022 (page 232 of the bundle) states as follows:-

" Hi David

1- Fire Stopping

I've attached notes of the training meeting on 24/ 05. Matt's plan for fire stopping seems poorly judged. He proposed a list of fire stopping designs to be pre- populated by a fire specialist- with the idea that Kensa would refer to the list when specifying fire stopping on each project. Matt had asked Phil some time previously to build the list. Fire Protection specialists will not be able to produce generic fire stopping designs.

2- Recruitment Candidate AG

Matt and Phil are booked in to interview AG (CV attached) in Manchester on 26 /05 for the role of Graduate Design Surveyor (SW/SE), a candidate with experience designing residential Sprinkler systems.

Matt conducted a first interview with AG on 31/ 03 for the Design Surveyor role and afterwards asked me to review the CV for AG for us to discuss his application- he wanted me to join him for a second interview. Matt hasn't returned to me to discuss, so for completeness (as I reported to Matt and Caroline) here are my

reasons why he's not suitable for employment, which was clear from reviewing the CV:
AG- Written English is poor, no relevant degree, interest in KCL not evident".
I don't know if you're aware of Matt's recruitment process but I sent Lee a summary as of 24/ 03 (see attached). I haven't heard any further response from Lee on recruitment.
Is appears to me to be a miscalculation, not only at the level of travel expenses but possibly at the level of H&S".

3- Recruitment, Training and Development

I'm meeting Caroline on Friday (see mail to Caroline and Matt 23/ 05 attached) to discuss the questions she raised an 11/05 after I sent Matt and Caroline a straight forward job description for a considered approach to recruitment. This is the correspondence I mentioned to you at the pizza day (13/ 05). I've attached the relevant emails- Re CV review for Graduate Design Surveyor South West and South East (10/ 05 and 12/05). Caroline responded but Matt has neither responded, nor answered my questions on recruiting manager on line management responsibilities. These are defining questions, so I feel I have no basis for further discussion with Caroline beyond Friday.
I really need your direction on this before Matt progresses to offering employment to candidates AG and AF.
I think it would help me to have that 3 way discussion you suggested sooner rather than later.

kind regards
Caspar"

15.5 The claimant also identified at the hearing that relies on K12- KCL Design Department Recruitment Outcomes Summary V2 dated 22 May 2022 at page 319 of the bundle in support of D8.

15.6 The claimant provides further support for his contentions regarding D8 including in:-

15.6.1 The claimant's witness statement at paragraph 6.8 (pages 371 to 372 of the bundle).

15.6.2 The claimant's written submissions (pages 19- 21). The claimant clarified in his written submissions that he relies on the contents of his email to Mr Broom dated 26 May 2022 rather than what was said at the firestopping meeting as the protected public interest disclosure. The claimant also says that he relies on the 3 May 2022 email. The claimant acknowledges in his submissions that he does not make an explicit link between the firestopping and fire sprinklers issue in the email dated 26 May 2022, however contends that he

believed that setting them side by side in the email tended to show the link as this would be obvious to someone involved in the industry.

15.6.3 The claimant's oral closing submissions

15.7 The respondent's position :-

15.7.1 The respondent denies that D8 was a protected public interest disclosure.

15.7.2 At paragraph 68 of the AGOR (page133 of the bundle). The respondent acknowledged paragraph 12.4 of the POC but otherwise denied paragraphs 12.1 – 12.3 of the POC including on the grounds that the contents of the email and attachments were an expression of dissatisfaction with Mr Fontaine's management style and capability rather than to raise health and safety/a matter of public interest.

15.7.3 The respondent provided further grounds for its denials at paragraphs 119- 124 of its written closing submissions (pages 352 – 353 of the bundle and in its oral closing submissions.

Disclosure 9

16. Alleged protected disclosure 9 ("D9") – on 14 September 2022 verbally to Mr M Trewhella.

17. Sources:-

17.1 Paragraph 3. 1.9 of the Order dated 28th December 2023 (page 161- 162 of the bundle) as follows :-

17.1.1 the Design Department's inability to recruit suitable staff was due to asking for the wrong things and looking for candidates in the wrong places (paragraph 3.1.9.1 of the Order dated 28 December 2023 – page 161 of the bundle).

17.1.2 the department's resourcing issues meant that the claimant could not see the department being able to deliver a high enough standard of work to the client on the Heat the Streets project unless something changed (paragraph 3.1.9.2 of the Order dated 28 December 2023 – page 162 of the bundle).

17.1.3 that only one person had been hired out of the four positions that had been advertised over a several month recruitment drive, and that the individual who had been hired did not have the right skills or experience for the job and had nevertheless been required to start working on active projects on day one of his employment (paragraph 3.1.9.3 of

the Order dated 28 December 2023 – page 162 of the bundle).

17.1.4 that what the claimant was particularly concerned about with Heat the Streets was the quality of the work because the project involved supplying to individual homeowners (paragraph 3.1.94 of the Order dated 28 December 2023 – page 162 of the bundle).

17.1.5 as Mr Fontaine had failed to recruit in adequate quantity or quality over the last nine months, the design department was no way over capacity and Mr Fontaine was asking the claimant to use various subcontractors to pick up different parts of Heat the Streets work, instead of allocating the claimant some of the time of the designers in the department the quality of whose work the claimant could rely on, and that this approach that Mr Fontaine was proposing would certainly take more of the claimant's time and would not enable the claimant to ensure the quality of the overall designs where it was a patchwork of inputs across the numerous subcontractors: (paragraph 3.1.9.5 of the Order dated 28 December 2023 - page 162 of the bundle)

17.1.6 that there was no review process for designs in place (paragraph 3.1.9.6 of the Order dated 28 December 2023 – page 162 of the bundle)

17.1.7 that for the first three years of the claimant's employment at the respondent, the claimant had been working to improve and professionalise its engineering practices because what the claimant found when the claimant was hired was chaos. The claimant considered this to be part of the claimant's role at the company, and Mr Fontaine had been receptive to this. For the last year Mr Fontaine had increasingly ignored the claimant's input and refused to allow the claimant sight of what was going on in the department (the non-domestic design process review meeting described with the claimant's claim) such that the claimant felt that he was no longer able to fulfil that aspect of the claimant's role(paragraph 3.1.9.7 of the Order dated 28 December 2023 and page 162 of the bundle)

17.2 Paragraph 13 of the POC (pages 25 – 26 of the bundle) and paragraph 38 of the claimant's further and better particulars of claim dated 26 July 2023 ("FBP") (pages 69- 70 of the bundle).

17.3 The transcript of the meeting between the claimant and Mr Trewhella on 14 September 2022 (pages 245 – 278 of the bundle).

The claimant relies on the following extracts from the transcript as the actual protected public interest disclosures in D9:-

17.3.1 (page 248 of the bundle – 16.39) "… e-mail that I sent to you which... kind of a sort of desperate last attempt, feeling as though no one was listening to me".

17.3.2 (page 248 of the bundle – 17.04) "Anyone that I could reach, didn't seem to be too interested in what I could see, as a completely unworkable situation, where Matt had these just completely confused jobs descriptions and job titles and didn't seem, it kind of really didn't seem as though he was... it didn't seem as though he was advertising what I know the job to actually be".

17.3.3 (page 248-249 of the bundle – 17.41-17.49) "…… there was no thought to what the people needed, what new staff needed to have, in terms of background…… what they would actually be doing in practice, how they would be trained and developed to come up to speed to be sort of you know, lead engineers on those big complicated projects…."

17.3.4 (page 249 - 18.01) "and all of the different engineering disciplines that we would need to bring into the department to make all of that work... I spent an awfully long time working out and very patiently describing to Matt exactly what the problems were with what he was doing, and how it really wasn't going to work. And the result is that, you know, of the four positions that Matt advertised, we've recruited one person who doesn't speak, unfortunately, very good English, and doesn't have any of the background that's required".

17.3.5 (page 249 – 18.12) "…..And we've given him projects on day one. And there's just... there's no thought to how to develop"

17.3.6 (page 253- 22.54) "….. the pinch of the project is the design"

17.3.7 (page 253- 23.12) "…. getting the designs out fast enough, is gonna make or break the project"

17.3.8 (page 255 – 24.31)"…. 53 weeks of design time…."

17.3.9 (page 255 24.37)" past the deadline... and I've suggested some approaches to Matt as to how we can..."

17.3.10 (page 255 – 24.44 -24.52)" speed things up, and I'm not really getting enough of a response from him …… to turn the ship around. That's the situation I wanted to make you aware of"

17.3.11 (page 259-31.23 – 31.31) " …. the way Matt's organised the team is that everyone is a start to finish designer…. for a project. So no one has any support. No one has any involvement in anyone else's project".

17.3.12 (page 260 31.45- 32.04)" That it means that you've got no ability to deal with situations where people are... they have got too much work on. So you can have one person twiddling their thumbs and the person sitting next to them... ... not….not be able to get through to the deadlines"

17.3.13 (page 260 32.18) "….. there's no review process in place at all. It's not……it's just not the way engineers work".

17.3.14 (page 268 13.01) "Matt has increasingly, um, refused that input….

17.3.15 (page 268 – 13.29) "….so the department has continued to fragment rather than turning into any kind of a team...."

17.3.16 (page 269 – 14.04 "……. what I consider to be my job in the design department is to fix and innovate and…. do all of the things that are outside the... sort of start to finish project design phase.."

17.3.17 (page 269 – 14.26" everything that's required to facilitate making that happen from a technical point of view is what I've contributed. And I.. I now don't feel as though I can do my job because I'm being kept out of all of the conversations…."

17.3.18 (page 270 15.04- 15.10) "but I can't see a way to…. deliver what the client needs"

17.3.19 (page 270 15.40)….."to the standards that there….. that .. that we've set up".

17.3.20 (page 271 – 15.39 " resource concerns that have come from, you know, lots of people in Kensa Utilities as well as me".

17.3.21 (page 273 16.27" I've asked Matt for additional resource with that… and.. the trail's gone quiet on that as well"

17.3.22 (page 273 16.45 ("there were four posts advertised for design, and we hired one person, and the other three posts don't seem to have continued to be recruited for"

17.3.23 (page 273 17.16 "… those places I think would have… if it had been organised properly would have got us out of the situation we're currently in".

17.3.24 (page 274 17.49 "Matt emailed me in January to ask for…. to get the ball rolling on recruitment. That, that's when we started that was our first conversation…"

17.3.25 (page 274 17.58)" about recruitment. And it's now September, and we just taken one person on who is going to take a very long time to be able to contribute".

17.3.26 (page 275 18.19 "if that was to do with the design department, I can tell you exactly why that was. It was because we were asking for the wrong things and looking in the wrong places".

17.3.27 (page 275 18.28 “I saw first hand everything that was.. and I.. rewrote Matt’s job descriptions and told him where to go to recruit people that we need”.
17.3.28 (page 276 19.31 “ requirement hasn't reduced at all”
17.3.29 (page 276 19.39 “For heat the Streets? For this? Yes. Too late.
17.3.30 (page 278- 23.56 “…. earlier in the week with David Broom where I said, you know, I can't see a future for me...”
17.3.31 (Page 278 24.03 “..in the design department. As it stands today. It's just… it's just not workable. And obviously, I'm not going to go into details of how, just uncomfortable it is to work with Matt at the moment”.

17.4 The respondent’s position:-

17.4.1 The respondent denies that D9 was a protected public interest disclosure.
17.4.2 At paragraph 71 of the AGOR(page 133 of the bundle) the respondent denied the claimant’s allegations and again contended that purpose nature and contents of the claimant’s statements were as an expression of dissatisfaction with Mr Fontaine's management style and capability rather than in the public interest and/or to raise any health and safety concerns.
17.4.3 The respondent provided further grounds for its denial at paragraphs 127- 133 of the respondent’s skeleton argument at pages 357 – 358 of the bundle together with pages 246, 247, 250 – 254, 256, 261- 264 and 267 of the bundle and its oral closing submissions.

FINDINGS OF FACT

18. The following findings of fact are made strictly for the purposes of determining the preliminary issue of whether the claimant made protected public interest disclosures for the purposes of sections 43 A – 43 B of the 1996 Act and are not therefore intended to be binding on any future Tribunal in respect of any other issue.

The respondent

19. The respondent, which is part of the Kensa Group, describes itself as a ground source heat pump delivery partner and contractor which specialises in larger – scale new build and social housing retrofit and non- domestic projects. Examples of the advertised projects undertaken by the respondent, including for an award-winning

multimillion-pound contract for a multi sited Housing Association are described at page 281 of the bundle.

The claimant

20. The claimant is a chartered engineer. At page 292 of the bundle there is a transcript from the University of Exeter in which it is recorded that the claimant became a Master of Engineering with Honours in renewable energy (class 1) on 27 June 2018. Whilst at University the claimant attended a lecture module entitled " Ethics and the Engineer" (the slides at pages 282 – 291 of the bundle") which included the consideration of the ethical/ professional dilemmas raised at pages 290 – 291 of the bundle. Mr Trewhella, who as referred to below is now the Chief Executive Officer of the Kensa Group Limited, was a contributor to the course.

21. The claimant joined the respondent in 2018 as an Assistant Contract Surveyor. In August 2019 the claimant was promoted to the position of Design Surveyor. In April 2021 the claimant was promoted again to the position of Senior Design Surveyor which position he continued to hold until the termination of his employment with the respondent. As Senior Design Surveyor the claimant played a key role in the respondent's projects. Examples of the projects in which the claimant took a key role are at page 281 of the bundle as referred to previously above.

The reporting structure and associated matters

22. At all material times, the claimant's immediate line manager was Mr Matthew Fontaine, Design Department Manager with Mr Lee Danysz as Operations Director. Mr Trewhella was the Managing Director of the respondent until around March 2022, at which time he moved to the position of Chief Executive Officer of the Kensa Group Limited. Mr Trewhella was succeeded as Managing Director of the respondent by Mr David Broom.

23. The Tribunal has limited information regarding the qualifications and experience of the personnel referred to above. The Tribunal is however satisfied on the available evidence, that Mr Trewhella is a qualified engineer with a well-recognised high level of relevant technical expertise and experience in the ground source heat pump industry.

24. The Tribunal is further satisfied that Messrs Broom, Danysz and Fontaine are well experienced in the ground source heat pump industry. Mr Danysz has a background in plumbing/ heating installation and experience of operations and management.

Email from the claimant to Mr Fontaine dated 4 March 2022 and attached evaluation sheet.

25. On 4 March 2022, the claimant wrote to Mr Fontaine confirming his impressions of the candidate whom they had interviewed together that afternoon for the role of Graduate surveyor, attaching an evaluation sheet confirming his views concerning the candidate's unsuitability for the role (pages 296 and 297 of the bundle). The claimant also stated in the email that they had had a useful discussion that day regarding the upcoming workload and that in the light of such information provided by Mr Fontaine during their discussion, the claimant now appreciated that they were far behind the necessary staffing levels. The claimant further expressed his view that whilst recognising that the candidate had presented an opportunity for a "swift hire" it would be a mistake to prioritise availability over the qualities and qualifications which they were seeking in a long term member of the department and that the pressure to recruit could lead the respondent towards a decision which they would very quickly start to regret. The claimant urged Mr Fontaine to give further consideration to their requirements before contacting the candidate again with regard to a possible second interview. The claimant concluded his e-mail by stating that it was good to now have the backing of senior management in relation to their need for additional staff and that he was confident that they would be able to recruit and train up the right people in the time available.

Email from the claimant to Mr Fontaine dated 7 April 2022

26. On 7 April 2022 the claimant emailed Mr Fontaine concerning recruitment. This e-mail is at page 320 of the bundle. In summary, the claimant raised concerns regarding the low standard of applicants, including the poor use of time spent on interviewing unsuitable applicants. The claimant also raised concerns regarding the lack of a structured and coherent recruitment process including that there was no bar against which candidates could be assessed, basis for shortlisting or selection panel in place. The claimant stated that he was at a loss as to how he could be of further assistance until Mr Fontaine he had established a coherent set of transparent recruitment measures which were consistently applied. The claimant concluded his e-mail by asking for the matter to be addressed before Mr Fontaine pressed on and ended up with an extended list of unsuitable candidates.

The email from the claimant to Mr Fontaine dated 22 March 2022 (D1).

27. On 22 March 2022 the claimant sent the e-mail (which is entitled "RE Interview Tomorrow") at page 170 of the bundle to his line manager,

Mr Fontaine. This e-mail, which the claimant relies upon as D1, is also set out at paragraph 2.3 above. In summary, the claimant expressed his views about the unsuitability of a candidate with architectural and surveying experience (candidate A), who was due to be interviewed the following day and suggested that in future it would be useful to review CV'S before offering interviews. The claimant does not offer any further explanation as to why candidate A was unsuitable for the post/ any posts within the respondent or explain any perceived health and safety risks or consequences of candidate A's appointment. Mr Fontaine responded on 22 March 2022 thanking the claimant for his review and input and stated that having reviewed candidate A's CV he would conduct the interview in the claimant's absence (page 172 of the bundle).

The email from the claimant to Mr Danysz dated 23 March 2022 (D2)

28. On 23 March 2022, the claimant sent the email (which Is entitled "RE Recruitment" at pages 171 – 173 of the bundle, to Mr Danysz . The email, which the claimant relies upon as D2, is also set out at paragraph 4 above. In summary, the claimant raised concerns about a series of interviews which had been undertaken by Mr Fontaine during March 2022 including the unsuitability of the candidates/the claimant's exclusion from the process including in respect of the candidate referred to for the purposes of D1 (candidate A). The claimant concluded his e-mail by indicating his availability to discuss the matter. The claimant does not say why he believed that any of candidates were unsuitable for the posts in question or raise any perceived health and safety risks / consequences if they had been appointed.

Subsequent events

29. None of the candidates referred to by the claimant in his e-mails to Mr Fontaine and/or Mr Danysz referred to above, were subsequently appointed by the respondent.

The email from the claimant to Mr Trewhella dated 28 March 2022 (D3)

30. On 28 March 2022 the claimant sent the e-mail (which is entitled Your Appointment to CEO") at page 174 of the bundle to Mr Trewhella. The e-mail, which the claimant relies upon as D3, is also set out at paragraph 6.3 above. In summary, the claimant congratulated Mr Trewhella on his appointment to his new role and stated that he was looking forward to "even greater success for Kensa" under Mr Trewhella's leadership. The claimant also expressed his concerns about Mr Fontaine's ability to recruit the people required by the respondent and indicated that the claimant could set up the necessary recruitment and training to build the

strong Design department that " we will need to grow". The focus of the claimant's letter is therefore on improving recruitment and training in order to build the strong design department needed for future growth. The claimant did not raise any concerns regarding any perceived health and safety issues / consequences of Mr Fontaine's alleged approach to recruitment.

31. There is no evidence before the Tribunal to indicate that Mr Trewhella responded to this email.

The video meeting between the claimant and Mr Fontaine on 29 March 2022 (D4)

32. On 29 March 2022 Mr Fontaine conducted a video meeting with the claimant. The claimant recorded this meeting, and the associated transcript is at pages 175 – 203 of the bundle. The alleged verbal disclosures which the claimant relies upon as D4, including the relevant passages from the transcript, are set out at paragraph 8.3 above. The relevant passages are also highlighted in yellow in the transcript.

33. In summary, this meeting was convened by Mr Fontaine to talk about in particular, the claimant's concerns regarding recruitment including why the claimant had felt it necessary to approach Mr Trewhella with his criticisms of the process which had been carried out by Mr Fontaine. The claimant explained to Mr Fontaine his concerns regarding what he perceived to be the shortcomings in the recent recruitment process undertaken by Mr Fontaine, which process the claimant stated he considered to be critical to the future development of the Department, together with his exclusion from the process. During the conversation the claimant offered to take over responsibility for recruitment from Mr Fontaine. The claimant did not raise with Mr Fontaine any perceived health and safety issues/ consequences arising in respect of the recruitment process.

34. The claimant and Mr Fontaine also discussed the state of their working relationship which was acknowledged by both of them to require improvement. The meeting concluded on a positive note with Mr Fontaine encouraging the claimant to speak to him / Mr Danysz if the claimant had any issues going forward and a commitment by Mr Fontaine to listen to the claimant/ communicate more in the future (page 203 of the bundle).

Email from the claimant to Mr Broom dated 27 April 2022 (D5)

35. On 27 April 2022, the claimant sent the e-mail at pages 204-205 of the bundle to Mr Broom. The e-mail, which the claimant relies upon as D5 is also set out at paragraph 10.3 above. In summary, the

claimant was proposing to Mr Broom that the respondent's design department should become an engineering department led by a qualified engineer which he stated would better enable the respondent to capitalise on its impressive track record of contracts. The claimant expressed concern about a recent project which he stated had been let down by design overreaching itself to tackle R&D and further stated that a more proactive engagement from the design department would have helped to identify shortfalls and alleviate pressures in operations. The claimant did not however provide any further information regarding any such issues or identify any related health and safety concerns. The claimant praised the contribution of the Design Manager (Mr Fontaine) for his contribution to the development of engineering skills but stated that it would be unfair and unsafe to call upon an engineer to lead an engineering team.

36. In the final paragraph of the email the claimant stressed the importance of safety and stated the engineering of the respondent's products must lead to efficient safe implementations which activities required the support of engineering teamwork. The claimant did not however identify any existing health and safety concerns. The claimant concluded his email by stating that he looked forward to being part of the respondent's contracting engineering team informed by industry standard levels of professionalism recognised/guided by the authorities referred to in his email.

Conversation between the claimant and Mr Broom on 3 May 2022

37. On 3 May 2022 there was a conversation between the claimant and Mr Broom at which an unidentified third party was also in attendance. This conversation was recorded by the claimant. The transcript is at pages 298-317 of the bundle. The claimant does not rely upon this conversation as a protected public interest disclosure.

38. In summary, Mr Broom acknowledged receipt of the claimant's emails and asked him to confirm his current priorities. The claimant told Mr Broom that he believed that the important thing was to get a handle on recruitment as the way in which they were advertising meant that they were trying to recruit surveyors to what was basically an engineering department. The claimant advised Mr Broom that this was causing problems as surveyors did not want to come and do engineering work and also that they were not attracting engineers - In essence they were confusing applicants and not getting the kind of people that they needed. The claimant advised Mr Broom that he was worried that they were going to make hiring choices which they would struggle to progress with over the next few years. Mr. Broom told the claimant that one of the things that the respondent had always struggled with was that no one else was doing exactly what

they did. Mr Broom enquired whether the claimant had discussed the matter with Mr Fontaine. The claimant advised Mr Broom that he had had very similar conversations with Mr Fontaine about the use of the word surveyor. Mr Broom acknowledged that there was no actual surveying in the respondent's work. The claimant informed Mr Broom that Mr Fontaine didn't understand the position however the conversations that he had with more senior people in the respondent and outside the industry, who were pushing toward professionalism in the ground source heat pump industry, concurred that it was engineering work. Mr Broom accepted that the claimant had made a good point and that dropping the surveyor element was probably more important than adding the engineering bit of it.

39. The claimant told Mr Broom that he believed that if they were to structure the department as an engineering department it would help with workflow and efficiency and that drawings would get signed off properly and problems spotted before they became real problems. Mr Broom acknowledged the benefits of what the claimant was suggesting including the employment of more operational level junior staff which would be necessitated by the level of work. The claimant proposed and discussed with Mr Broom the setting up of a training programme for graduate engineers with a second track of non-engineering graduates that would do basic draughtsman work. Mr Broom expressed the view (with which the claimant concurred) that managing technical process didn't always require a technical person but that it was necessary to have some level of technical oversight and authority when the respondent became involved in the bigger more complicated work. The claimant expressed the view that the department was being held back by the fact that it was not structured according to how an engineer would structure a department and the need to have engineering workflows. The claimant also suggested that whilst he wasn't proposing that Mr Fontaine should leave there were some things which it would be possible to relieve Mr Fontaine of that he was not really fulfilling and which would allow the department to move forward. The claimant offered to provide further details of what he was proposing in response to which Mr Broom indicated that that would be useful at some point however implementing something was going to take further time and thought. The claimant stated that he believed that the respondent had time, possibly from months to a year and a half, to point the respondent in the right direction so that when the thrust came, they were ready to go and in response to which Mr Broom indicated that the recent changes and promotions were about setting up the respondent’s capability so that they were able to respond to future accelerations in work.

Email from the claimant to Caroline Hampton and Mr Fontaine dated 10 May 2022 (D6)

40. On 10 May 2022, the claimant emailed Ms Hampton (Recruitment coordinator at the respondent) and Mr Fontaine concerning the future structure of the department and associated recruitment issues. This e-mail is a pages 206-207 for bundle (with attached Design Department Evaluation at page 208 of the bundle). The relevant extracts upon which the claimant relies as D6 are set out at paragraph 12.4 above.

41. In summary, the claimant gave his assessment of why the quality of the respondent's applicants for the post of design surveyor and design engineer was so poor. The claimant stated that he had noticed that recruitment agencies were struggling to respond to the respondent's job titles which cast engineers as surveyors. The claimant further stated that it was more of a problem that they were calling themselves surveyors when they weren't than that they were not calling themselves engineers when they were, as this implied a level of professionalism in the design department that was not being achieved. The claimant also stated that the respondent was not employing surveyors in the design department with the necessary qualifications to be registered and regulated by the RICS (and if they were they would be overqualified for the surveying aspects of the role). The claimant further stated that the general activity in the design department was to provide design services for the construction engineering and that if they applied the UK Standard for Professional Engineering Competence and Commitment(UK- SPEC) to the respondent's roles it showed how the job titles could be clarified.

42. The claimant also stated in the e-mail that the Government had a target of installing 600,000 heat pumps per year by 2028 which he said would require a 20 fold increase in current installation rates and the role to be played by the respondent in such expansion including to demonstrate to the industry how to organise a contracting company which was capable of handling multi-million contracts from the point of view of safety and efficiency on site, technical excellence and client satisfaction. The claimant further stated that he understood that in order for the respondent to maintain its market share it would require the design department to grow to around 100 staff in five years and that in recognition of the fact that high quality staff with appropriate engineering skills were proving to be few and far between they needed to revise their expectations and restructure their recruitment and training efforts to concentrate on a simple standard approach that would be flexible, repeatable and scalable. The claimant concluded his e-mail by saying that if they competed for

the very best graduates -high achievers who were on track with the appropriate IPD they would be able to train them rapidly on all that they had learnt together about working on complex GSHP installation projects.

43. The claimant relies on this e-mail to show that he had made protected public interest disclosures (as identified at Paragraph 12.4 above) relating to health and safety and (in respect of 12.4.2 only) to a breach of a legal obligation. The claimant does not however identify in this e-mail any concerns relating to health and safety / any failure to comply with any legal obligations.

E-mail from the claimant to Mr Broom RE Approach to firestopping and recruitment dated 26 May 2022 (D8)

44. The claimant e-mailed Mr Broom on 26 May 2022 (together with the stated attachments) concerning - design department recruitment. This e-mail is at page 232 of the bundle with the stated attachments at pages 233 – 244 of the bundle. The attachments include the claimant's notes of a team meeting (at page 233 of the bundle) on 24 May 2022 relating to fire stopping. The email, which the claimant relies upon as D8, is also set out at paragraph 15.4 above.

45. In summary, the claimant raises three areas of concern in the email dated 26 May 2022 relating to :- (a) Mr Fontaine's plan for firestopping which he described as "poorly judged" (b) the conduct of Mr Fontaine's recruitment process in relation to candidate AG (a candidate with experience designing residential sprinkler systems) together with the reasons why he considered that he was not suitable for employment which the claimant stated was obvious from his CV. The claimant attached a copy of the email which he had sent to Mr Danysz on 24 March 2023 regarding Mr Fontaine's recruitment process. The claimant also stated that Mr Fontaine's recruitment process appeared to be a miscalculation "not only at the level of travel expenses but possibly at the level of H&S". The claimant did not however provide any further details of any health and safety concerns and (c) the claimant's wider concerns relating to Mr Fontaine's approach to recruitment including with regard to issues relating to recruiting manager and line management responsibilities. The claimant requested further direction before Mr Fontaine progressed to offering employment to candidates AG and AF and requested the three-way discussion which he stated Mr Broom had previously suggested.

The associated transcript of the meeting on 24 May 2022

46. The Tribunal has been provided with a transcript of the associated team meeting on 24 May 2022 which was recorded by the claimant.

This transcript is at pages 211 – 231 of the bundle (which was originally relied upon by the claimant in support of the now withdrawn disclosure 7). It is accepted by the claimant that in the event of any discrepancy between this transcript and his notes of the meeting on 24 May 2022 the transcript should prevail.

47. The transcript of the meeting on 24 May 2022, which was led by Mr Fontaine, records that there was a wide-ranging discussion regarding firestopping during which the members of the team, including the claimant, expressed their views regarding the best way forward including with regard to the need for further training and whether it was appropriate to request a consultant to provide a matrix of designs. During the discussions, Mr Fontaine proposed putting together a matrix of materials and sending it to a fire specialist or manufacturer so that they could create a specification (page 221 - 31. 23) in response to which the claimant proposed team training on fire stopping before deciding whether they wanted a consultant to provide a matrix of designs (page 229 – 54.03). Mr Fontaine stated that he believed that they were going to have to do both however they should get booked onto training and speak to a consultant for guidance (page 229 – 54.33). There was also a discussion about the difficulties which the team had experienced when seeking to obtain firestopping advice previously.

48. There was also a discussion at the meeting as to whether the candidate that Mr Fontaine was due to interview again in the near future (candidate AG) might have experience of firestopping. Mr Fontaine responded that although he had been hopeful, it was clear from the questions which he had asked of the candidate at the first interview that this was not the case including that although AG was involved in sprinklers that they had nothing to do with fire stopping (page 230 – 57.43). The meeting concluded on the basis that the team would acquire further training and that Mr Fontaine would contact the two associations which had been mentioned during the meeting (including by the claimant) to see what they recommended.

The claimant's discussions with Mr Trewhella on 14 September 2022 (D9)

49. The claimant had a meeting with Mr Trewhella on 14 September 2022. Mr Kamal Sayany, (whom the Tribunal understands to be the claimant's brother) who had been working as a subcontractor on the Heat the Streets project) was also in attendance. The transcript of the meeting on 14 September 2022 (which was recorded by the claimant) is at pages 245 – 278 of the bundle. The extracts from the transcript identified at paragraph 17.3 above (which are highlighted in yellow in the transcript) are relied upon the claimant as D9.

50. The claimant started the meeting by saying that he wanted to catch up with Mr Trewhella on the conversation that he had had with him about a year ago at a conference in Manchester about bringing more resource into the design department. The claimant told Mr Trewhella that following their conversation he had put together a report for Mr Fontaine to initiate a discussion with him regarding the future arrangement of work in the design department, including to build a technical centre of excellence to facilitate future growth, but that it had hit a stone wall and that around that time Mr Fontaine had started withdrawing from him completely. The claimant described to Mr Trewhella the difficulties which he stated he had encountered with Mr Fontaine regarding recruitment including with regard to confused job descriptions and job titles and the lack of thought regarding the kind of people required for the work. The claimant further stated that of the four positions advertised by Mr Fontaine only one candidate had been recruited (AG) whose English was not very good, that he didn't have the background required and that he was given projects from day one without any thought on how to develop him.

51. The claimant advised Mr Trewhella that his focus over the last few months had been on the Heat the Streets project during which he had been working closely with the team to develop a design strategy and that that had got to the point where the client's requirements had been clearer. The claimant and Mr Trewhella had a discussion regarding the likely evolution of the project and the hope to get some projects underway where planning and highways applications were not required. The claimant advised Mr Trewhella that they were now at the point where they understood everything that they needed to do for the rest of the project with more work to do in the relevant timescale than previously estimated and that getting the designs out fast enough was going to make or break the project. The claimant also advised Mr Trewhella that they had passed the deadline and had suggested approaches to Mr Fontaine to speed things up but had not received an adequate response from him to turn the ship around. The claimant informed Mr Trewhella that he had suggested to Mr Fontaine taking Ruben (Kravis) and David (Ashford) off their current duties and bringing them on to Heat the Streets full time in response to which Mr Fontaine had suggested filling gaps with outsourced support. The claimant stated that he believed that the quality of the work for the Heat the Streets project was really important as they were working with individual homeowners. The claimant expressed his confidence in David (Ashford) and Reuben (Kravis) as he said that they knew what they were doing and required very little instruction including that Reuben was able to do the process from start to finish. The claimant informed Mr Trewhella that Mr Fontaine had organised the team so that everyone was a start to finish designer for a project without support or involvement in

anyone else's project which meant that they had no ability to deal with situations where some people had too much work/ could not met their deadlines whilst others did not have enough to do. The claimant also stated that there was no review process in place which was not how engineers worked.

52. The claimant advised Mr Trewhella that he was not getting what he needed from Mr Fontaine and dismissed Mr Trewhella's suggestion that it was as a result of a personality clash. The claimant contended that when he had joined the respondent, he had spent a lot of time fixing problems in the department but Mr Fontaine had increasingly refused his input so that the department had fragmented rather than turning into a team. The claimant stated that he felt that he could not do his job because he was being excluded from the discussions.

53. The claimant stated that he was happy with everything that they had achieved on Heat the Streets and the quality that they had set up but that he could not see a way to deliver what the client (Kensa Utilities) needed to the standards that they had set up and that there were other resource issues on other projects which were also not being addressed by Mr Fontaine. The claimant criticised Mr Fontaine's approach to recruitment including that although conversations had started in January regarding recruitment by September, they had only taken on one person who was going to take a very long time to be able to contribute. In response to Mr Trewhella's comment that he had heard that it was very difficult to get candidates the claimant responded that the reason for the difficulties in the design department was because they were asking for the wrong things in the wrong places and that he had rewritten Mr Fontaine's job descriptions and told Mr Fontaine where to go to recruit the people required and that they were now passed the point to recruit for the requirements of Heat the Streets. Mr Trewhella informed the claimant that he wasn't sure about the likely workload going forward and the claimant indicated that he did not have a clue what anyone else was working on anymore.

54. Mr Trewhella concluded by asking the claimant what he wanted to take away from the meeting and indicated that he had already talked to Mr Danysz about the situation. The claimant indicated that he had already had discussions with others about opportunities elsewhere in the company (to which Mr Trewhella responded positively) and that he had got to the point earlier where he had told Mr Broom that he couldn't see a future for himself in the design department as it was not workable. The claimant further stated that it was just not workable however that he was not going to go into detail of just uncomfortable it was to work with Mr Fontaine at that time. Mr Trewhella concluded

the meeting by telling the claimant that he did not need to as he was not dumb.

Other matters

55. The claimant contends (in paragraph 5 of his witness statement) that by the spring of 2022 (no date given) the condition of the respondent's Design Department was unsafe including because of (a) the lack of technical oversight (b) that Mr Fontaine was not qualified or competent to run a team of engineers doing the work that was being carried out (c) there were designers in the department who were neither properly qualified or supervised to carry out the work being asked of them. The claimant gave a specific example of Mr Reuben Kravis whom he stated was being asked to carry out work which was not appropriate to his qualifications in the absence of close and competent supervision. The claimant further stated that Mr Kravis had been tasked with the lead designer role on a complex multiple tower block project for a named Council without appropriate support or supervision (c) Mr Fontaine's inadequate approach to and conduct of recruitment and (d) that the design department was being asked to perform construction but was not working to the standards associated with such profession.

56. The Tribunal accepts that some of the issues referred to above were raised in the claimant's alleged protected public interest disclosures referred to above. The Tribunal has however noted that notwithstanding that the claimant says that he had formed the view by spring 2022 that the design department was unsafe and the claimant's acknowledged professional/ ethical responsibilities as an engineer, the claimant did not state such a view in any of his alleged protected public interest disclosures. The Tribunal has also noted that although the claimant raises potentially serious issues in his witness statement regarding the duties and responsibilities of Mr Kravis on a large Council contract there is no reference to such concerns in his contended protected public interest disclosures and further that the claimant speaks in very positive terms in his discussions with Mr Trewhella on 14 September 2022 about the work and abilities of Mr Kravis (paragraph 51 above).

THE LAW

57. The key statutory provisions relating to protected disclosures are contained in sections 43 A to 43C of the 1996 Act including, in particular for the purposes of this case in section 43 B (1) of the 1996 Act (the relevant parts of which) provide as follows :-

"**43B Disclosures qualifying for protection**

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following :-
(a)…….
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c)…..
(d)that the health or safety of any individual has been, is being or is likely to be endangered."

58. The Tribunal has also had regard to the comprehensive list of legal authorities set out in the respondent's list of authorities at pages 359 – 360 of the bundle.

59. The Tribunal has reminded itself in particular of the matters referred to below.

60. In order for a disclosure to be a protected/ qualifying disclosure for the purposes of Sections 43 A – 43 B of the 1996 Act, it must satisfy the following conditions :-

60.1 It must be a disclosure for the purposes of section 43A of the 1996 Act.

60.2 It must be a "qualifying disclosure" for the purposes of section 43B of the 1996 Act namely, it must be a "disclosure of information" which in the reasonable belief of the worker making it, is made in the public interest and intends to show that one or more of six the "relevant circumstances" has occurred, is occurring or is likely to occur.

60.3 There must be a disclosure of information namely, the conveying of facts and an expression of dissatisfaction by an employee as part of a dispute with his/ her employer is not enough. It was however made clear in the Court of Appeal judgment in **Kilraine v London Borough of Wandsworth [2018] IRLR CA 846** that information for the purposes of section 43B of the 1996 Act, may include a statement which may also be characterised as an allegation.

60.4 As further explained by the Court of Appeal in **Kilraine**, "information" for the purposes of Section 43 (B) (1) of the 1996 Act, must be read with the qualifying phrase "tends to show,"ie the worker must reasonably believe that the information "tends to show" that one of the relevant circumstances has occurred is

occurring or is likely to occur. Therefore, to be a disclosure it must have sufficient factual content to be capable of tending to show one of the relevant failures. Whether the disclosure relied upon meets the relevant standard will be for the Tribunal to evaluate in the light of the relevant facts of the case

60.5 The above question is likely to be closely aligned with the issue of whether the worker making the disclosure had the reasonable belief that the information he or she disclosed tends to show one of the six relevant circumstances.

60.6 Further as explained by the Court of Appeal in **Chesterton Global Ltd v Nurmohamed [2017] IRLR 836,CA** the question of the reasonable belief of the worker has a subjective and objective element and if the worker subjectively believes that the information which he or she discloses tends to show one of the listed alleged circumstances and the statement or disclosure has sufficient factual content and specificity such that it is capable of tending to show the alleged circumstances it is likely that such belief will be a reasonable belief.

60.7 In deciding whether a disclosure amounts to a qualifying disclosure the higher courts have made it clear that a Tribunal should adopt a structured approach and consider each of the statutory elements in turn making it clear that it has done so (**Martin v London Borough of Southwark EA- 2020-000432, Kealy v Westfield Community Development Association [2023] EAT 96 and Williams v Michelle Brown UKEAT/0239/20** .

60.8 The relevant elements are as follows:-

60.8.1 there must be a relevant disclosure of information

60.8.2 the relevant belief must be reasonably held

60.8.3 the worker must believe that the disclosure is made in the public interest.

60.8.4 The worker must believe that the disclosure tends to show one or more of the relevant circumstances listed in sub paragraphs (a) to (f) of section 43 B (1). The relevant circumstances relied upon in this case are that the health or safety of any individual has been, is being or is likely to be endangered (applies to all of alleged protected disclosures other than in respect of one of the alleged disclosures relied upon in respect of disclosure D6) or that a person has failed is failing or is likely to fail to comply with any legal obligation to which he/she is subject (sections 43 B (1) (b) and/or (d) of the 1996 Act.

60.8.5 Any such belief must be reasonably held.

60.9 As far as the reasonable belief is concerned – the worker must have a reasonable belief that the disclosure is made in the public

interest and tends to show the relevant circumstances. The information disclosed does not need to be true what is required is that the worker had a reasonable belief in the truth of the information at the time of making it **(Darton v University of Surrey [2003]IRLR 133,EAT**. The assessment of the worker's state of mind must be based on the facts as understood by him at the relevant time albeit that the factual accuracy of the allegations may be an important factor in determining whether the worker did have such a reasonable belief. Where the worker relies on more than one disclosure there needs to be a reasonable belief in respect of each of them.

60.10 The worker also has to have a reasonable belief that the disclosure is made in the public interest. In respect of the aspects of public interest, the Tribunal has to determine whether the claimant had a genuine belief that the disclosure was in the public interest and if so, whether the worker had reasonable grounds for so believing. The Tribunal has had regard to the four-factor guidance contained in **Chesterton** concerning this element of the qualifying disclosure. The necessary reasonable belief in the public interest may arise on later contemplation by the worker and need not have been present at the time of the making of the disclosure.

60.11 The Tribunal has considered first the questions identified above relating to the nature and sufficiency of the disclosure / whether the claimant had a reasonable belief in any such disclosure before (if still relevant) going on to consider the issues relating to public interest.

60.12 A worker bears the burden of establishing that he/ she has made protected public interest disclosures which establish the relevant circumstances – **Boulding v Land Securities Trillium (Media) Services UK EAT /0023/06**

THE CONCLUSIONS OF THE TRIBUNAL

61. The Tribunal has considered whether the claimant made the alleged protected public interest disclosures identified above. When determining this question, the Tribunal has had regard to the findings of fact and associated information referred to above together with the written and oral closing submissions of the parties and legal authorities/ principles referred to in this Judgment.

The e-mail from the claimant to Mr Fontaine dated 22 March 2022 (D1)

62. The Tribunal has considered first D 1 – the email from the claimant to Mr Fontaine dated 22 March 2022 at page 170 of the bundle together with the further information summarised at paragraphs 1 - 2.6 above

and the Tribunal's findings of fact including in particular at paragraph 27 above.

63. The Tribunal has considered first whether D1 constituted a disclosure / qualifying disclosure for the purposes of Section 43 B of the 1996 Act.

64. The claimant relies on section 43 B (1)(d) (health and safety) for the purposes of D1.

65. The respondent denies that D1 was a disclosure / qualifying disclosure for the purposes of section 43 B of the Act.

66. In summary, the claimant, contended that his email to Mr Fontaine dated 22 March 2022, meets the test for a qualifying disclosure including, as a starting point, that he disclosed information/ conveyed facts to Mr Fontaine that the candidate had 20 years' of experience in architecture including site surveying experience, that the candidate was not suitable for any of the roles advertised by the respondent and further that the candidate was offered an interview before his CV was reviewed. The claimant also contended that, having regard to the authorities, including **Williams v Michelle Brown** the use of the words "in my opinion" was no barrier to the Tribunal finding that there was a disclosure of information as disclosures often contain a mixture of fact and opinion and the words were followed by the information referred to above. The claimant also contended that the respondent's further argument that any information provided by the claimant did not, in any event, pass the sufficiency test as it did not include any information which tended to show that the health and safety of an individual had been/ was being or was likely to be endangered was mistaken as it conflated the, first stage, disclosure of information question with the separate (and second stage question) of whether the claimant had a reasonable (subjective) belief that the information provided tended to show that the health and safety of an individual was likely to be placed at risk.

67. With regard to the question of whether the claimant had a reasonable belief that the information tended to show the relevant wrongdoing(that the health and safety of an individual was likely to be placed at risk) the claimant contended that there were two distinct elements to the claimant's reasonable belief that the health and safety of individuals would be at risk namely that (a) the information contained in the e-mail dated 22 March 2022 tended to show that the candidate in question was not qualified and that if he was appointed by the respondent the health and safety of individuals into whose schools, offices and homes heat pumps would be installed was likely to be endangered because he would be working beyond his

competence and would not have competent supervision and(2) the information also tended to show that Mr Fontaine was not carrying out a competent hiring process notwithstanding that he was solely responsible for hiring staff which would led to a similar result as with the candidate in question.

68. The claimant further contended that the reasonableness of his belief should be considered in the context of both the information provided about the unsafe condition of the respondent's design department as at the spring of 2022 as set out at paragraph 5 of his witness statement and also that Mr Fontaine would have been well aware of how the department was structured including that there was no technical oversight as he was the departmental manager and further, as a senior manager in the construction industry, of the potential seriousness of such matters and that it was not therefore necessary for him to include such matters in his email. The claimant further relies for the purposes of determining the reasonableness of the claimant's belief on the authority of **Norbrook Laboratories (GB)Ltd v Shaw [2014] ICR 540 EAT** which he says establishes that test for a health and safety wrongdoing is wider than for a criminal offence (which he says is why the claimant did not pass the sufficiency test in the **Williams** case) and relies on the information which he has provided concerning his professional training and experience which he says gave him cause to reasonably hold his beliefs.

69. The claimant further contended that he had the necessary belief that this disclosure was in the public interest as he had concerns for the general public who were the occupants of buildings in which designs were being installed. The claimant relies on the authorities of **Millbank Financial Services Lts v Crawford [2014] IRLR 18 EAT** together with **Chesterton**.

70. The respondent disputes that D1 meets any of the requirements of section 43 B of the 1996 Act. In summary, the respondent firstly contended that the letter to Mr Fontaine dated 22 March 2022 provided an opinion/ was a pure allegation unsupported by evidence / failed to convey information as required pursuant to section 43B of the 1996 Act. The respondent further contended that the alleged disclosure was, in any event, vague and unspecific and failed to provide any information which tended to show any likely endangerment of health and safety, as required by Section 43 B of the 1996 and as confirmed by **Kilraine** (the sufficiency test). The respondent further says that claimant does not complain that the health and safety of any individual has being endangered and that his contentions regarding any likely future endangerment (paragraph 8.6 of his POC) are unsupported by any evidence and do not meet the

necessary threshold. The respondent further contends that the claimant's contentions regarding public interest are circular and do not meet the statutory test and that the claimant had no reasonable belief in the matters disclosed.

The conclusions of the Tribunal on D1

71. The Tribunal has had regard to the structured approach/ associated guidance contained in the authorities referred to above including in particular in **Williams v Michelle Brown, Kilraine, Simpson v Cantor Fitzgerald Europe [2021] IRLR 238,CA** and **Cavendish Munro Professional Risk Management Ltd v Geduld 2010 IRLR 38 EAT.**

72. The Tribunal has considered first whether D1 contained a disclosure of information as required for the purposes of section 43B (1) of the 1996 Act . The Tribunal is satisfied having had regard to the contents of the letter dated 22 March 2022 that although the claimant states that he is providing " his opinion" regarding candidate "A" it also contains (albeit minimal) information regarding candidate A's experience and the recruitment process to date.

73. The Tribunal is not however satisfied that the claimant provided in D1 information which tended to show that " the health or safety of any individual has been, is being or is likely to be endangered" which is also required by section 43 B of the 1996 Act at this first stage of the process. This is clear from **Kilraine** (paragraph 35 of the judgment) in which it is stated that :-

"Grammatically, the word "information" has to be read with the qualifying phrase , "which tends to show [etc]….In order for a statement or disclosure to be a qualifying disclosure according to this language , it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection 1".

74. This point was also made at paragraphs 25 and 26 of **Williams v Michelle Brown** (which in turn also relied on paragraph 69 of the EAT judgment in **Simpson v Cantor Fitzgerald Europe** – also referred to above).

75. The Tribunal therefore rejects the claimant's contention that this aspect only falls to be determined at the second stage of the process when considering the question of the reasonableness of the claimant's belief (if any) regarding such matters.

76. The claimant accepts that there is no direct reference to health and safety in D1 but, in summary, contends that:- (a) this was not

necessary, as was the case in the example of a disclosure of information given by the Court in **Cavendish** and (b) that he did not feel at the time and still did not feel that there was any need for him to provide the reasons why an unsuitable candidate would be a health and safety risk as he and everyone involved (including Mr Fontaine) knew that hiring an incompetent engineer would result in dangerous designs which would put at risk the health and safety of the people in the buildings into which those designs were installed.

77. Having given the matter careful consideration, the Tribunal is not satisfied that the claimant, who bears the burden of establishing on the balance of probabilities that he had made the alleged protected /qualifying disclosures, has provided in D1 sufficient factual content and specificity as is capable of tending to show that the health and safety of any individual "has been , is being or is likely to be endangered (as required by section 43 B (1) (d) of the 1996 Act).

78. When reaching this conclusion, the Tribunal appreciates that in the example of a disclosure of information provided in the **Cavendish Munro** case it was sufficient for the worker to have communicated information that "the wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around"… without actually stating that he believed that the health and safety of an individual was likely to be endangered.

79. That situation is however very different to the current case. In the example provided in **Cavendish Munro** the likely endangerment of health and safety is apparent on the face of the disclosure. The information contained in D1 is however limited to the experience of the named unsuccessful candidate/ the offering of interviews before reviewing CV's and there is no reference in D1 to any of the additional consequential contingent matters upon which the claimant now seeks to rely at paragraph 8.5 of his POC and/or in his witness statement (paragraph 5) to show actual/ likely endangerment to the health and safety of the category of persons identified in the claimant's POC.

80. The claimant seeks to rely for the purposes of Section 43 B (1) (d) of the 1996 Act upon a chain of consequential contingent events, which he contends are likely to have occurred resulting in the endangerment of the health and safety of the specified individuals namely, that if the design department is not sufficiently qualified the designs may not be safe. Such matters are not however referred to in D1 and moreover, are not, in anyway, factually related to the (limited) information which the claimant did provide in respect of the candidate (candidate A) in question.

81. Further, the Tribunal rejects the claimant's contention that the alleged likely endangerment of health and safety relied upon would have been obvious to Mr Fontaine in the light of his experience and the nature of the respondent's work. The Tribunal is not satisfied on the facts,(including in particular from the contents of the email dated 22 March 2022 and Mr Fontaine's subsequent discussions with the claimant on 29 March 2022 (paragraphs 27 and 32-34), that Mr Fontaine was or would reasonably have been aware from the claimant's email relating to the candidate identified in D1 (Candidate A) of the consequential contingent health and safety endangerment upon which the claimant relies for the purposes of these proceedings.

82. It is clear from the above authorities, such as **Williams v Michelle Brown, Kilraine** and also in **Simpson v Cantor Fitzgerald,** that at the first stage of the analysis (and before any consideration of the reasonableness of any belief held by the claimant) it is necessary for the claimant to establish, on the balance of probabilities, that the information/ facts conveyed ie the actual disclosure relied upon contains sufficient factual content and specificity (including that it tends to show the relevant "failure"). The claimant has however, for the reasons explained above, failed to satisfy this requirement.

83. Accordingly, the Tribunal is not satisfied that the claimant has established that he made a disclosure of information / qualifying disclosure in respect of D1 and this element of the claim is therefore dismissed.

The email from the claimant to Mr Danysz on 23 March 2022 (D2)

84. The Tribunal has gone on to consider D2- the email from the claimant to Mr Danysz dated 23 March 2022 at pages 171 – 173 of the bundle together with the further information summarised at paragraph 4- 4.5 above and the Tribunal's findings of fact including in particular at paragraphs 28 – 29 above.

85. The Tribunal has again considered first whether D2 constituted a disclosure/ qualifying disclosure for the purposes of section 43 B of the 1996 Act as set out previously above.

86. The claimant relies on section 43 B (I) (d) of the 1996 Act (health and safety) for the purposes of D2.

87. The respondent denies that D2 was a disclosure/ qualifying disclosure for the purposes of section 43 B of the 1996 Act.

88. The claimant contends that his email to Mr Danysz dated 23 March 2022 meets the test for a disclosure/ qualifying disclosure including that the claimant disclosed information/ conveyed facts that tended to show that there was a likely health and safety endangerment to the individuals identified. The claimant relies on the grounds already provided in respect of D1 and further contends that everyone in his profession, including Mr Danysz, who held a position of responsibility, would have understood that this was likely to lead to health and safety of the individuals being endangered.

89. The respondent disputes that the D2 meets any of the requirements for section 43 B of the 1996 Act and relies on the grounds already provided in respect of D1.

The conclusions of the Tribunal

90. The Tribunal has considered D2 in accordance with the approach adopted for D1.

91. Having given careful consideration to the contents of the claimant's email to Mr Danysz on 23 March 2022 (which is relied upon as D2) together with the associated findings of fact at paragraphs 28 and 29 above, the Tribunal is satisfied that D2 does contain information /convey facts relating to the recruitment process in which the claimant and Mr Fontaine had been engaged and associated events.

92. The Tribunal is not however satisfied that, for the reasons already explained in respect of D1, that the claimant has provided in D2 sufficient factual content and specificity as is capable of tending to show that the health and safety of any individual has been, is being or is likely to be endangered as required by section 43 B (1) (d) of the 1996 Act.

93. Whilst the Tribunal accepts that the email to Mr Danysz contains information relating to the recent recruitment process there is still no reference in the e-mail to the alleged consequential perceived contingent likely health and safety endangerment upon which the claimant seeks to rely for the purposes of these proceedings. The claimant has again failed to provide in D2 sufficient factual content and specificity as is capable of tending to show that the health and safety of any individual has been, is being or is likely to be endangered as required by section 43 B (1) (d) of the 1996 Act.

94. Further, the Tribunal is not satisfied on the facts, including in particular from the contents of the email dated 23 March 2022 and in the light of the findings of fact at paragraphs 28 and 29 above, that Mr Danysz was or would reasonably have been aware from the

email of the consequential contingent health and safety concerns upon which the claimant relies for the purpose of these proceedings.

95. Accordingly, in the light of the legal authorities and legal analysis referred to above in respect of D1 (as summarised already above) the Tribunal is not satisfied that the claimant has established that he made a disclosure of information/ qualifying disclosure in respect of D2 and this element of the claim is therefore dismissed.

The email from the claimant to Mr Trewhella dated 28 March 2022 (D3).

96. The Tribunal has gone on to consider D3, the email from the claimant to Mr Trewhella dated 28 March 2022 at page 174 of the bundle together with the further information summarised at paragraph 6 above.

97. The Tribunal has considered D3 in accordance with approach adopted in respect of D1 and D 2 above.

98. The claimant again relies on section 43 B (1) (d) (health and safety) for the purposes of the 1996 Act.

99. The respondent again denies that D3 was a disclosure / qualifying disclosure for the purposes of section 43 B of the Act.

100. In summary, the claimant relies on his submissions in respect of D1 and D2. In addition, the claimant contended that he was aware that Mr Trewhella, who he says had been a guest lecturer/ syllabus adviser on the claimant's engineering degree course, who had taught the claimant about professional ethics and to whom the claimant went when he required assistance/ oversight with designs, therefore understood the complex technical aspects of the work required. The claimant further contended that the information provided by the claimant in his e-mail dated 28 March 2022 would reasonably have been expected to indicate to someone in Mr Trewhella's position that insufficient and/or incompetent work would be done and that this would put people's health and safety at risk.

101. In summary the respondent relied on its contentions in respect of D1 and D2 above.

The conclusions of the Tribunal

102. The Tribunal has considered D3 in accordance with the approach adopted for D1 and D2.

103. Having given careful consideration to the contents of the claimant's e-mail to Mr Trewhella dated 28 March 2022 (which is

relied upon as D3) together with the associated findings of fact at paragraphs 30 and 31 above, The Tribunal is satisfied that the email does contain (albeit very minimal) information relating to recruitment in the design department and regarding the claimant's stated ability to set up recruitment and training in that department.

104. The Tribunal is not however satisfied that, for the reasons already explained in respect of D1 and D2, that the claimant has provided sufficient factual content and specificity as is capable of tending to show that the health and safety of any individual has been, is being or is likely to be in danger, as required by section 43 B(1) (d) of the 1996 Act.

105. When reaching this conclusion, the Tribunal has taken into account in particular, that the stated subject matter of the e-mail is Mr Trewhella's appointment as CEO. Further, far from raising any concerns regarding health and safety the claimant talks in the email in the terms of looking forward to even greater success for the respondent under his leadership and helping to build the strong design department that they needed as a company to grow.

106. Further the Tribunal is not satisfied on the facts that Mr Trewhella was or would reasonably have been aware from the contents of the claimant's e-mail dated 28 March 2022 of the consequential alleged contingent health and safety endangerment upon which the claimant relies for the purposes of these proceedings.

107. When reaching this conclusion, the Tribunal has taken into account not only the contents of the e-mail dated 28 March 2022 and the findings of fact at paragraphs 30 and 31 of the bundle (which do not raise any health and safety issues) but also the contents of the subsequent discussions between the claimant and Mr Trewhella on 14 September 2022 (the transcript at pages 245 – 278 of the bundle) referred to further below in which the claimant still did not raise the health and safety concerns upon which he now seeks to rely.

108. Accordingly, in the light of the legal authorities and legal analysis referred to above in respect of D 1 and D2, the Tribunal is not satisfied that the claimant has established that he made a disclosure of information /qualifying disclosure in respect of D3 and this element of the claim is therefore dismissed.

The alleged verbal disclosures by the claimant to Mr Fontaine during a meeting on 29 March 2022 (D4)

109. The Tribunal has considered next D4 – the alleged verbal disclosures by the claimant to Mr Fontaine during a meeting on 29

March 2022. The Tribunal has had regard to the transcript of the meeting recorded by the claimant at pages 175 – 203 of the bundle in which the alleged disclosures upon which the claimant relies are highlighted in yellow. The Tribunal has also had regard in particular, to the further information at paragraph 8 above. The claimant also relied, in support of D4, on the identified additional documents from Section K including a copy of his University slides relating to Professional Ethic and Competence and (page 282)and the Joint Ethical Statement for Engineers at pages 294- 294 of the bundle.

110. The Tribunal has noted that in paragraph 8.5 of the claimant's POC (page 22 of the bundle) the claimant's contentions regarding the meeting on 29 March 2022 including that he says that he told Mr Fontaine that he was concerned about the hiring process which Mr Fontaine was carrying out, that he (the claimant) was in a better position because of his qualifications and experience to manage such decisions and, that he should be given the responsibility to do so. The claimant further states that he told Mr Fontaine during that meeting that he (the claimant) had a duty of professional ethics (arising under the Engineering Council) and a duty to the respondent arising under its Whistleblowing policy to bring to light this concern . The claimant does not however rely on the references to professional ethics and or the respondent's whistleblowing policy statement as recorded in the entries timed at 9.36 and 9.51 in the transcript as alleged disclosures.

111. The Tribunal has considered D4 in accordance with the approach previously set out above.

112. The claimant relies on section 43 B 1 (d) (health and safety) for the purposes of D4.

113. The respondent denies that D4 (or any part of it) constitutes a disclosure/ a qualifying disclosure for the purposes of section 43 B (1) of the Act.

114. In summary, the claimant contends that he provided extensive and detailed information to Mr Fontaine during this meeting regarding his concerns about the way in which Mr Fontaine was conducting the recruitment process / the associated decisions. The claimant further contended that the information which he provided tended to show that Mr Fontaine was carrying out a completely chaotic process that was going to lead to too few and/or incompetent staff and that recruiting staff before deciding how to supervise them would result in incompetent supervision such that the work done by the department would be inadequate and that people would be unsafe in the buildings in which the designs would be installed.

115. In summary, the respondent contends that the claimant's complaint relates to Mr Fontaine's failure to involve the claimant in the recruitment process, that Mr Fontaine's approach to recruitment could not bring in the people required and says that he could do a better job. The respondent also denied that the claimant had raised a whistleblowing complaint and relied on previous submission referred to above to rebut that D4 was a qualifying disclosure.

The conclusions of the Tribunal

116. Having given careful consideration to all of the extracts from the transcript of the meeting between the claimant and Mr Fontaine on 29 March 2022 (as highlighted in yellow) relied upon by the claimant as protected disclosures (which are relied upon as D4) together with the associated findings of fact at paragraphs 33 and 34 above, the Tribunal is satisfied that D4 contains information regarding the recruitment process undertaken by Mr Fontaine since February 2022 including in respect of the claimant's alleged exclusion from the process, the unsuitability of candidates and the operation of reporting and management lines.

117. The Tribunal has also taken into account in particular the entry at paragraph (u)(set out at paragraph 8.3 above) timed at 08.57 at page 196 of the bundle) relied upon by the claimant as one of his alleged disclosures from the transcript of the meeting with Mr Fontaine in which he talks about the recruitment process being critical to the entire future development of the department and that as a senior member of the department he had to " voice some concern and that's what I've done".

118. The Tribunal is satisfied that the claimant has disclosed information relating to his concerns regarding the operation by Mr Fontaine of the recruitment process including in respect of the use of job descriptions, management reporting lines and the claimant's exclusion from the process. The Tribunal is further satisfied, as recorded in the transcript, that the claimant stated that he had voiced his concerns as a practising engineer and according to the ethics of the industry and the whistleblowing policy of the respondent as the recruitment process was critical to the future development of the department.

119. Notwithstanding the above, the Tribunal is not however satisfied that the claimant has provided in D4 such information, namely with sufficient factual content and specificity, as tends to show that the health and safety of any individual has been, is being or is likely to be endangered as required by section 43 B (1) (d) of the 1996 Act.

120. When reaching this conclusion, the Tribunal has noted that during the meeting, which was convened by Mr Fontaine following the claimant's approaches to a more senior manager, the focus of the discussion is on recruitment and the relationship/ communication between the claimant and Mr Fontaine. The claimant does not at any point raise the health and safety matters arising from and/ or relating to the recruitment process (or otherwise) upon which he now seeks to rely for the purposes of these proceedings and notwithstanding that it is clear from the transcript, that the claimant was aware of his professional ethical duties as an engineer and of the respondent's whistleblowing policy.

121. Further, the Tribunal is not satisfied on the facts, including the contents of the transcript of the meeting on 29 March 2022 and the findings of fact at paragraphs 32 – 34 above, that Mr Fontaine was, or would reasonably have been aware, from the matters discussed at that meeting, of the alleged likely consequential contingent health and safety endangerment to resident heat pump users upon which the claimant seeks to rely.

122. Accordingly, the Tribunal is not satisfied that the claimant has established that he made a relevant disclosure of information/ qualifying disclosure to Mr Fontaine in respect of D4 and this element of the claim is therefore dismissed.

123. Further for the avoidance of doubt, if for any reason the alleged disclosures contained in the transcript of the meeting dated 29 March 2022 are found to have provided sufficient factual content and specificity to be capable of tending to show that the health and safety of an individual has been, is being or is likely to be endangered (which the Tribunal does not accept) the Tribunal is not, in any event, satisfied in the light of its findings of fact that the claimant had a reasonable belief that any such disclosure tended to show such health and safety endangerment.

124. The Tribunal appreciates that this issue has to be determined in the context of whether the claimant had a reasonably held belief that the information relied upon tended to show that the health and safety of an individual had been, was being or was likely to be endangered (and accepting that whilst such belief may have been reasonably held it might nonetheless turn out to be incorrect).

125. When reaching this conclusion, the Tribunal has taken into account in particular, that the claimant has not provided any details of and /or documentary evidence to show any actual or likely health and safety endangerment to any heat pump users, that the

claimant says in paragraph 6.4.1 of his witness statement no more than that the designs may be inadequate. Further, the claimant's contentions regarding health and safety endangerment is at odds with what the claimant subsequently said to Mr Trewhella during their discussion on 14 September 2022 regarding the quality of the work in the department/ work undertaken by Reuben Kravis/ David Ashford (paragraph 51 above).

The aggregate effect of D1- D4

126. The claimant also seeks to rely, further/ in the alternative, on the aggregate effect of D1 – D4 pursuant to the judgment in **Norbrook Laboratories (GB) ltd v Shaw [2014]ICR 540 EAT.** The Tribunal is not however, satisfied that the aggregation of D1 – D4 is of any assistance to the claimant in this case. The claimant's claims have failed so far because of the claimant's failure to provide sufficient factual content and specificity to be capable of tending to show that the health and safety of any individual has been, is being or is likely to have been endangered as required by section 43 B (1) (d) of the 1996 Act and, having considered them together, still does not provide the necessary factual information.

E-mail from the claimant to Mr Broom dated 27 April 2022 (D5).

127. The Tribunal has considered next D5 - the e-mail from the claimant to Mr Broom dated 27 April 2022 which is at pages 204-205 of the bundle. The e-mail is also set out at paragraph 10 above. The Tribunal has also had regard to the further information relating to D5 contained in paragraph 10 above and also, the findings of fact at paragraphs 35 and 36 above.

128. The Tribunal has considered D5 in accordance with the approach previously set out above.

129. The claimant again relies on section 43 B(1)(d) of the 1996 Act (health and safety) for the purposes of D5.

130. The respondent denies that D5 (or any part of it) constitutes a disclosure/ a qualifying disclosure for the purposes of section 43 B of the 1996 Act.

131. In summary, the claimant contended that he had provided information (as opposed to an allegation or opinion) that the design department had progressed to the point where engineering drawings were being mediated and produced, that the department had overreached itself by tackling R&D to the detriment of a project and it would be unfair as well as unsafe to call upon a non-engineer (Mr

Fontaine) to lead an Engineering team. The claimant further contended that he had made it clear in the e-mail that the final word was safety and that the respondent needed to progress to being part of a contracting engineering team informed by industry levels of professionalism and recognised/ guided by the authorities referred to in the e-mail.

132. In his witness statement the claimant further contended that his email to Mr Broom tended to show that the respondent's Design Department was not functioning in a safe manner, that it was working outside its areas of competence/ that its standards were not aligned and that this in turn tended to show that its work was likely to be inadequate and that the occupiers of buildings into which its designs were installed would not be safe.

133. In summary, the respondent relies on its previous arguments in respect of D1 – D4. The respondent contends that the only reference to safety in D5 is to " it would be unsafe to call on a non engineer to lead an engineering team" and in the final paragraph where the claimant says that the respondent's work must be safe. The respondent further contends that the claimant does not complain in the e-mail that the respondent's practices were unsafe, including that he does not say in his email to Mr Broom (as subsequently stated at paragraph 9. 2.2 .1 of his POC) that members of the team were reporting to/ recruited by Mr Fontaine and that there was no workflow structure or review process in place as one would expect in a professional engineering team (page 23 of the bundle).

The conclusions of the Tribunal

134. The Tribunal is satisfied, having given careful consideration to the claimant's e mail dated 27 April 2022 (pages 204 – 205 of the bundle and the findings of fact at paragraph 35 above) that its principal purposes was to promote the reformulation of the respondent's Design Department into an Engineering Department with a qualified engineering lead.

135. The e-mail dated 27 April 2022 however, also conveyed information relating to the engineering nature of the work/ designs undertaken in the Design Department together with concerns relating to recent difficulties which the claimant stated had been experienced on a recent project requiring domestic cooling solutions and recent pressures in Operations. The email also advocated the importance of safety including that "it would <u>be</u> (emphasis added) unfair as well as unsafe to call upon a non - engineer to lead an Engineering Team" and the importance , for reasons of safety, of

adopting industry standard levels of professionalism and training/ development schemes.

136. In his witness statement (paragraph 6.5) , the claimant contended that his e-mail dated 27 April 2022 tended to show that the Design Department was not functioning in a safe manner and was working outside its area of competence as a result of which its work was likely to be inadequate and the occupiers of buildings into which its designs were installed would not be safe.

137. Such concerns were not however articulated in the claimant's e-mail dated 27 April 2022 including in particular, and notwithstanding the claimant's acknowledged professional/ ethical responsibilities as an engineer, that the respondent's designs were likely to be inadequate and/ or that the occupiers of the buildings into which its designs were installed would not be/ were not likely to be safe. The email also recognised the positive contribution which Mr Fontaine had made to the development of engineering skills in the Design Department.

138. Further, the claimant provides no information in the e-mail about the nature of the difficulties experienced with regard to the recent project requiring domestic cooling solutions and he does not suggest that such difficulties or the potential shortfalls/ recent pressures in Operations, also referred to in the e-mail were, in anyway, related to and /or gave rise to / was likely to give rise to any health and safety dangers to any occupiers of buildings in which the respondent's designs were installed.

139. In the circumstances, the Tribunal is not satisfied that the claimant, who bears the burden of establishing on the balance of probabilities, that he made the alleged protected/ qualifying disclosures has provided in D5 sufficient factual content and specificity as is capable of tending to show that the health and safety of any individual has been being or is likely to be endangered as required by section 43 B of the 1996 Act.

140. Further, for the avoidance of doubt, if for any reason the information contained in the e-mail to Mr Broom dated 27 April 2022 is found to have provided sufficient factual content and specificity as to be capable of tending to show that health and safety of an individual has been is being or is likely to be endangered (which the Tribunal does not accept) the Tribunal is not, in any event, satisfied in the light of its findings of fact that the claimant had a reasonable belief that any such information tended to show any/ any such likely health and safety endangerment.

141. When considering this issue, the Tribunal has adopted the approach identified previously above, including that it has to be considered from the perspective of the claimant namely whether in the reasonable belief of the claimant the information tended to show that the health and safety of an individual had been , was being or was likely to be endangered.

142. When reaching its conclusions the Tribunal has taken into account the importance of safety in the industry. The Tribunal has also taken into account however, that the claimant has not provided any details of and or documentary evidence to show any actual and/or likely health and safety endangerment to any heat pump users/ the buildings in which they are/ were to be installed . The Tribunal has also taken into account that in the body of the e-mail dated 27 April 2022 the claimant talks about capitalising in full on an impressive track record of hard worn innovative contracts and praises the design manager (Mr Fontaine) for the contribution that he had made to the development of engineering skills within the Design Department.

143. The Tribunal has also noted that in the transcripts of the claimant's subsequent discussions with Mr Broom on 3 May 2022 (paragraphs 37 – 39 above) and with Mr Trewhella on 14 September 2022 (paragraphs 50 – 51 above) the claimant does not raise any concerns that the occupiers of buildings into which designs were/ were to be installed were not/ would not be safe. Moreover, the claimant spoke in positive terms to Mr Trewhella in September 2022 regarding the quality of the work / confidence in the work undertaken by David Ashford and Reuben Kravis.

144. In all the circumstances, the Tribunal is not satisfied , having regard to all of the above that the claimant, in any event, had a reasonable belief that the disclosures relied upon in the letter dated 27th April 2022 tended to show that the health or safety of any individual had been, was being or was likely to be endangered for the purposes of section 43B (1) (d) of the 1996 Act.

145. Accordingly, the Tribunal is not satisfied that the claimant has established that he made a relevant disclosure of information / qualifying disclosure in respect of D5 and this element of the claim is therefore dismissed.

Email from the claimant to Ms C Hampton and Mr M Fontaine dated 10 May 2022 (D6)

146. The Tribunal has considered next D6- the email from the claimant to Ms Hampton (recruitment co- ordinator with the respondent) and Mr M Fontaine entitled "RE review for Graduate

Design Surveyor South West and South East (at pages 206-207 of the bundle). There is also an attached document (at page 208 of the bundle) entitled KCL Design Department Role Evaluation. The Tribunal has also had regard to the additional information contained at paragraph 12 above and in particular, at paragraph 12.4 in which the extracts from the letter upon which the claimant relies as protected disclosures are set out.

147. The claimant relies upon section 43 B (1) (d) of the 1996 Act (health and safety) in respect of all of the alleged extracts relied upon from the email dated 10 May 2022 save for the one alleged disclosure referred to below (identified at paragraph 12.4.2 above and 3.1.6 of the Order dated 28 December 2023 (page 160 of the bundle).

148. The alleged disclosure upon which the claimant relies for the purposes of section 43B(1) (b) (breach of a legal obligation) of the 1996 Act is follows:-

"It is actually more of a problem that we are calling ourselves surveyors when we aren't, than that we are not calling ourselves engineers when we are. It implies a level of professionalism in the Design Department that is not being achieved".

149. In summary the claimant contended that he provided in the email dated 10 May 2022 information that the Design Department was doing the work of providing design services for construction engineering, that there was insufficient capacity and capability in the team and that there was about to be a dramatic increase in the respondent's business owing to new government targets . Further the claimant contended in his witness statement that the information which he provided regarding recruitment failings, tended to show that the department was not set up in a safe way to do the construction engineering work, that they were not on track to recruit staff who were competent / or would be competently supervised and these things were likely to lead to unsafe designs being issued.

150. The claimant does not identify in the email dated 10 May 2022 the relevant legal obligation on which he seeks to rely. The claimant however stated in his witness statement dated 3 April 2024 that the legal obligation upon which he seeks to rely is contained in SI 2008 no 1276 – the Business Protection from Misleading Marketing Regulations 2008 ("the Regulations").

151. The claimant contended in summary, that the relevant obligation was to not mislead potential clients by misrepresenting the Design Department as being more competent and professional than

it really was and that the respondent was in breach of a legal obligation because it was giving a false impression of the quality to potential and existent clients in order to win work.

152. The purpose of the Regulations is stated as being to prohibit misleading advertising as defined in Regulation 2

153. Regulation 3 of the Regulations then provides as follows:
"Prohibition of advertising which misleads traders
3(1) Advertising which is misleading is prohibited
(2) Advertising is misleading which:-
(a) in any way , including its presentation , deceives or is likely to deceive the traders to whom it reaches; and by reason of its deceptive nature, is likely to effect their economic behaviour: or
(b) (not relevant here).

154. The claimant seeks to rely in support of his case on his discussions with Mr Broom on 3 May 2022 which he says support his position on the use of the word surveyor (page 298 – 317 of the bundle)/ breach of a legal obligation.

155. The claimant relies on his previous contentions in respect of the previous alleged disclosures in support of the alleged health and safety endangerment contentions in respect of D6.

156. The respondent denies, including for the reasons explained above in respect of the previous disclosures) that D6 (all aspects) meets the statutory requirement for a disclosure/ qualifying disclosure. The respondent also contends that the claimant has failed to identify / properly identify the legal breach relied upon in compliance with the requirements of cases such as **Eiger Securities LLP v Korshunova [2017]IRLR 115 EAT and Arjomand- Sissan v East Sussex Healthcare NHS Trust UKEAT/0023/06.**

The conclusions of the Tribunal

157. The Tribunal has considered first the position with regard to the alleged health and safety aspects of D6.

158. The Tribunal is satisfied that the extracts from D6 relied upon by the claimant convey information relating to the recruitment process/ (including the difficulties recruiting / the absence of high-quality staff with engineering skills) and the respondent's role in the market place going forward.

159. The Tribunal is not however satisfied, having regard to the reasoning already explained above in respect of the previous alleged disclosures, that the relevant extracts (or indeed the letter as a

whole) include any factual information which tends to show that the health and safety of any individual has been, is being or is likely to be endangered for the purposes of section 43 B(1) (d) of the 1996 Act.

160. The only reference to safety in the letter, as a whole, is at the bottom of page 206 when the claimant talks about " Safety and efficiency on site" as part of how he saw the role of the respondent in the industry going forward and the importance of recruitment and training to such vision.

161. The claimant has therefore failed to establish that he made a disclosure/ qualifying disclosure and this element of D6 is therefore dismissed.

162. The Tribunal has therefore gone on to consider the claimant's remaining claim in respect of D6 relating to the alleged breach of a legal obligation. When doing so the Tribunal has had regard in particular, to the helpful guidance contained in the legal authorities of **Eiger** and **Arjomand – Sissan** referred to above.

163. Having given the matter careful consideration the Tribunal is satisfied that the claimant has provided information in his email dated 10 May 2023 (page 206 of the bundle) that the respondent's staff were describing themselves as surveyors rather than engineers which he contended implied a level of professionalism that was not being achieved.

164. The claimant has identified the Regulations as being the source of the relevant legal obligation upon which he relies. The claimant also relies on the comments of Mr Broom during their conversation on 3 May 2022 (paragraph 38 above) regarding such matters. The claimant has not however provided (either in the original email or subsequently in these proceedings) any explanation of how he says that the information provided in the e-mail dated 10 May 2022 tends to show a breach of the Regulations by the respondent including how he says that the constituent parts of the Regulations (including Regulation 3) apply in this case.

165. Further the Tribunal is not satisfied that the claimant had, in any event, a genuine and reasonably held belief that the respondent was in breach of the Regulations.

166. When reaching this conclusion, the Tribunal has taken into account in particular that the claimant did not identify the Regulations as the source of the relevant legal obligation until late in the proceedings (his witness statement dated 3 April 2024).

167. Further, and more importantly, it is clear from the claimant's e-mail dated 10 May 2022 that his focus was seeking to ensure that the respondent had the necessary infrastructure and recruitment policies and processes in place to allow it to procure / develop (what he considered to be) the necessary engineering skills required to meet the anticipated large expansion of heat pumps installation by 2028.

168. When seeking to analyse the reasons why the applicants for the posts of design surveyor and design engineer had been so poor the claimant observed in the email that he had noticed recruitment agencies (rather than potential clients) struggling to respond to job titles which cast engineers as surveyors. It is in this context that the claimant went on to make the comment about the problem in calling themselves surveyors. Such comment had also arisen in a similar context during the claimant's discussions with Mr Broom on 3 May 2022 (paragraph 38 above).

169. Further, the claimant relies in these proceedings on his own company profile at page 281 of the bundle to demonstrate his experience and expertise in the industry/ work undertaken by him on behalf of the respondent. In this profile the claimant is referred to as a Senior Design surveyor notwithstanding that the claimant does not purport to have any formal surveying qualifications.

170. In all the circumstances, the Tribunal is not satisfied, on the balance of probabilities, that claimant has provided sufficient information as was capable of tending to show the breach or likely breach of the Regulations and /or that he, in any event, held a reasonable belief that the respondent had failed, was failing or was likely to comply with its legal obligations and this element is therefore dismissed.

Email from the claimant to Mr D Broom dated 26 May 2024 (D8)

171. The Tribunal has considered next D8 – the email from the claimant to Mr D Broom dated 26 May 2022 entitled "Design Department Recruitment" (at page 232 of the bundle). The claimant also relies in support on the various attached documents at pages 233 – 244 of the bundle including his notes of the fire stopping team meeting on 24 May 2022. The Tribunal has also had regard to the additional information contained at paragraph 15 above (where the relevant email upon which he relies as D8 is also set out).

172. The claimant relies upon section 43 B (1) (d) of the 1996 Act (health and safety) in respect of two alleged protected disclosures contained in the email dated 26 May 2022 namely :- (a) (in the first

paragraph of his email) that Mr Fontaine was pursuing a "poorly judged" approach to firestopping namely, that he was proposing a list of fire stopping designs to be pre- populated by a fire specialist so that the respondent could refer to the list when specifying fire stopping on a project and (b) that he had concerns that Mr Fontaine and Mr Carpenter were about to interview a candidate for the role of Graduate Design surveyor who had previously done work on fire sprinkler systems and that he was concerned that Mr Fontaine might hire him under the false impression that he would bring fire stopping expertise.

173. The claimant acknowledged in his written submissions that he did not make an explicit link between the firestopping and fire sprinklers concerns in his email but contended that he believed that setting them side by side in the email tended to show the link because it would have been obvious to anyone who was involved in the industry that there was a dangerous potential conflation at play which was likely to endanger people's health and safety.

174. In summary, the respondent denies that D8 (all aspects) meets the statutory requirements for a disclosure/ qualifying disclosure including that :- (a) it is stated in the claimant's own notes of the firestopping meeting on 24 May 2022 (page 233 of the bundle) that nobody raised any objections to Mr Fontaine's strategy and (b) that whilst the email to Mr Broom does raise concerns that Mr Fontaine and Mr Carpenter were about to interview a candidate (AG) who the claimant considered to be unsuitable for the role of Graduate Design Surveyor – he did not express any concerns that Mr Fontaine might hire the candidate under the false impression that someone with experience with fire sprinklers would bring fire stopping expertise (c) the claimant provides no details of his assertions that Mr Fontaine's recruitment processes could be a miscalculation …" possibly at the level of H&S" which in any event does not meet the required test of "likely endangerment" and (d) the reasons relied upon in respect of the previous alleged disclosures.

175. The Tribunal has considered first the alleged protected disclosure in respect of Mr Fontaine's alleged "poorly judged" approach to firestopping.

176. The Tribunal is satisfied that the first paragraph of the claimant's email to Mr Broom dated 26 May 2022 (page 232 of the bundle) contains a disclosure of information relating to Mr Fontaine's stated approach to the production of fire stopping designs. Further, although the email does not make any reference to the likely endangerment to the health and safety of tenants and others by reason of the implementation of generalised fire stopping solutions, the Tribunal

accepts that the stated information was sufficient to tend to show (given the nature of the process under discussion) the likely endangerment to health and safety.

177. The Tribunal is not however satisfied that the claimant had a reasonable belief that the information relating to this matter tended to show that the health and safety of any individual had been, was being or was likely to be endangered.

178. When reaching this conclusion , the Tribunal has taken into account in particular, its findings of fact at paragraphs 47 / 48 above together with the contents of the associated transcript of the meeting on 24 May 2022. Whilst Mr Fontaine proposed a possible matrix of designs, he also accepted at the meeting that further training and guidance was required before deciding upon the way forward. Further, the upshot of the meeting was that Mr Fontaine agreed to contact the two associations which had been mentioned at the meeting (including the one suggested by the claimant) to see what they recommended . The Tribunal is therefore not satisfied that the claimant had a reasonable belief that the information contained in the first paragraph of his email to Mr Broom dated 26 May 2022 tended to show that Mr Fontaine's plan for firestopping was "poorly judged" or that the health and safety of an individual had been, was being or was likely to be endangered.

179. The Tribunal has gone on to consider the second part of the alleged disclosure relating to AG. The Tribunal is satisfied that the email contains information regarding the recruitment process relating to AG including why the claimant considered him to be unsuitable for the post of Design Surveyor. The Tribunal is also satisfied that the email describes Mr Fontaine's recruitment process as a possible health and safety miscalculation.

180. The Tribunal is not however satisfied that the information tended to show the alleged health and safety breach relied upon by the claimant. When reaching this conclusion, the Tribunal has taken into account, that the alleged protected disclosure relied upon for the second part of D8 is the claimant's concern that Mr Fontaine might employ AG under the false impression that he would bring fire stopping expertise which would thereby place the health and safety of tenants and other uses at risk. There is not however, as accepted by the claimant, any reference to any such concerns in the email dated 26 May 2022 . Further, the Tribunal rejects the claimant's contention that such concerns would have been obvious to Mr Broom from the fact that the claimant had placed AG's experience of sprinklers side by side with the firestopping issues as the Tribunal is

not satisfied having regard to the contents of the email that any such inference could properly be inferred.

181. Further, if for any reason the Tribunal is wrong and the email does constitute a relevant disclosure the Tribunal is not, in any event, satisfied that the claimant had a reasonable belief that Mr Fontaine might employ AG under the false impression that he would bring fire stopping experience.

182. When reaching this conclusion, the Tribunal has noted from its findings of fact at paragraph 48 above (and from the transcript of the meeting itself – page 230 – 57.37 and 57.39) that Mr Fontaine stated at the meeting that having interviewed AG it was apparent that the sprinklers which AG had experience of had nothing to do with firestopping. The Tribunal is therefore not satisfied that the claimant could have had a reasonable belief that Mr Fontaine was under the impression that AG would bring fire stopping experience to the respondent.

183. Accordingly, the Tribunal is not satisfied that the claimant has established that he made relevant disclosures and/ or qualifying disclosures to Mr Broom and this element of the claim is therefore dismissed.

The transcript of the meeting between the claimant and Mr M Trewhella on 14 September 2022 (D9)

184. Finally, the Tribunal has considered D9 – the multiple extracts highlighted in yellow identified in the claimant's transcript of his meeting with Mr Trewhella on 14 September 2022 which is at pages 245 – 278 of the bundle. The Tribunal has also had regard to the additional information contained a paragraph 17 above including in particular at 17.3 where the multiple extracts upon which the claimant relies for the purposes of D9 are set out.

185. The claimant relies upon section 43 B (1) (d) of the 1996 Act (health and safety).

186. The respondent denies that the extracts (or any of them) relied by the claimant meet the statutory requirements for a disclosure / qualifying disclosure. The respondent relies on it contentions in respect of D1. The respondent further says that D9 does not mention anything regarding the quality of the work / impact on the public and is instead focussed on recruitment, the structure of the department and the claimant's exclusion from discussions.

The conclusions of the Tribunal

187. Having given careful consideration to the extracts relied upon by the claimant as disclosures (both individually and collectively) for the purposes of D9, the Tribunal is satisfied that they contain information relating to three principal issues namely :- (a) the recruitment processes undertaken by Mr Fontaine including the preparation of unsuitable / confusing job descriptions / the recruitment of unsuitable people/ inadequate resources / the effect thereon on standards/ speed of delivery (including 17.3.2 - 17.3.5, 17.3.22- 17 .3.26 above) (b) Mr Fontaine's management of the department including work allocation/ and lack of review of engineering projects (paragraph 17.3.11 –17. 3.15, 17.3.18 – 17.3.21) and (c) the claimant's exclusion from discussions/ rejection of the claimant's input (paragraphs17.3.4, 17.3.17, 17.3.30 – 17.3.31).

188. The claimant accepts that there was no explicit reference in the above extracts to the endangerment / likely endangerment of the health and safety of any individuals but contends that such potential consequences would have been obvious to someone with Mr Trewhella's level of responsibility and experience (including as he had taught and advised the claimant on professional ethics during his engineering degree).

189. Having given the matter careful consideration, the Tribunal is not however satisfied, save in respect of the information provided to Mr Trewhella regarding AG (as referred to at 17.3.4 and 17.3.5 above and as addressed further below), that the claimant provided to Mr Trewhella sufficient information as was capable of tending to show that the health and safety of any individual had been, was being or was likely to be endangered.

190. When reaching this conclusion, the Tribunal has taken into account the matters previously identified in respect of D1 above and further, the absence of any reference to any concerns regarding the safety of the respondent's designs or consequential risks to the health and safety of any individuals occupying the building in which the designs were/would be installed.

191. Further the Tribunal is not satisfied that Mr Trewhella would, notwithstanding his technical knowledge and experience , have reasonably understood any such health and safety concerns in the absence of any reference to them by the claimant during the meeting of 14 September 2022 including the identification of any specific designs which had / were causing concern. Moreover, Mr Trewhella would not reasonably have been so alerted in the light of the

positive feedback which the claimant gave to Mr Trewhella during the meeting on 14 September 2022 including regarding the work undertaken by David Ashford and Reuben Kravis (paragraph 51 above) and further that he was happy with everything that the respondent had achieved on Heat the Streets and the quality that the respondent had set up (paragraph 53).

192. The Tribunal has therefore gone on to consider whether, In the light of the Tribunal's findings at paragraph 185 above (in respect of AG) , the claimant had a reasonable belief that the matters identified at paragraph 17.3.4- 17.3.5 above were capable of tending to show that the health and safety of an individual had been, was being or was likely to be endangered for the purposes of section 43 (B) (1) (d) of the 1996 Act.

193. Having given the matter careful consideration the Tribunal is not satisfied that the claimant had a reasonable belief that the information referred to at paragraphs 17.3.4 – 17.35 relating to AG was capable of tending to show that the health and safety of an individual had been, was being or was likely to be endangered for the purpose of section 43 (B) (1) (d) of the 1996 Act.

194. When reaching this conclusion, the Tribunal had taken into account in particular that the claimant has not provided any details of any problems relating to any designs or projects to which AG was assigned notwithstanding the claimant's acknowledged professional and ethical responsibilities as an engineer to advise Mr Trewhella of such matters. Further, not only does the claimant not raise any specific health and safety concerns but also speaks in positive terms of the work undertaken in the Department.

195. The Tribunal has further noted that the matters upon which the claimant relies in support of his reasonable belief in respect of D9 (paragraph 6.9.2 of his witness statement – page 373 -do not relate to AG (or the other matters identified as protected disclosures at paragraph 17.3 above) but to matters relating to the (firestopping) meeting on 24 May 2022 (which the claimant did not raise during his meeting with Mr Trewhella on 14 September 2022).

196. In all the circumstances, the Tribunal is not satisfied that the claimant made a qualifying disclosure to Mr Trewhella on 14 September 2022 in respect of the disclosures relating to AG (the only element of D9 in respect of which the Tribunal held that the claimant had made a relevant disclosure) and this element of the claim is therefore also dismissed.

197. Further, for the avoidance of doubt, if for any reason the remaining aspects of D9 (relating to the other matters identified above) do constitute disclosures which tended to show that that the health and safety of an individual had been, was being or was likely to be endangered the, Tribunal is not, in any event, satisfied, for the reasons already explained in respect of D1 and in respect of AG above, that the claimant had a reasonable belief that the tended to show such alleged breach for the purpose of section 43 B (1) (d) of the 1996 Act.

Other matters

198. In the light of the claimant's failure to establish any relevant qualifying disclosures for the purposes Section 43 B (1) of the 1996 Act the claimant's complaints of unfair dismissal and or detriment pursuant to sections 103A and/or section 47 of the 1996 Act are therefore dismissed.

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Employment Judge Goraj
Date: 16 May 2024

JUDGMENT SENT TO THE PARTIES ON
5th May 2024

FOR THE OFFICE OF THE TRIBUNALS

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The Employment Tribunal (ET) is required to maintain a register of judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: https://www.gov.uk/employment-tribunal-decisions

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1. Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge.

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Practice Directions and Guidance for Employment Tribunals (England and Wales) - Courts and Tribunals Judiciary