THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Rahman	**v**	**Troup Bywaters + Anders LLP**

Heard at: London Central **On**: 18-22 March 2024

Before: **Employment Judge Glennie**
Mr P Alleyne
Mr I McLaughlin

Representation:
Claimant: **In person**
Respondent: **Ms R Owusu-Agyei (Counsel)**

JUDGMENT

The unanimous judgment of the Tribunal is that the claim is dismissed.

REASONS

1. By his claim to the Tribunal the Claimant, Mr Rahman, made the following complaints:

   1.1 Automatic unfair dismissal.

   1.2 Detriments for making protected disclosures.

   1.3 Unlawful deduction from wages.

2. The Respondents, Troup Bywaters + Anders, dispute those complaints.

3. The Tribunal is unanimous in the reasons that follow.

4. It was agreed that the name of the Respondent as shown in the proceedings should be amended by the addition of “LLP”.

5. The Tribunal heard and determined the issues as to liability in the first instance.

The issues

6. The issues on liability were identified by a Tribunal chaired by Employment Judge Khan at what was intended to be the first day of the full hearing on 19 December 2023, as follows.

7. Did the Claimant make one or more qualifying disclosures on the following occasions:

   7.1 On 13 October 2022 raising with Andrew Hixson the fact that the machines were so slow that people were having to work late, including late into the evening.

   7.2 On 13 January 2023 in a Teams message and voicemail, telling his line manager Martin Ingram that he and other employees were working late into the night and that this was unreasonable.

   7.3 On 13 January 2023 in the same exchange informing Mr Ingram that apprentices were also working long hours and so would not be earning the minimum wage.

   7.4 At a catch up meeting with Andrew Hixson and Mr Ingram [the meeting was in fact with Mr Hixson alone] on 26 January 2023 stating that he was unhappy working past midnight.

   7.5 At the same meeting on 26 January 2023 raising the issue of other employees working late into the night and the employees' effective salaries falling below the minimum wage.

   7.6 Were these disclosures of information.

   7.7 Did the Claimant believe that he was making the disclosures in the public interest.

   7.8 If so, was that belief reasonable.

   7.9 Did the Claimant believe that the disclosures tended to show that:

      7.9.1 A person had failed, was failing or was likely to fail to comply with a legal obligation, namely the Working Time Regulations and the National Minimum Wage Act.

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

   7.10 If a qualifying disclosure was made, it was agreed that it was a protected disclosure as it was made to the Claimant's employer.

8. Re detriment (sections 44, 45A and 47B of the Employment Rights Act), did the Respondent do the following things:

   8.1 Mr Hixson and Mr Ingram, for the duration of the Claimant's employment, failed to provide sufficient equipment or equipment that worked sufficiently well, so that the Claimant had to use his own computer. (Relevant protected disclosure made on 13 October 2022).

   8.2 Mr Ingram pressured him to postpone his annual leave in order to meet deadlines, in the week of 16 December 2022. (Relevant protected disclosure made on 13 October 2023).

   8.3 Mr Ingram denied the Claimant opportunities for work which would have developed his professional skills. The Claimant has given one example, the use of IES modelling. (Relevant protected disclosure made on 13 October 2022).

   8.4 Mr Ingram redistributed work from other colleagues to the Claimant twice on 19 December 2022. (Relevant protected disclosure made on 13 October 2022).

   8.5 Mr Ingram told the Claimant to attend the office on 19 January 2023 which was a day when he should have been working from home. (Relevant protected disclosure made on 13 January 2023).

   8.6 Mr Hixson told the Claimant to attend the office on 26 January 2023 which was a day when he should have been working from home. (Relevant protected disclosure made on 13 January 2023).

   8.7 Mr Hixson and Mr Ingram branded the Claimant as "negative", someone who complained a lot, and ignored his concerns and failed to resolve his issues, at a catch up meeting on 26 January 2023. (The Claimant relies on all five protected disclosures).

   8.8 Included the following comments in his dismissal letter which were defamatory and affected his chances of gaining future employment: "Unfortunately, your performance has not been satisfactory, and we have not seen any significant improvement since initially raising our concerns with you. Consequently, due to unsatisfactory performance during your probationary period and not fulfilling the role requirements, the decision has been made to terminate your employment effective 26th January 2023". (The Claimant relies on all five protected disclosures).

9. By doing so, did the Respondent subject the Claimant to detriment.

10. If so, was this done on the ground that he had:

10.1 Made a relevant complaint about health and safety (s.44). The Claimant relies on disclosures 7.1, 7.2 and 7.5.

10.2 Refused to comply with a requirement which the Respondent imposed or proposed to impose in contravention of the WTR or to forgo a right conferred on him under the Working Time Regulations r.10(1) (s.45A).

10.3 Made the protected disclosure(s) set out above (s.47B).

11. Re automatic unfair dismissal, section 103A of the Employment Rights Act: It is agreed that the Claimant was dismissed on 26 January 2023. Was the making of any protected disclosure the reason or the principal reason for the Claimant's dismissal.

12. Re section 100 of the Employment Rights Act (health and safety):

12.1 Was it not reasonably practicable for the Claimant to have raised the matter through the designated workplace health and safety representative? It is agreed that there was a health and safety representative at the Claimant's place of work, although the Claimant says he was unaware of this at the relevant time.

12.2 If so, did the Claimant bring to the Respondent's attention circumstances connected with his work which he believed were harmful or potentially harmful to health and safety. The Claimant relies on disclosures 7.1, 7.2 and 7.5.

12.3 Did he do so by reasonable means.

12.4 Was that the reason or the principal reason why the Claimant was dismissed.

13. Re section 101A of the Employment Rights Act (working time):

13.1 At the time of his dismissal had the Respondent imposed a requirement on him in breach of the Working Time Regulations 1998; or had the Respondent asked him to forgo a right conferred on him by those Regulations. The Claimant says that he was being required to work in breach of regulation 10(1) WTR, i.e. the right to a daily rest period of not less than 11 consecutive hours.

13.2 If so, had the Claimant refused, or proposed to refuse, to do either of those things.

13.3 Was that the reason or the principal reason he was dismissed.

14. Re unauthorised deductions (Part II of the Employment Rights Act):

14.1 It is agreed that the Claimant was contractually entitled to 25 days annual leave plus 8 Bank Holidays, and that he took 13 days during his employment. It is also agreed that the Respondent made a deduction of 2 days' pay from the Claimant's final wage. Was this deduction unauthorised?

14.2 The Claimant says he had accrued 13 days leave by the date of his dismissal, whereas the Respondent says he had accrued 10.5 days, so that it was entitled to make the deduction of 2 days' pay to clawback leave taken exceeding the annual entitlement.

The applicable law

15. The statutory provisions about protected disclosures are found in Part IVA of the Employment Rights Act 1996. These include the following:

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

43B (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.

(e)……

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

43C (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –

(a) To his employer……

16. The requirements in section 43B(1) for a reasonable belief on the part of the worker means, as reflected in the issues set out earlier in these reasons, that the worker must in fact have had the required belief, and that the belief must be reasonable.

17. In paragraph 34 of its judgment in **Chesterton Global Limited v Nurmohamed [2017] IRLR 837** the Court of Appeal gave guidance on the issue of public interest. Relevant factors could include the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they were affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer.

18. Section 47B(1) of the Employment Rights Act provides that:

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

19. Section 44 of the Employment Rights Act provides as follows:

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

(a)….
(b)….
(c). being an employee at a place where –

(i) There was no …. representative or safety committee, or
(ii) There was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
He brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful to health or safety.

(2) ……
(3) ……
(4) This section does not apply where the worker is an employee and the detriment in question amounts to dismissal…..

20. Section 45A of the Employment Rights Act provides as follows:

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

(a) Refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,
(b) Refused (or proposed to refuse) to forgo a right conferred on him by those Regulations.

21. Again, under this section, dismissal does not amount to a detriment.

22. Section 48(2) of the Employment Rights Act provides that, on (among others) a complaint under sections 47B(1), 44 and 45, it is for the employer to show the ground on which any act or deliberate failure to act was done.

23. In **NHS Manchester v Fecitt [2011] EWCA Civ 1190** the Court of Appeal held that the test of a detriment being done on the ground of a protected disclosure is satisfied if the disclosure materially (i.e. more than trivially) influenced the employer's treatment of the worker.

24. Turning to the provisions in the Employment Rights Act about automatic unfair dismissal, section 103A provides as follows:

An employee who is dismissed shall be regarded …… as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

25. Health and safety cases are governed by section 100, which includes the following provisions:

(1) An employee who is dismissed shall be regarded …… as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –

(c) Being an employee at a place where –

(i) There was no…..representative or safety committee, or
(ii) There was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
He brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

26. Section 101A provides as follows:

(1) An employee who is dismissed shall be regarded …….as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –

(a) Refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,
(b) Refused (or proposed to refuse) to forgo a right conferred on him by those Regulations.

Evidence and findings

27. The Tribunal heard evidence from the following witnesses:

27.1 The Claimant, Mr Rahman.

27.2 Mr Martin Ingram, an Associate responsible for a team of engineers, and the Claimant's line manager.

27.3 Mr Andrew Hixson, a Partner and Mr Ingram's line manager.

28. There was an agreed bundle of documents and page numbers which follow in these reasons refer to that bundle.

29. Mr Hixson and Mr Ingram interviewed the Claimant for a role as a Mechanical Engineer on 5 July 2022. They offered him the job and he accepted it, signing the contract of employment on 13 July 2022 and starting work on 15 August 2022.

30. The Claimant primarily (although not exclusively) worked on a project known as "Chubb", wherein the Respondents were working on 2 floors and a mezzanine out of 35 floors in the building. This involved use of engineering software known as "Revit" to design and plan the engineering elements of each floor. Mr Ingram's evidence was that initially he was happy with the Claimant's work, although he thought that the was sometimes slower than he would have expected. Mr Ingram did not raise any issue with the Claimant about this, saying that overall the deadlines were being met, that the Claimant was new to the Respondent, and that generally he (Mr Ingram) is not quick to criticise team members.

31. Mr Ingram also stated (in paragraph 16 of his witness statement) that once the Claimant started work on stage 3 of the Chubb project, he frequently raised IT issues. Mr Ingram acknowledged that some of the systems were slow, and said that the Claimant was aware that they were being upgraded. He said that he encouraged the Claimant to speak to the IT team.

32. On 13 October 2022 there took place an online meeting involving the Claimant, Mr Hixson, another manager Mr Burden, and the architects engaged on the project. It was common ground that the Claimant said little, if anything, during the meeting. The Claimant's case is that after the meeting, but while still online, he made what he relies on as his first disclosure to Mr Hixson (paragraph 7.1 above). This was to the effect that people could end up having to work late, and he made some reference to his previous employer, Waterman.

33. The Claimant very frankly said in evidence that he could not remember exactly what he said on this occasion. Mr Hixson stated that he did not remember the Claimant saying anything at all. The Tribunal found as a matter of probability that the Claimant said something about the feasibility of the timetable for the work but probably did not say that people could end up working late as this is quite specific and, we considered, not something that the Claimant would be likely to raise in advance of it actually happening.

34. This finding means that the Claimant has not established the factual basis of his claim to have made a protected disclosure on this occasion.

35. There then followed four matters relied on as detriments done on the ground that the Claimant had made that disclosure (issues 8.1 to 8.4 above). For completeness, the Tribunal will set out its findings about these.

36. The first of these was a complaint that the Respondent failed to provide the Claimant with sufficient IT equipment, or equipment that worked well. It was common ground that there were some problems with the Respondent's IT system. In September 2022, as evidenced by an email exchange at page 218, the Respondent had changed the Claimant's virtual desktop for one with a higher specification. The Tribunal found it inherently unlikely that Mr Hixson or anyone within the Respondent's organisation would react to the Claimant's scepticism about whether the work could be done within the relevant time frame or with the available resources by intentionally depriving him of equipment that could have helped him to achieve that.

37. The Claimant maintained that the IT system was inadequate but did not identify anything specific which could have been provided but was not. The Tribunal found that the Respondent did not intentionally withhold or fail to provide any equipment, and that this alleged detriment is not made out on the facts.

38. The second alleged detriment concerned leave that the Claimant had booked for 3 weeks commencing on 19 December 2022. His case was that he was put under pressure to postpone or alter this by 2 days. In the event he commenced his leave on 21 December 2022 and extended it by 2 days, thus taking 3 weeks in total as originally planned. It was common ground that Mr Ingram did not ask the Claimant to do this, and that he in fact volunteered it. He said that he felt under pressure to do so because Mr Ingram was mentioning a deadline for completing certain work by 21 December 2022.

39. The Tribunal found that, to the extent that Mr Ingram referred to the deadline, he did so because it existed and not because of anything that the Claimant had said on 13 October 2022. We also considered that there was no detriment to the Claimant in changing the dates for his leave to the minor extent that he did. There was no evidence that doing so caused him to change any particular plans, and the overall length of his leave was unchanged.

40. The Claimant also alleged that he suffered detriment by Mr Ingram denying him opportunities to develop his professional skills, with particular reference to IES modelling. In paragraph 8.1.5.9 of his witness statement the Claimant referred to being tasked with preparing drawings for thermal modelling. In cross-examination he said that he had asked in his interview whether IES modelling would be used, and stated that it also came up in conversation and that he asked Mr Ingram to be allowed to use it. When

asked about this aspect, Mr Ingram said that he did not accept that he had told the Claimant that he could use IES modelling.

41. In this connection, the Claimant referred to Teams chats on 2 November 2022 (page 145) and 3 November 2022 (page 147). Ms Owusu-Agyei also took the Claimant to the chat on 4 November 2022 at page 148. All of these related to the thermal modelling work. There was no suggestion of complaint or dissatisfaction in what the Claimant had written, nor was there any mention of IES modelling. The Claimant's explanation for this in cross-examination was that he did not want to dictate to Mr Ingram, and that he wanted to be amicable and not cause problems. The Tribunal considered that it would have been possible to raise IES modelling in a way that did not amount to complaining or dictating to Mr Ingram. We also considered that, had the Claimant been expecting to use this, and had he felt disadvantaged by not doing so, he would at least have mentioned it. We concluded as a matter of probability that IES modelling had not been discussed, and that the Claimant had not been subjected to a detriment in respect of it.

42. The fourth of these alleged detriments was that on 19 December 2022 Mr Ingram twice redistributed work from other colleagues to the Claimant. There was an email exchange on that date on page 233 in which Mr Ingram asked the Claimant if he could help with some work that a colleague, Mr Burden, was unable to do, saying "any chance you can assist with this?" The Claimant replied "yes I'll have a look in the evening". In a similar vein, in a Teams conversation at page 169 Mr Ingram asked the Claimant if he could look at some drawings in his absence on a day's leave, to which the Claimant replied "I'll have a look tomorrow if they still aren't done". The Claimant's responses did not suggest that he was in any way dissatisfied with being asked to assist. The Tribunal found that these were ordinary requests for assistance and did not amount to a detriment to the Claimant.

43. On 13 January 2023 there took place a Teams conversation and a voice call, both between the Claimant and Mr Ingram, which the Claimant relied on as containing the protected disclosures in issues 7.2 and 7.3 above. The relevant parts of the Teams conversation were the following written by the Claimant:

    43.1 "I'm not confident it will be done by March. The issues with the machines still haven't been addressed. It took weeks of working past midnight and weekends to just get one floor in the state that it's in now."

    43.2 "Also it wasn't just me, other were working late into the night too."

    43.3 "This is getting unreasonable, I can't be expected to work past midnight and weekends for another month and a half……."

44. The Claimant's account of the voice call was in paragraph 4.38 of his witness statement. He stated that he said words along the lines of the following:

44.1 "This wasn't right and cannot keep going on." Mr Ingram accepted that the Claimant might have said this. The Tribunal found that he probably did.

44.2 "Having people work such long hours (14-18 a day) should not be allowed". Mr Ingram denied that the Claimant said this. The Tribunal found that he probably did, as Mr Ingram accepted in relation to the next element that the Claimant made reference to other people working long hours.

44.3 "Even apprentices are working past midnight and long hours, there was no way they were making past minimum wage." Mr Ingram accepted that the Claimant said something about apprentices working late and/or long hours. The Tribunal concluded as a matter of probability that he also made some reference to the minimum wage as this would be a plausible concern if apprentices (who would be paid at a relatively low rate) were working additional hours.

44.4 "I cannot physically work to the extent I did in the stage 3 again." Mr Ingram accepted that this was said.

44.5 "I'll be making a formal complaint to HR since nothing can be done." Mr Ingram disputed that this was said: the Tribunal did not consider that this had any bearing on the issues as to protected disclosure and that it was not, therefore, necessary to determine whether or not the Claimant said this.

45. The Tribunal found that the Claimant disclosed information in the Teams conversation and in the call with Mr Ingram. The information was that he and others, including apprentices, were working late and were working long hours.

46. We also found that the Claimant believed that he was making the disclosure in the public interest. In paragraphs 4.58 to 4.60 of his witness statement the Claimant said that what was happening was happening to others apart from himself, including to people with different line managers from his. He said that the National Minimum Wage was a matter of public interest and that it had been the subject of news and media comment, for example in connection with Sports Direct, Poundland and the Mandatory Work Programme (also known as Mandatory Work Activity). The Tribunal accepted the Claimant's evidence about his belief that he was making the disclosure in the public interest.

47. Similarly, we accepted the Claimant's evidence that he believed that the information that he disclosed tended to show a failure to comply with legal obligations under the National Minimum Wage legislation, in relation to apprentices, and that the health of individuals was being, or was likely to be, endangered by the risk of "burnout" (as stated in paragraph 4.20 of his witness statement). The latter was relevant to other individuals and to

himself. The Claimant could not have believed that the information tended to show a breach of legal obligation in relation to himself as his contract included an opt-out from the Working Time Regulations and his salary was such that the National Minimum Wage was not engaged.

48. The Tribunal then asked itself whether these beliefs on the Claimant's part were reasonable. We found that with regard to other individuals they were not, in either respect. The Tribunal considered that, for these beliefs to be reasonable, the Claimant would need to know more than he evidently did about the facts of the situation as it applied to other workers, including apprentices. He would need to know matters such as what the individuals' working hours were over a period and, if they worked longer than a standard day, whether they would be given time off in lieu.

49. The Tribunal found that information such as this would be necessary for a belief in a breach of a legal obligation or danger to health of other individuals to be reasonable, as these would not be expected to arise from occasional examples of working late or "long" hours. It would also be necessary for the belief that the disclosures were being made in the public interest. While the Tribunal accepted the broad proposition that there is a public interest in compliance with the National Minimum Wage legislation and in the health of workers, more than this would be required for a belief that the particular disclosure was made in the public interest.

50. If (as the Tribunal assumes in the Claimant's favour) it was reasonable for him to believe that his own health was endangered, a belief that a disclosure about this was made in the public interest was not, in the Tribunal's judgement, a reasonable belief. Applying the guidance in **Chesterton**, the Tribunal took into account the Claimant alone being the person whose interests the disclosure served; the lack of any medical or occupational health evidence about any effect on the Claimant's health; and the limited period of time in question.

51. Mr Ingram's evidence was that, following this conversation and still on 13 January 2023, he spoke to Mr Hixson. He stated that he had previously told the latter of the Claimant's complaints about the IT system, and that on this occasion he probably said that he was finding it difficult to work with him. Mr Hixson was not sure about the date although he believed it was probably 13 January. His account was that Mr Ingram said that the Claimant's complaining was becoming excessive, his complaints including IT issues and resources, and working late. Mr Hixson said that he would speak to the Claimant.

52. There followed two incidents which the Claimant relied on as detriments done on the ground that he had made the disclosures on 13 January 2023. These were that Mr Ingram and Mr Hixson told the Claimant to attend the office on 19 and 26 January respectively, these being days when, on the Claimant's case, he should have been working from home.

53. It was common ground that, when the Claimant started work with the Respondent, Mr Ingram told him that he was required to attend the office on 3 days per week. This was reinforced by a general email dated 13 January 2023 at pages 235-236. It was also common ground that the Claimant had worked from home on Monday 16 and Tuesday 17 January 2023, and that on 18 January he said that he was not planning to be in the office on Thursday 19 January.

54. There was a dispute about whether, on this occasion, Mr Ingram said "you need to come in" (as per the Claimant's evidence) or "we are supposed to be in the office 3 days a week" (according to Mr Ingram). The Tribunal considered that it mattered little exactly what was said: on either version, Mr Ingram made it clear that the Claimant was expected to come in to the office. The Tribunal found that, whatever Mr Ingram said, it was not a detriment to remind the Claimant that he was required to be at the office 3 days a week, or to say that he should not work from home on any further days that week, when he had already worked from home on the Monday and Tuesday. It was no more than a reflection of the Respondent's policy.

55. With regard to 26 January 2023, Mr Hixson's evidence was that he wanted to have a meeting with the Claimant as a result of what Mr Ingram had told him, as described above. The Claimant and Mr Hixson agreed that on 23 January 2023 they had a conversation about meeting on 26 January. The Claimant's pleaded complaint about this, as reflected in the list of issues, was that 26 January was a day when he should have been working from home, and that requiring him to attend the office was a detriment done on the ground that he had made the disclosures on 13 January.

56. The Claimant's evidence went somewhat further than this, in that he said that he told Mr Hixson that 26 January was not convenient as he had arranged to take his mother to a hospital appointment on that date, but Mr Hixson had insisted that he should attend at 9 o'clock, which clashed with the appointment. When asked about this in cross-examination, the Claimant said that it was impossible that he would not have mentioned this. When Mr Hixson was cross-examined on the point, he said the Claimant did not tell him about the appointment, and that he definitely would have re-arranged the meeting had he done so.

57. Although this dispute fell somewhat outside the ambit of the issue, the Tribunal considered that Mr Hixson would not have deliberately required the Claimant to attend a meeting at a time that prevented him taking his mother to her appointment. There was nothing else in the evidence before us that suggested that he would act in that way.

58. With regard to the complaint that Mr Hixson required the Claimant to attend the office on a day when he should have been working from home, the Tribunal found the position to be similar to that concerning the allegation about 19 January 2023. Given that the Claimant had up to that point attended the office on 2 days that week, it was not a detriment to him to ask or require him to attend on a third day, i.e. 26 January.

59. The Tribunal also concluded that on both occasions the Claimant was required to conform to the requirement to be in the office 3 days a week for the straightforward reason that this was the requirement and Mr Ingram and Mr Hixson expected him to observe it. We found no reason to connect the enforcement of that requirement with what the Claimant had said on 13 January 2023.

60. The Claimant relied on what he said at the meeting on 26 January 2023 with Mr Hixson as containing further protected disclosures in terms that he was unhappy working past midnight; raising other employees working late into the night; and their effective salaries falling below the national minimum. It was also common ground that at this meeting Mr Hixson dismissed the Claimant.

61. The Respondent's pleaded case in paragraphs 14-16 of the Grounds of Resistance was as follows:

> "14. The Claimant expressed a negative attitude about all aspects of his work and often reacted defensively that the systems would not or did not work. The Respondent considered that the capabilities the Claimant displayed were not reflective of his CV and what he expressed his capabilities were at the interview stage, upon which was the basis that the Claimant was offered his employment.
>
> "15. These concerns were discussed between Andrew Hixson (Partner), Martin Ingram (the Claimant's line manager) and C Jones (HR Coordinator). Following their discussion, Andrew Hixson decided it would be appropriate to terminate the Claimant's employment on the basis that he was not suitable for the role.
>
> "16. Andrew Hixson invited the Claimant to a meeting on 26 January 2023. During this meeting, the decision to terminate his employment was communicated to the Claimant."

62. The Tribunal considered that this pleading conveyed the clear impression that the sequence of events was that (a) Mr Hixson, Mr Ingram and Ms Jones had a discussion; (b) Mr Hixson decided to terminate the Claimant's employment; (c) Mr Hixson conveyed the decision (that he had already made) to the Claimant at the meeting.

63. Mr Hixson's evidence differed from this. In paragraph 23 of his witness statement, Mr Hixson said that he spoke to Ms Jones briefly ahead of the meeting. His account was that he thought that the Claimant might say that he wanted to leave the Respondent, and that if he did not say that, it was in his own mind that dismissal might be a possibility. Mr Hixson continued that Ms Jones advised that, as the Claimant was in his probationary period, he could lawfully be dismissed and that it was not necessary to follow a long-term capability process. In cross-examination, he said that he had not decided to dismiss the Claimant before the meeting, and that, to the extent

that the pleaded case differed from his evidence, it was wrong. In answer to the Tribunal, Mr Hixson said that he did not tell Ms Jones why he was contemplating dismissing the Claimant, nor did she ask him.

64. It was common ground that in the meeting on 26 January 2023 Mr Hixson said that he had heard that the Claimant was not happy, and that the Claimant referred to being treated as a technician as opposed to an engineer (although he said that he did not emphasise or repeat this to the extent suggested by Mr Hixson).

65. As stated above, the Claimant relied on information given in the course of this meeting as amounting to further protected disclosures. Mr Hixson accepted that some, but not all, elements of what the Claimant relied on were said by him. The Tribunal made the following findings:

65.1 The Claimant's evidence was that he said that he was unhappy with having to continuously work past midnight and that he could not do that again for another month and a half. Mr Hixson's evidence was that he recalled the Claimant saying that he was working late. The Tribunal accepted the Claimant's evidence about the detail of what he said, which was similar to what he had written in the Teams conversation on 13 January.

65.2 It was agreed that the Claimant said that he was stuck in a role that was different from what he had been promised would not happen at his interview.

65.3 The Claimant stated that he said that what was going on was not right and that he was not the only person affected. Mr Hixson said that he did not believe that the Claimant said this. The Tribunal found as a matter of probability that this was said. Again, it was similar to what the Claimant had said in the Teams conversation, and it was similar to the comment recorded in sub-paragraph 4 below, which Mr Hixson accepted was said.

65.4 The statement that other people were working late nights on different projects also mirrors the content of the Teams conversation, and again the Tribunal found as a matter of probability that, contrary to Mr Hixson's recollection, this was said.

65.5 The Claimant's evidence was that he said that even apprentices were working late into the night and that there was no way they were making minimum wage. Mr Hixson disputed this. The Tribunal has found that the Claimant said this to Mr Ingram, and we found as a matter of probability that he also said it to Mr Hixson.

65.6 It was agreed that the Claimant said that his concerns were not being taken seriously.

65.7 Mr Hixson denied that the Claimant said that he wanted to raise his concerns formally. As with the similar comment said to have been made to Mr Ingram, this is not an element that would be relevant to an assessment of whether the Claimant made a protected disclosure on this occasion. It is perhaps more relevant to make a finding about this in relation to the 26 January meeting, as this was when the Claimant was dismissed. The Tribunal found it probable that he did say this.

66. The content of the disclosure made by the Claimant on this occasion was similar to what he had said to Mr Ingram on 13 January. It contained similar information. The Tribunal's findings about the issue of belief are also similar to those made with regard to the 13 January disclosures. For essentially the same reasons as set out above in relation to the 13 January disclosures, the Tribunal found that the Claimant believed that he was making the disclosure in the public interest; that he believed that the information disclosed tended to show a failure to comply with legal obligations under the National Minimum Wage legislation; and that he believed that the information disclosed tended to show that the health of individuals was being, or was likely to be, endangered by the risk of "burnout".

67. Again for essentially the same reasons as have been given in relation to the 13 January disclosure, the Tribunal found that the Claimant could not have believed that there was a breach of legal obligation in relation to himself; that the beliefs that he in fact held were not reasonable beliefs; and that (assuming that he believed that the disclosure about himself tended to show that he believed that his health was endangered) it was not reasonable to believe that this was made in the public interest.

68. Mr Hixson stated, and the Claimant did not dispute, that the latter accused him of lying in the job interview. In paragraph 31 of his witness statement, Mr Hixson said that he observed that it might be better for the Claimant to consider moving on and finding a job elsewhere, at which point the tone of the meeting changed, as they were both frustrated. He continued:

"……I believe he accused me of lying about the role at TB+A. After this accusation, the meeting ended fairly quickly and I asked Mo to leave."

69. In paragraph 30 of his witness statement Mr Hixson accepted that it was likely that he said something about the Claimant being negative and complaining a lot, as that was his perception based on what the Claimant was saying in the meeting and on what Mr Ingram had told him. The Tribunal found that this was indeed Mr Hixson's genuine perception, and that this perception was the reason why he said it.

70. When asked in cross-examination about the reason for the Claimant's dismissal, Mr Hixson said that his attitude was one of the factors, alongside the factors that he raised at the meeting and which he (the Claimant)

thought were unresolvable. Mr Hixson stated that the accusation of lying also contributed to the decision.

71. The Tribunal accepted Mr Hixson's evidence that he decided to dismiss the Claimant in the course of the meeting on 26 January, and not before that. We also accepted Mr Hixson's account of discussing the possibility of dismissal with Ms Jones before meeting the Claimant, and found that, where the Respondent's pleaded case differed from his account, it was incorrect. The Tribunal considered that, if Mr Hixson had decided to dismiss the Claimant in any event before the meeting, and having been advised that he was able to do so because he was still within his probationary period, Mr Hixson would not have begun or continued a discussion about why he was unhappy. Nor would he have suggested that the Claimant might move on and find a job elsewhere: he would have gone straight to dismissing him.

72. On 25 January 2023 Ms Manning of the Respondent's HR department had sent an email to Mr Hixson at page 282 reminding him that the Claimant's probation was due to end on 15 February and asking for the completed probation review form and confirmation of whether a permanent appointment was to be made. Immediately after the meeting on 26 January 2023 Mr Hixson replied, copied to Ms Jones:

"As discussed this morning and to formally confirm Mo has left the business as of this morning and we won't be confirming his permanent appointment."

73. In paragraph 35 of his witness statement Mr Hixson said that he did not give any further details about what was discussed in the meeting, such that Ms Jones "did not know anything specific about the reason for Mo's departure, other than that I had asked her before the meeting about dismissing an employee due to failed probation."

74. There followed on 27 January 2023 at page 239 a letter to the Claimant from Ms Jones. The Claimant argued that what was said about his performance was inaccurate and defamatory, and amounted to a detriment done by reason of his disclosures. The letter read as follows:

"Re: Unsatisfactory Probation Period

I am writing to you to confirm your discussions with Andrew Hixson on Thursday 26th January 2023.

As you are aware your employment with TB+A was subject to a probation period during which time your performance and suitability for the role would be assessed.

Unfortunately, your performance has not been satisfactory and we have not seen any significant improvement since initially raising our concerns with you. Consequently, due to unsatisfactory performance during your

probationary period and not fulfilling the role requirements, the decision has been made to terminate your employment effective 26th January 2023.

With an end date of Thursday 26th January you have accrued 10.5 days leave and have taken 13 days to date, therefore the 2.5 days taken in excess of your entitlement will be deducted from your final salary payment.

You are contractually entitled to 1 week's notice of termination of employment, however as you are aware you have already been paid up until 31st January 2023, therefore you will only be paid 0.5 days in lieu.

Your P45 and final payslip will be issued to you in due course.

On behalf of all the Partners, I wish you every success with your future endeavours."

75. When asked about this letter in cross-examination Mr Hixson agreed that it did not mention the Claimant's attitude. He said that he believed the letter to be standard, and that he had not seen it before it was sent out. Mr Hixson further stated that he could not remember when he first read the letter, but he believed that this was when the witness statements were being prepared. He said that the letter was "not quite accurate", and a little later that he did not agree with it. Mr Hixson also agreed that it was not the case that performance issues had been raised with the Claimant at any earlier stage. Mr Hixson added that the Claimant's performance had not been satisfactory in that he was "going back to [Mr Ingram] all the time and raising issues about IT all the time."

76. The Claimant contended that the letter was designed to cover up the real reason for his dismissal, namely the making of disclosures, a suggestion which Mr Hixson denied. The Tribunal found the apparent lack of communication between Mr Hixson and Ms Jones about why he was considering dismissing the Claimant, or why he had done so, a little surprising. Ultimately, however, we accepted Mr Hixson's evidence about the dismissal letter. When Mr Hixson had spoken to Ms Jones about the possibility of dismissing the Claimant, she had referred to the probationary period. Mr Hixson had then communicated his decision to dismiss by replying to Ms Manning's email about the probationary period and making reference to his earlier conversation with Ms Jones. The Tribunal could therefore understand that Ms Jones might have assumed that the case was one of a straightforward failure to fulfil the requirements of the role, and wrote in fairly standard terms accordingly. We concluded that the letter was not an attempt at a cover-up as contended by the Claimant.

77. The Tribunal found that a number of factors contributed to Mr Hixson's decision to dismiss the Claimant. These were the number and extent of his complaints, reflecting what Mr Hixson perceived as his "attitude"; the effect these were having on Mr Ingram; and his calling Mr Hixson a liar. We found that the number and extent of the complaints was the principal reason.

78. These complaints included matters which the Claimant relied on as amounting to protected disclosures. The Tribunal has found that these were not protected disclosures. We did not attempt to address the causation issue on the alternative basis that (contrary to our finding) any of the disclosures were protected, as this would involve envisaging different scenarios and combinations of findings, which we considered to be disproportionate.

79. There remain three further factual issues. With regard to the Claimant's alternative case about automatic unfair dismissal under section 100 of the Employment Rights Act, it was agreed that there was a health and safety representative at his place of work. An essential component of the case under section 100 is that it was not reasonably practicable for the Claimant to have raised the circumstances which he believed were harmful or potentially harmful to health and safety with that representative.

80. The Claimant's case was that he was unaware of the existence of the representative. He was taken in cross-examination to documents at pages 114 and 115, taken from the Respondent's intranet, which showed a Mr Bunting as the external OH & S (occupational health and safety) management representative and Ms Jones as the person with OH & S responsibility for the London office. On page 116 there was a photograph of a standard form poster with health and safety information, including a telephone number for Mr Bunting and another for a Ms Bower.

81. The Claimant said that this poster was in an obscure place, namely the printing room. In paragraph 6.6 of his witness statement, he said that "this poster isn't immediately visible upon entering, and I only visited the room to print documents. Upon exiting, my focus was typically on the printed material. I do not recall the poster".

82. The Tribunal found this to be a weak explanation. The photograph showed the poster to be plainly visible, above and to the side of the printer. Wherever such a poster might be positioned, it could always be said that an employee's focus would tend to be on what had taken him to that room: the point is rather that the employee could be aware that it was there and could consult it when necessary. Tellingly, in the Tribunal's judgement, there was no evidence that the Claimant had ever thought of finding out whether there was a health and safety representative and, if there was, how to contact them. In paragraph 6.3 of his witness statement he said that he was "unaware of a process aligning with 100(1)(c) ERA 1996 at the times of my disclosure".

83. The Tribunal considered that, whether or not the Claimant had noticed the poster, he could reasonably be expected to be aware of the practice of there being workplace health and safety representatives or officers, and to have looked into whether there was one for his workplace. Had he made any enquiry about this, it can reasonably be assumed that he would have been directed to Ms Jones, Ms Bower, or Mr Bunting, or to the poster. We

found that it was reasonably practicable for him to raise the relevant circumstances with the representative. His complaint under section 100 failed for this reason.

84. Turning to the complaint under section 101A of the Employment Rights Act, in paragraphs 5.11 and 5.12 of his witness statement the Claimant stated that the opt-out from the Working Time Regulations appeared within the terms of his contract and not in a separate document, as per ACAS guidance, and that the pressure to work extra unpaid hours created a fear of repercussions for opting back in. Neither point supports the Claimant's case, as identified in the issues above, that he was being asked to forgo the right to a daily rest period of not less than 11 consecutive hours.

85. Furthermore, in the Teams conversation on 13 January 2023 Mr Ingram responded to what the Claimant said about working past midnight and at weekends with the following: "I'm not expecting you to work silly hours, and I don't want you to either (neither do I)……" The Tribunal concluded that it was not the case that the Claimant was asked to forgo the right to a daily rest period of not less than 11 consecutive hours

86. Finally, Ms Jones' letter of 27 January 2023 made reference to holiday pay, stating that the Claimant effectively owed the Respondent 2.5 days. It was common ground that a deduction from the Claimant's final salary payment had been made reflecting this.

87. The Claimant's case about why this was wrong was not entirely clear: ultimately, he relied on having used information on a government website to calculate the applicable holiday pay. He agreed that his employment had lasted 5 months and that the correct formula was that one twelfth of the annual holiday entitlement of 25 days accrued each month. The Claimant also agreed that he had taken 13 days leave in addition to Bank Holidays. He also accepted that the Respondent was entitled to deduct any leave taken in excess of what had accrued.

88. The Tribunal found that the Respondent's position on this issue was correct. One twelfth of 25 is 2.083. Multiplying this by 5 gives 10.41, which the Respondent rounded up to an entitlement of 10.5 days, leaving a balance owed of 2.5 days.

Conclusions and summary

89. The Tribunal's conclusions about the 5 disclosures relied on by the Claimant are as follows.

90. We have found that the factual basis for the alleged disclosure on 13 October 2022 has not been established. The Claimant has not shown that he made a protected disclosure on that occasion.

91. With regard to the disclosures made on 13 and 26 January 2023, the Tribunal has found that the Claimant's belief that these were made in the

public interest, and his belief that they tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation, or (subject to the limited exception applying to himself) his belief that the health or safety of an individual had been, was being or was likely to be, endangered were not reasonable beliefs. It follows that these were not qualifying disclosures within section 43B of the Employment Rights Act.

92. It follows that the Claimant has not established that he made any protected disclosures, and that his complaints of detriments done on the ground that he made such disclosures, and his complaint of automatic unfair dismissal based on the making of such disclosures, fail for that reason.

93. As to the detriments relied on with regard to the protected disclosure complaint, the Tribunal's findings are as follows:

93.1 The detriment of not being provided with sufficient equipment was not made out on the facts.

93.2 There was no detriment with regard to annual leave in December 2022.

93.3 The detriment of not being given work which would have developed his professional skills was not made out on the facts.

93.4 There was no detriment with regard to the distribution of work on 19 December 2022.

93.5 Making it clear to the Claimant that he was expected to attend the office on 19 January 2023 was not a detriment and was not done on the ground of what he had said on 13 January.

93.6 The Tribunal reached the same conclusions about the Claimant being required to attend the office on 26 January 2023.

93.7 Mr Hixson's description of the Claimant as being negative and complaining a lot could, in the Tribunal's view, amount to a detriment, depending on whether or not there was objective justification for it (as to which we had made no finding). We have, however, concluded that it was done on the ground of that being Mr Hixson's genuine perception.

93.8 The Tribunal found that the content of the dismissal letter, in saying that the Claimant's performance was unsatisfactory and had shown no improvement following concerns being raised was a detriment. The Claimant knew that no such concerns had been raised and was justified in feeling aggrieved when the letter said that they had. This was not, however, done on the ground that he had made disclosures (quite apart from any question as to whether those were protected).

94. The complaint of automatic unfair dismissal based on the raising of health and safety concerns failed because it was reasonably practicable for the Claimant to have raised these through the designated health and safety representative.

95. The complaint of automatic unfair dismissal based on a refusal to forgo a right conferred by the Working Time Regulations failed because the Claimant was not asked to forgo the right concerned.

96. The complaint of non-payment of holiday pay failed because the Respondent had correctly calculated the amount due to the Claimant.

_____
Employment Judge Glennie

Dated: ……10 June 2024……..

Judgment sent to the parties on:

11 June 2024
…….....

…….....
For the Tribunal Office