Case No: 1401480/2022

EMPLOYMENT TRIBUNALS

Claimant: Rafieu Alharazim

Respondent: Bournemouth Churches Housing Association

Heard at: **Southampton Employment Tribunal**
On: **1st, 2nd, 3rd and 4th July 2024**
Before: **Employment Judge Lang and**
Tribunal Members English and Flanagan

Representation
Claimant: Mr Alharazim in person
Respondent: Ms Hatch, counsel

RESERVED JUDGMENT

1. The Claimant's application to strike out the Response is dismissed.

2. The Claimant's claim for automatic unfair dismissal, pursuant to section 103A Employment Rights Act 1996 is not well founded and is dismissed.

3. The Claimant's claim for automatic unfair dismissal pursuant to section 100 Employment Rights Act 1996 is not well founded and is dismissed.

4. The Claimant's claims for detriment due to making a protected disclosure pursuant to section 47B Employment Rights Act 1996 are not well founded and are dismissed.

5. The Claimant's claims for direct race discrimination pursuant to section 13 Equality Act 2010 are not well founded and are dismissed.

6. The Claimant's claims for victimization pursuant to section 27 Equality Act 2010 are not well founded and are dismissed.

7. The Claimant's claim for breach of contract, for failure to pay notice pay is not well founded and is dismissed.

8. The Claimant's claim for outstanding holiday pay pursuant to the Working Time Regulations 1998 is not well founded and is dismissed.

REASONS

1. This is a claim brought by Mr. Rafieu Alharazim, hereafter referred to as the Claimant. The Claim is brought against his former employer Bournemouth Churches Housing Association, hereafter referred to as the Respondent. The Claim was presented on 27th April 2022.

2. In short, the Claimant brings the following claims:
    a. Automatic unfair dismissal arising from making a protected disclosure ("whistle blowing") pursuant to section 103A Employment Rights Act 1996.
    b. Automatic unfair dismissal due to the claimant making a health and safety disclosure pursuant to section 100 Employment Rights Act 1996.
    c. Detriment due to making a protected disclosure pursuant to section 47B Employment Rights Act 1996.
    d. Direct race discrimination pursuant to section pursuant to section 13 Equality Act 2010.
    e. Victimisation pursuant to section 27 Equality Act 2010.
    f. Breach of contract for failure to pay notice pay.
    g. Breach of the Working Time Regulations 1998 for failure to pay outstanding holiday pay.

This hearing

3. There has been some delay in this matter having come for final hearing. Originally it had been listed for July 2023 however, due to judicial availability was postponed until 1st July 2024. The hearing then came before us on the 1st, 2nd 3rd and 4th July 2024. It was not possible for our Judgment and reasons to be given and therefore this Judgment was reserved.

4. Unfortunately, there were issues with the bundle. Three versions of the bundle have been produced. The original for the hearing in July 2023, version two in January 2024 which was unredacted, and version 3 which was provided on, or around, 17th January 2024 which had some contact details redacted. We were told that version three was sent to the Claimant on the 17th January 2024 by post, it was also sent by email with a link being sent. The Claimant does not appear to have received the hard copy of the bundle. He did not open the link as he does not download links from the Respondent. He had therefore prepared using version two. We were told that version three contained the documents requested by the Claimant, and that had impacted the pagination. The Respondent had prepared using version three and we were provided with version three. Having identified and discussed the issue we proposed to use version three. To make sure that the documents identified by the Claimant were brought to our attention and put to the witnesses in cross examination the Employment Judge would check the reference (using a digital copy of version two which was sent to him on request), and then refer the witness and parties to the corresponding reference in version three. That approach was agreed.

5. The Respondent provided some updated risk assessments on the afternoon of day one. They were provided for the Claimant to read before he could set out

whether he objected to them being relied on. He did not object to them being relied on, but he did require more time to read them. He was given that time on day one. The Claimant also explained some emails were missing, from the bundle, he was able to locate them and provided them during the hearing and he was allowed to rely on them.

6. On day two the Claimant made a preliminary application to strike out the Response to the Claim based on the issue with bundles. That application was refused with oral reasons being given. We ruled we would proceed on the way that was agreed on day one. We heard oral evidence from the Claimant on day two. On day three and the morning of day four we heard evidence from Mr Panesar and Mr Baker on behalf of the Respondent. Submissions followed on the morning day four before discussions commenced.

7. Due to the time constraints, caused by the issues set out above, it was necessary to impose time limits on the Claimant's cross examination. We are however, satisfied that the points which he wanted to make were put to the witnesses and we are satisfied that we have a full understanding of his case. For completeness at the start of the hearing it was indicated that the Claimant had around 35 questions for Mr Panesar and 22 for Mr Baker. This is not raised as a criticism, but he did in fact have many more, which he was allowed to ask. To put it into context Mr Panesar gave evidence from 10am on day three until 15.25, Mr Baker from 15.25 until 16.30 then from 09.45 to 10.30 on day four. Mr Baker's role being more limited.

The Issues

8. The list of issues was set out by Employment Judge Midgley on 24th November 2022, there has been no application to amend the same, and the issues in respect of liability are as follows:

1. **Protected disclosure ('whistle blowing')**

1.1. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

1.1.1 What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

1.1.1.1 On 7 January 2022 verbally to Budh Panesar that that a site in St Pauls, Bournemouth which the claimant had been instructed to visit represented a health and safety risk because of a risk of a needle stick injury being caused to the claimant or others because needles and sharps had not been safely disposed of and littered the site

1.1.1.2 On 17 January 2022 verbally to Mr Robert Marsden, an HR officer, that Mr Panesar was discriminating against the claimant and/or subjecting him to detriment because the claimant has raised health and safety concerns about site visits

1.1.2. Were the disclosures of 'information'?

1.1.3. Did the claimant believe the disclosures of information were made in the public Interest?

1.1.4.Was that belief reasonable?

1.1.5 Did the claimant believe that the information tended to show that:

1.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;

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

1.1.6. Was that belief reasonable?

1.2 If the claimant made a qualifying disclosure, it is accepted that it was a protected disclosure because it was made to the claimant's employer.

2. **Dismissal (Employment Rights Act s. 103A ERA 1996)**

2.1 Was the making of any proven protected disclosure the principal reason for the claimant's dismissal?

2.2 The claimant did not have at least two years' continuous employment and the burden is therefore on the claimant to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosure(s)

3. Dismissal (Employment Rights Act s. 100 ERA 1996)

3.1 Was there a health and safety committee or appointed employee health and safety representative within the respondent?

3.1 If so, was it reasonably practicable for the claimant to raise the matter by those
means?

3.3 If not, did the Claimant bring to the Respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety? In particular, on 7 January 2022 did the claimant inform Mr Panesar that a site in St Pauls, Bournemouth which he was instructed to visit represented a health and safety risk because of a risk of a needle stick injury being caused to the claimant or others needles and sharps had not been safely disposed of and littered the site?

3.4 Alternatively, did the claimant believe those circumstances to be serious and imminent, and so refuse to attend the St Paul's site.

3.5 If so, was that belief reasonable?

3.6 Was either the claimant's actions at 3.5 or 3.6 the reason or principal reason for the claimant's dismissal?

4. Detriment (Employment Rights Act 1996 section 47B)

4.1 Did the respondent do the following things:

4.1.1 On 17 January 2022 Mr Panesar referred the claimant to HR in relation to a false allegation against the claimant that he was failing to follow management instructions, such as to attend sites, that his attitude towards colleagues was not positive, and he lacked capability to generate service charges or answering general service charge queries?

4.1.2 Dismissing him on 28 January 2022 [this is accepted]

4.1.3 Rejecting his appeal on 9 June 2022 [this is accepted]

4.2 By doing so, did it subject the claimant to detriment?

4.3 If so, was it done on the ground that the claimant had made the protected disclosures set out above?

5. Direct race discrimination (Equality Act 2010 section 13)

5.1 The claimant describes himself a Black African Male.

5.2 Did the respondent do the following things:

5.2.1 On 7 January 2021 did Mr Budh Panesar denigrate and criticise the claimant by criticising him in respect of the rejection of the service charges payment by Exeter Local Authority, saying that he did not know how to prepare fixed and variable service charges and that he asked too many questions of Mr Panesar and other work colleagues without reasonable or proper cause?

5.2.2 On 17 January 2022 Mr Panesar referred the claimant to HR in relation allegations against the claimant which he knew to be false, namely that the claimant had failed to follow management instructions, such as to attend sites, that his attitude towards colleagues was not positive, and he lacked capability to generate service charges or answering general service charge queries?

5.3 Was that less favourable treatment? The claimant relies upon Mr Mark Sager as a comparator.

5.4 If so, was it because of the claimant's race, nationality or ethnicity?

6. **Victimisation (Equality Act 2010 s. 27)**

6.1 Did the claimant do a protected act as follows:

6.1.1 On 7 January 2022 informing Mr Panesar that he was discriminating against the claimant?

6.1.2 On 17 January 2022 informing Mr Marsden that Mr Panesar was discriminating against him?

6.1.3 Issuing these Tribunal proceedings

6.1.4 It is admitted that the respondent:

6.1.4.1 Dismissed the claimant on 28 January 2022

6.1.4.2 Rejected the claimant's appeal on 9 June 2022.

6.2 By doing so, did the respondent subject the claimant to detriment?

6.3 If so, was it because the claimant had done the protected acts?

7. Breach of contract: notice pay

7.1 What was the claimant's notice period? The claimant asserts it was one week, amounting to 5 working days

7.2 Was the claimant paid for that notice period?

8. Holiday Pay (Working Time Regulations 1998)

8.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended? The claimant says that has not paid for 2 days of annual leave.
8.2 What was the claimant's leave year?
8.3 How much of the leave year had passed when the claimant's employment ended?
8.4 How much leave had accrued for the year by that date?
8.5 How much paid leave had the claimant taken in the year?
8.6 Were any days carried over from previous holiday years?
8.7 How many days remain unpaid?
8.8 What is the relevant daily rate of pay?

Findings of Fact

9. We shall firstly set out our findings of fact. In doing so, and when considering the burden of proof, they are made on the balance of probabilities, that is to say what is more likely than not. We should make clear we have considered all of the documentation, the fact a document is not expressly referred to in these reasons does not mean it has not been considered.

10. The Claimant was employed as a Senior Service Charge Officer. His employment commenced on 2nd August 2021 and ended on 28th January 2022. He was paid the sum of £33,423.00 per annum and was contracted to work 37.5 hours per week. Under the Claimant's contract for the period of 2nd August 2021 to 31st March 2022 his holiday entitlement was 119 hours. The entitlement for the full year is 180 hours.

11. The Respondent is a company which provides housing accommodation. It has numerous sites, also known as schemes. As part of the business model they charge local authorities and others providers service charges, for example that may well be communal water, in house caring staff etc.

12. The Claimant was introduced to the Respondent by a recruitment agency. We have been provided with the email from the recruiter to the Claimant and that sets out that the role was one that was working from home. However, the contract of employment provided the place of work at St Swithun's House, Bournemouth. At some stage there was discussion about the Claimant going to

Bournemouth two days per month. When the Claimant's employment started, he was managed by a Ms Moji Oladipupo. He was subject to a 6 month probationary period and that involved regular meetings due to take place on weeks; 4, 8, 12, 16, 20 and 24.

13. Before considering the relevant events we need to consider how the role came to be created. We were told, and we accept that the Claimant's role as a Senior Service Charge Officer was newly created and he was the first permanent staff member in place, although a Ms Andrea Wey had been "stepping up" into that role beforehand. A job description was provided which set out the requirements of the role.

14. The Claimant's initial reviews at weeks 4, 8 and 12 were undertaken by Ms Oladipupo. Within the probationary reviews the following is of note from her comments:

    a. *Rafieu has met all the key stakeholders. He should arrange with Andrea to visit some schemes to give him a better understanding of the lay out of the schemes and what services are provided and so charged for.* [Week 4].
    b. *For the week 12 probation meeting. Rafieu is to state how he has perfotrrmed [sic] against all the targets/ objectives set* [Week 8].
    c. *2 follow up catch ups have taken place after this meeting to talk through the expectation of the roles with Rafieu* [week 8].
    d. *Rafieu is getting to know the different service areas gradually and establishing relationships across the teams. To do more of this as various teams are involved in the setting and recovery of service charge* [Week 12].

15. We therefore accept that Ms Oladipupo did not raise concerns over the Claimant's performance with him either within these meetings or separately, we are however, satisfied that some prompts were given by her to assist the Claimant in meeting his objectives.

16. The Claimant then began to be managed by Mr Panesar. There was initially a disagreement between the parties as to the date this commenced and whether it was 1st November 2021 or the 24th November 2021. We accept the Claimant's contention, as was accepted by Mr Panesar in his evidence, that he formally became the Claimant's manager on 24th November. We do, however, accept Mr Panesar's evidence that there was a gradual transition period from the 1st November 2021, as is documented at the front of the probationary documents. The probationary document at week four also demonstrates that Mr Panesar was having meetings with the Claimant at that point in time, supporting his contention that even before he was managing the Claimant he was working with him and had oversight of his performance.

17. There was no formal handover between Ms Oladipupo and Mr Panesar, however we find that the two did speak and we accept the evidence of Mr Panesar that "*she stated that the claimant would require closer supervision and attention as she had concerns over his capability. She stated that he may not last in the post*."

We accept Mr Panesar's evidence on this which is also corroborated by the comments that Mr Baker set out from his discussions with her from May 2022 which were sent to her for her approval. We do, however, accept that the concerns Ms Oladipupo raised with Mr Panesar about the Claimant's performance were not raised by her with the Claimant directly, including as part of the probationary meetings.

18. The Claimant's week 16 review was originally scheduled to take place in December 2021, however Mr Panesar brought that forward to the 24th November 2021. The evidence given by Mr Panesar, which we accept, is the reason it was brought forward was due to Mr Panesar's availability.

19. In this meeting on the 24th November Mr Panesar raised concerns about elements of the Claimant's performance. The following is noted at the start: *There are certain expectation [sic] from this role and it is clear that Rafieu sees this role differently perhaps comparing it to his previous role.* Mr Panesar then went on to set out seven objectives, including his comments (which appeared in red on the original document). They were as follows:

    1. *Meet service charge review deadlines . To review all service charge workbooks and set service charges for 2022/ 23 (eligible & ineligible) for each service with support from Mark Sager. Rafieu has stated that this objectives has been completed , but this is not correct , he has populated the figures but the workbooks need to be reviewed and signed off. I will provide detailed feedback during the stages of approving the workbooks.*

    2. *To devise an information fact sheet with Q&A for residents and one that can be used for BCHA website*
    This has been completed by Moji

    3. *To support the income team meet KPI rent arrears target of 5%*
    No input yet as Rafieu has not been given specifics on this, I will provide further instructions on how the service charges impact on arrears , particularly in services where personal charges are high.

    4. *Provide timely responses to all service charge queries and respond to HB challenges*
    Rafieu currently needs advise and clarity on each response and better understanding of the challenges. He will need to take ownership of these which will increase as he completes service charge workbooks by himself , he also need to understand historical service challenges still come under his remit.

    5. *Make contact and build positive and strong working relationship with HB departments for each local authority*
    There has been some communication[sic] *and successes with two HB authorities but further work required to develop relationship. Rafieu need to make contact proactively with each HB and demonstrate* [sic] *positive dialogue*

6. *Work closely with Development to set service charges for new build/acquisitions & leasehold properties*
   Has started attending the Developmnet [sic] *meeting but will need to participate more as his knowledge increases, also expected to attend site visits and larger services. This will benefit him to fully understand the charges and make recommendations.*

7. *To fully understand all housing management system including Open Housing, Exchequer , and docuware and become competent user. Rafieu has said that he has had training with Mark and feels he is competent and feels no further training required he will need to demonstrate this through his day to day responsibilities.*

20. We will turn to our analysis of these concerns in due course. It is accepted that this week 16 document was not uploaded to the digital HR system Cezanne at the time. We are however, satisfied that the Claimant had sight of this document as his comments were entered after those of Mr Panesar, and one of the Claimant's complaints about the week 20 process is it was, unusually, sent to him for completion before the meeting. The Claimant distinguishes between objectives and targets and makes the point that Mr Panesar did not set him a target for example to visit 3 sites per month. Mr Panesar accepts he did not set such targets and accepted with hindsight that may have been beneficial.

21. The week 20 meeting took place on 7th January 2022. Unusually, the Claimant was asked to complete his comments before the meeting, although Mr Panesar told us that he sometimes did undertake the reviews in that way. We accept that as part of the meeting Mr Panesar went through the concerns on performance and we accept they were documented in the probation minutes. We will deal with whether this amounted to denigration in our conclusions. Again, theses minutes were not uploaded to the HR system Cezanne and we accept that the Claimant was not given a copy of them until his employment had ended. We accept that was an oversight on the part of Mr Panesar. We also accept that a failure to upload to Cezanne is a breach of the probationary policy. The Claimant was, however, aware of the concerns because the comments at week 20 mirror those at week 16.

22. The Claimant alleges that in this meeting on the 7th January 2022 he made a disclosure in relation to health and safety. The list of issues records the allegation as follows:

    On 7 January 2022 verbally to Budh Panesar that that a site in St Pauls, Bournemouth which the claimant had been instructed to visit represented a health and safety risk because of a risk of a needle stick injury being caused to the claimant or others because needles and sharps had not been safely disposed of and littered the site

    That account contradicts the account which was given in oral evidence. Within his oral evidence the Claimant set out that he said "*You know the places you want me to go are not safe. You have a duty of care, you know I am not inoculated to go to those places*". When further asked about the allegation he accepted he did not make reference to needles and sharps. His clear focus in his

evidence and subsequently in his cross examination was that the Respondent owes him a duty of care and that they did not care about his health and safety.

23. We are satisfied, on the balance of probabilities, that the comment made in respect of health and safety was not raised on the 7th January 2022. There is no contemporary evidence to support the contention that it was. Whilst it is right to point out that the Claimant did not see the probationary minutes until after his dismissal, and he challenges the accuracy of them, his evidence on this has also been contradictory, for example the point on what had been said as set out above on what was said. That was not the only contradiction, he also set out in his written evidence that once the health and safety concern was raised "*he* [Mr Panesar] *was angry… He then stopped the meeting; and told me he is going to take me to HR for suitability meeting*." In his oral evidence he said "*when I say that he kicked off, stopped the meeting and said I will refer you to HR.*" Later in cross examination he went on to say that Mr Panesar responded asking whether he was asking for an assessment for each service before the Claimant was asked to visit. That is a change in his evidence, but that response is what is recorded as being Mr Panesar's response in the suitability meeting minutes on the 17th January 2022. We also note the Claimant's contention in the meeting on 17th January 2022 when being challenged about not following reasonable instruction by undertaking site visits was because he was being discriminated against and again on the 24th January 2022 when he was told of his dismissal his response was that it was because he was being discriminated against "*because I am an African*". The Claimant does not refer to health and safety, as shown by the minutes. We accept that during the meeting on the 7th January 2022 Mr Panesar told the Claimant that he would be taken to a suitability meeting.

24. Following the meeting an email was sent by Mr Panesar to Rob Marsden in HR. That meeting documents the concerns of Mr Panesar, it does not refer to health and safety concerns being raised.

25. The Claimant was then invited to a suitability meeting on the 11th January 2022. That meeting took place on 17th January 2022. We have the minutes from that meeting. We are satisfied that it was within that meeting the Claimant raised health and safety for the first time the minutes record the position as follows:

> *RA [*the claimant]….
>
> *On visits, you have a duty of care to me, if I am going to those places, some sites are not safe to go into, injections etc*
>
> *RM* [Mr Marsden] – *please can we unpick this?*
> *RA – You have a care of duty to me, I do not know what each place is*
>
> *BP* [Mr Panesar] - *Are you are saying you want me to do complete assessment before you go to each service*
>
> *RA – I do not want you to do assessment all over again. My question is if you owe a duty of care to, you must ensure that I am equip to visit site that are not safe to go without inoculation.*

RM – explained process, Covid has been a big change and challenge, each service covid risk assessment is on the Hub, you can also call the service manager.

RA – if I ask question I will not go wrong

26. We accept that was the extent of the disclosure provided and that it contradicts the wording outlined within the list of issues. The site in question was a site known as St Pauls. The Claimant had arranged to visit that site in November 2021 however it was cancelled because the person he was due to meet could not attend, the Claimant did not cancel this meeting the provider did. The Claimant said he was aware of risk of needles because others had told him, the risk assessments we have been provided with from the relevant period only refer to needles on one occasion. We accept in the meeting on the 17th January 2022 allegations were made by the Claimant that Mr Panesar was discriminating against him. In his evidence in respect of the protected disclosures the Claimant indicated that it was personal to him as opposed to the public.

27. For the avoidance of doubt we reject the contention of the Claimant that he said in any of the meetings that the action was being taken against him because of health and safety concerns, that is supported by the contemporaneous evidence available at the time as set out above.

28. On the 24th January 2022 a follow up meeting took place and the Claimant was informed orally of the decision to terminate his employment.

29. On the 25th January 2022 the Claimant wrote an email to Mr Marsden and Ms Moylan raising that his legal advisor had reached the conclusion that his termination was not proper for the following reasons:
    1. *No written reason was given to me for my termination*
    2. *Nothing official or in writing regarding the dismissal*
    3. *I want you to know that I am still expecting to be paid my contractual pay regardless you have prevented access to continue my work.*
    4. *For the sake of any doubt I want to inform you that I am still employed with MCHA.*

    He goes on at the end to state: *I would like to bring to your notice that I informed you during out meetings that, Budh has "Descriminated" [sic] against me, but you did not investigate my allegation for discrimination…. I am now making a formal grievance complaint against Budh for discrimination against me.*

30. A response was sent to those allegations on the 26th January 2022. On the 27th January 2022 a letter was made confirming the Claimant's dismissal with effect from 28th January 2022 and that he would be paid in lieu of his notice, which was one week.

31. On the 28th January 2022 the Claimant raised concern about the accuracy of the minutes from the 17th January meeting, in particular he commented that the following was "*deliberately omitted":* "*What you are doing to me it is not in the interest of the organisation but in your own interest because you leaving the organisation, and I am honestly believe you are not acting in good faith towards me, but sabotaging the organisation."*

32. The Claimant appealed the termination of his employment on 2nd February 2022. That meeting was chaired by Caroline Moylan, who no longer works for the Respondent. She has produced a statement within these proceedings. We are told that statement was produced on instructions however, she has not attended to give evidence, and her statement is not signed. We can therefore only place very limited weight on that document. We can attach some weight however, as it reflects the contemporaneous documents in the bundle. Additionally, it is accepted that she has had no prior involvement with the Claimant, and when asked about his criticism of her, in short, it is because he considers she has not done her job correctly otherwise she would have found in his favour, and that she is trying to protect the organisation.

33. We have the benefit of the minutes from that appeal which took place on 8th March 2022. It was clearly a detailed comprehensive meeting, lasting over four hours and the minutes, which it is accepted are not verbatim, run to over 23 pages. The meeting started at 13.17 and ended at 17.18, although there was a short break. Ms Moylan wrote to the Claimant on 15th March 2022 with the outcome of the meeting dismissing the Claimant's allegations. On balance we are satisfied that the reason Ms Moylan dismissed the appeal was because she did not consider it was made out, we do not find that the dismissal of the appeal was because of the Claimant raising any protected disclosure, or because she was subjecting the Claimant to a detriment for having done a protected act.

34. Meanwhile the Claimant had raised a grievance on 25th January 2022 and again on 28th January 2022. This was investigated by Mr Baker who attended to give evidence. We accept that Mr Baker was not involved with the Claimant prior to being appointed to consider his grievance, save for an incident where he may have asked the Claimant where a member of staff was. The grievance process was very thorough and extensive steps were taken to investigate. As part of the process Mr Baker spoke to 6 different individuals (not including the claimant, who he spoke with in a meeting on 29th April 2022 which we have the minutes for). Mr Baker also reviewed numerous documents including the probationary booklet, the suitability meeting outcome and the appeal outcome including, the notes of those meetings, emails provided by the claimant and emails from other members of staff. He did not search through every email that had been sent during the Claimant's employment but did consider those provided. It has been challenged that what he has recorded people having said may not be true however, we are satisfied what he has recorded is what individuals have told him and that is why he sent his notes to them for approval. We found him to be an honest witness, he was frank accepting that some things could have been done better. We accept his reasoning for not upholding the grievance and do not consider that it was done because he was discriminating against the Claimant, or because the Claimant had made a protected disclosure or done a protected act under the Equality Act.

35. We accept and find that there have been some failings on behalf of the Respondent, they include not uploading the probationary reviews to Cezanne, a failure to set targets, not giving the Claimant the minutes of the week 20 meeting until after he was dismissed and Ms Oladipupo not raising her concerns with the

Claimant either in person or on the probation documents. The failure to upload to Cezanne was an administrative oversight, the failure to set targets was because Mr Panesar had not thought to, and we do not know why Ms Oladipupo did not raise concerns with him directly.

36. The Claimant commenced the ACAS process on 17th March 2022 as set out within the ACAS certificate. The certificate was issued on 26th April 2022. These proceedings were received on 27th April 2022.

Fabrication and authentication emails and minutes

37. The Claimant has raised an allegation that the emails we have been provided with and the minutes are not authentic and have been fabricated. The minutes are not verbatim, and they are necessarily a note, we do not however, consider that they cannot be relied on, nor do we consider they are fabricated or not authentic.

38. In so far as the emails in the bundle not being authentic or fabricated there is simply no evidence to support such a contention, and we accept the emails are true copies of what was sent.

The Claimant's performance

39. Part of the Claimant's allegations are that the concerns raised in respect of his performance were false and Mr Panesar knew they were false, as such it has been necessary for us to consider this as part of our findings.

40. The first concern relates to the Claimant attending sites which were sometimes referred to as schemes as part of the evidence. They are properties which are run by the Respondent which they charge local authorities (and others) service charges for.

41. It was clearly a requirement of the role for the Claimant to attend sites. The action list of the probationary form sets out the following action for the manager of the Claimant:

Set up a local induction programme for the new employee, including visits to other areas of the business, external stakeholders, as appropriate

42. The following comment was noted by Ms Oladipupo during her week 4 review (our emphasis is added):

Rafieu has met all the key stakeholders. He should arrange with Andrea to visit some schemes to give him a better understanding of the lay out of the schemes and what services are provided and so charged for

43. The issue is again raised in the week 16 review as follows (again with our emphasis added):

Has started attending the Developmnet [sic] meeting but will need to participate more as his knowledge increases, also expected to attend site visits and larger

services. This will benefit him to fully understand the charges and make recommendations.

44. The reason the Claimant needed to visit sites was so he could identify additional elements that could be charged as part of the service charge, to check the accuracy of the sums being claimed so to ensure it was correct but also to maximise the revenue of the Respondent. If matters are being overcharged for that leads to sums being clawed back by local authorities, undercharging means there is a lack of revenue.

45. Throughout the Claimant's employment he undertook one visit to a refuge which was a new site (i.e. one not previously charged for). The Respondent's position was that this was the only visit that was undertaken. The Claimant told us he did two visits, one being this new refuge the other was a site opposite the Respondent's premises however, it seems to us that it is the same site. We find that there was one visit to a site that was undertaken during the Claimant's employment, but even if it were two site visits that is two in five months out of 223 sites.

46. Whilst the Claimant was largely working from home he could, we find as the Respondent told us, have added them onto his visits to the local area however, he did not. We accept Mr Panesar's account that when he had spoken with the Claimant about visits to sites the Claimant resisted, indicating that the need was to visit new sites not existing sites as the relevant data could be provided by on site teams of the existing sites. That approach to visiting of sites mirrored what the Claimant told us during his oral evidence which corroborates the evidence of Mr Panesar.

47. We accept that around November 2021 the Claimant had arranged to visit the St Paul's site however that was cancelled by a worker at the St Paul's site, however, there is no evidence to suggest that the Claimant sought to rearrange the same.

48. The second issue raised was the Claimant's communication with others. The Claimant points us to the comment that he raised within his week 4 probationary report, namely:

    M*uch more clear communication in relation to work request and instruction from colleagues*.

    The Claimant appeared to indicate that request was what he was being criticised for. We do not accept that. The issue in respect of the Claimant's communication was that colleagues wanted information from the Claimant and when they did not get that information that they required they would then need to contact Mr Panesar who would give the information required and would then provide the Claimant with feedback. The Claimant then raised the issue was that Mr Panesar should have been defending him with colleagues and setting out that he needed the information is needed in a clearer way. That contradicts the Claimant's own account in respect of information having been given. In making the findings above we accept the evidence of Mr Panesar over that of the Claimant, he was a more credible and consistent witness.

49. Mr Panesar said that the Claimant was argumentative. We accept this evidence. Whilst we are mindful that people respond differently to the stress of giving evidence and representing oneself however, the Claimant during his own evidence, and during cross examination of the Respondent's witnesses, was argumentative when he disagreed or was challenged. He would also become defensive and would argue with counsel or the witness, which corresponds with the behaviour that Mr Panesar was concerned about.

50. In respect of the third concern that related to the Claimant demonstrating his capability in the role. The evidence appears to support the Claimant's assertion that initially Mark Sager set the service charge for a project in Exeter. Exeter City Council then challenged the charges, and the Claimant told us that he resolved that issue. The Respondent does not agree because the resolution that the Claimant agreed to resulted in monies that had previously been agreed by Exeter and had been paid by them, was not then being recovered and was now being clawed back. The Claimant states that is because the Respondent was not entitled to claim those sums, Mr Panesar disagreed. We find that there is clearly a disagreement in relation to this service charge, and we are unable to find who is correct, however, we are satisfied that there are differing views, and the concerns held by Mr Panesar were well held and reasonable. For the avoidance of doubt, we do not consider that he had made the concern up or falsified them.

51. The final concern related to not answering general service charge queries and we accept that the basis of this concern was because of what the tenancy officers had reported to Mr Panesar as is reflected in the evidence which we have seen. Again, we find this concern was reasonably held by Mr Panesar on the information he was given.

52. We make clear and find that, as both Mr Panesar and Mr Baker accepted, that whilst there were concerns on the Claimant's performance there were clearly elements of his job that he could do and could do well. The Claimant himself has taken us to examples of this within the bundle. The issue, however, is the consistency of doing the job well and meeting the threshold that the Respondent required of him. That was the concern of the Respondent.

The Law

Unfair dismissal

53. The Claimant alleges two forms of unfair dismissal, firstly due to making a protected disclosure and therefore in breach of section 103A of the Employment Rights Act 1996, the second pursuant to section 100 of the Employment Rights Act 1996, due to having raised a Health and Safety concerns.

54. Section 103A of the Employment Rights Act 1996 provides that:

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

55. Section 100 of the Employment Rights Act 1996 provides the following:

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

…

(c)being an employee at a place where—

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

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

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

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

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

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

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

56. In cases concerning automatic unfair dismissal the usual two year qualifying period does not apply, however, the burden of proof rests upon the Claimant to prove, on the balance of probabilities, that the reason for the dismissal was for an automatically unfair reason as per **Smith v Hayle Town Council 1978 ICR 996, CA**

57. Section 103A of the Employment Rights Act 1996 sets out that the reason for dismissal will be automatically unfair if the reason, or principal reason, was due to the employee having made a protected disclosure. When there is more than one disclosure the test to apply is whether or not the principle reason was the protected disclosures taken as a whole **El-Megrisi v Azad University (IR) Oxford EAT 0448/08**.

"Whistleblowing: Protected Disclosure

58. Section 43A of the Employment Rights Act 1996 sets out the definition of a protected disclosure as:

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.

59. Section 43B Employment Rights Act 1996 goes on to set out the definition of a qualifying disclosure
(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)that a criminal offence has been committed, is being committed or is likely to be committed,

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

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

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

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

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

(2)For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3)A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4)A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5)In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

60. There is a requirement for there to be a disclosure of information. In the case of **Kilraine v London Borough of Wadsworth [2018] ICR 1850** Sales LJ, noted that allegations and information were mutually exclusive. In considering whether the information threshold has been met the test is whether the disclosure has "sufficient factual content and specificity such as is capable of tending to show" one of the factors set out at section 43B subsection 1. We remind ourselves that as outlined in **Norbrook Laboratories (GB) Ltd v Shaw [2014] IRC 540 (EAT)** earlier communications can be read in conjunction with later ones.

61. As per **Dodd v UK Direct Solutions Limited [2022] EAT 44.** when considering whether the Claimant believed that there was a relevant failure, and whether that belief was genuine, the time of assessing reasonableness and the belief is at the time at which the disclosure was made, not what the Claimant came to believe later on.

62. Breach of a legal obligation can include breach of an employment contract **Parkins v Sodexo [2002] IRLR 109.**

63. The next stage involves considering whether or not there was a reasonable belief that the disclosure was within the public interest. Internal matters can mean that they fall within the public interest. When evaluating internal matters, we should consider all the circumstances in summary that includes the numbers of those involved or likely to be affected, the nature and extent of the interests affected, the nature of the wrongdoing and the identity of the wrongdoer, as set out in the case of **Chesterton Global Limited v Nurmohamed [2018] ICR 731**.

64. If a qualifying disclosure is made to the Claimant's employer than pursuant to section 43C(1) (a) of the Employment Rights Act then it is a protected disclosure.

Detriment due to making a protected disclosure.

65. Section 47B of the Employment Rights Act 1996 provides:

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
(1A)A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
(a)by another worker of W's employer in the course of that other worker's employment, or
(b)by an agent of W's employer with the employer's authority,
on the ground that W has made a protected disclosure.

66. Detriment is not defined in the Employment Rights Act. The House of Lords in ***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337 HL*** adopted the words of Brightman LJ in Ministry of Defence v Jeremiah 1980 ICR 13, CA in that a detriment "exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment, and that it should be considered from the perspective of the employee." The wording of the statute includes a deliberate failure to act. The question of whether or not there is a detriment is separate to that of causation. Dismissal however, cannot be a detriment.

67. If we consider there is a detriment, we must then consider whether the Claimant was subjected to a detriment by the Respondent.

68. We remind ourselves it is for the Respondent to show the grounds on which any act or deliberate failure to act was done. Additionally, when considering the

reason put forward for any action or deliberate failure to act, we can draw inferences as appropriate and have had regard to the guidance as set out in **International Petroleum Ltd and ors v Osipov and ors EAT 0058/17**.

69. The EAT in **Aspinall v MSI Mech forge Ltd EAT 891/01** noted that: The protected disclosure has to be causative in the sense of being "*the real reason, the core reason, the causa causans, the motive for the treatment complained of*",

Equality Act Claims

Direct Discrimination

70. Section 13 of the Equality Act 2010 defines direct discrimination as follows:

(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

71. Section 23(1) of the Equality Act 2010 goes on to set out that on a comparison of cases there must be no material differences between the circumstances.

72. At paragraph 11 of **Shamoon v Royal Ulster Constabulary [2003] UKHL 11** Lord Nicholls sets out that at times Employment Tribunals *may sometimes avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.* Lord Nicholls goes on at paragraph 12 to outlined that *there will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant.*

73. The case of **Nagarajan v London Regional Transport [1999] IRLR 572** highlights the need for us to consider the "mental processes" of the alleged discriminator, known as the motivation. However, we remind ourselves that is not the same as motive and as shown in **Amnesty International v. Ahmed UKEAT 0447/08** a well meaning employer can still discriminate.

74. In accordance with section 136 of the Equality Act 2010 the burden is on the Claimant to prove the facts from which we could conclude, in the absence of any other explanation, that an employer has committed an act of direct discrimination, we are obliged to uphold the claim unless the employer can show it did not discriminate.

75. The test of less favourable treatment is an objective one. Further, as per Lord Scott in **Chief Constable of West Yorkshire Police v Khan ICR 1065** different treatment is not the same in less favourable treatment.

Victimisation

76. Section 27 of the Equality Act 2010 provides the following:

> *(1)A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a)B does a protected act, or*
>
> *(b)A believes that B has done, or may do, a protected act.*
>
> *(2)Each of the following is a protected act—*
>
> *(a)bringing proceedings under this Act;*
>
> *(b)giving evidence or information in connection with proceedings under this Act;*
>
> *(c)doing any other thing for the purposes of or in connection with this Act;*
>
> *(d)making an allegation (whether or not express) that A or another person has contravened this Act.*
>
> *(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*
>
> *(4)This section applies only where the person subjected to a detriment is an individual.*
>
> *(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.*

77. The term detriment has a broad meaning, but assistance can be gained from us considering the ECHR code provides:

'Detriment' in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards

78. When considering a detriment, it needs to be considered from the Claimant's point of view as per **Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065 HL. Shamoon v Chief Constable of the Royal Ulster Constabulary 2023 ICR 337** HL established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. There are therefore both subjective and objective elements to the question of detriment.

Burden of Proof

79. For those claims brought under the Equality Act 2010 section 136 sets out the provisions concerning the burden of proof:

> *136 Burden of proof*
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*
> *(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*
> *(5) This section does not apply to proceedings for an offence under this Act.*
> *(6) A reference to the court includes a reference to—*
> *(a) an employment tribunal;*
> *(b) the Asylum and Immigration Tribunal;*
> *(c) the Special Immigration Appeals Commission;*
> *(d) the First-tier Tribunal;*
> *(e) the [Education Tribunal for Wales];*
> *(f) [the First-tier Tribunal for Scotland Health and Education Chamber].*

80. The provisions as at section 136 have been subject to numerous appeal authorities and the Guidance in **Wong v Igen Ltd [2005] EWCA 142** is settled law.

Beach of contact/ unlawful deduction in wages

81. Pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 the tribunal had jurisdiction to consider claims for a breach of contract. We must consider what the term of the contact is before considering where there has been a breach of that term.

82. A breach of contract claim may include a breach for failing to pay wages owed. Alternatively, we can consider this claim pursuant to section 13(1) Employment Right Act 1996, which provides the right of a deduction not to be suffered coupled with section 23 of the act which gives the worker the right to present the claim. **Bear Scotland v Fulton [2015] IRLR 15** provides that there must be a "sufficient frequency of repetition" for any series of deductions to be made in accordance with a claim pursuant to section 23 (3) Employment Rights Act 1996.

83. The time period for bringing such a claim is three months from the date of breach or when payment is owed in accordance with section 23 Employment Rights Act 1996 unless the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months. The section goes on to provide that the tribunal may consider the complaint if it is presented within such a further period as the tribunal considers reasonable. The same test applies in respect of

considering the claim as a breach of contract pursuant to Article 7 of the Extension of Jurisdiction Order.

84. Section 87 of the Employment Rights Act provides:

87 Rights of employee in period of notice
(1) If an employer gives notice to terminate the contract of employment of a person who has been continuously employed for one month or more, the provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86(1).
(2) If an employee who has been continuously employed for one month or more gives notice to terminate his contract of employment, the provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86(2).
(3) In sections 88 to 91 "period of notice" means—
(a) where notice is given by an employer, the period of notice required by section 86(1), and
(b) where notice is given by an employee, the period of notice required by section 86(2).
(4) This section does not apply in relation to a notice given by the employer or the employee if the notice to be given by the employer to terminate the contract must be at least one week more than the notice required by section 86(1).

Claim for outstanding holiday pay

85. The Working Time Regulations 1998 set out a statutory minimum period of holiday, and in the event that holiday is not taken in the leave year when an employment ends, for payments to be made in lieu. Regulation 13 and 13A provides for a statutory minimum of 5.6 weeks per annum. The starting date is the date the employment commenced unless there is a written relevant agreement between the employee and the employer provides for a different leave year.

86. In the event that the sums are outstanding the employee may bring a claim for breach of contract or pursuant to regulation 14 of the Working Time Regulations. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions of sections 221-224 ERA, with some modifications in calculating a weeks' pay an average of pay over the previous 52 weeks is taken. In accordance with a series of cases including the Court of Appeal's judgment in **British Gas Trading Ltd v Lock and anor 2017 ICR 1,** all elements of a worker's normal remuneration, not just basic wages, must be taken into account when calculating holiday pay for the basic four weeks' leave derived from European Law but not the additional 1.6 weeks leave which is purely domestic in origin. The Court of Appeal in **Harpur Trust v Brazel (Unison intervening) [2019] EWCA Civ 1402**, confirmed that when calculating the sums appropriate calculation is 5.6 weeks as per the Working Time Regulations and not a calculation of 12.07% as commonly used.

Conclusions

87. We turn to our conclusions having had regard to the findings of fact which we have made, the law and the issues which we need to determine. We have been

able to consider some of the questions on individual issues together as set out below.

Protected disclosure ('whistle blowing')

1.1. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

1.1.1 What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

1.1.1.1 On 7 January 2022 verbally to Budh Panesar that that a site in St Pauls, Bournemouth which the claimant had been instructed to visit represented a health and safety risk because of a risk of a needle stick injury being caused to the claimant or others because needles and sharps had not been safely disposed of and littered the site.

88. We have set out our findings of fact in respect of this allegation within the above finding of fact section of these reasons. In summary we do not accept that any disclosure was made on 7th January 2022 as alleged, and we accept the evidence of Mr Panesar in relation to that. In so far as what was said on the 17th January 2022, we found that the disclosure was not in the terms as alleged but in fact words to the effect of "*You have a duty of care, you know I am not inoculated to go to those places".* Those were the terms set out by the Claimant in his oral evidence.

1.1.1.2 On 17 January 2022 verbally to Mr Robert Marsden, an HR officer, that Mr Panesar was discriminating against the claimant and/or subjecting him to detriment because the claimant has raised health and safety concerns about site visits

89. We have set out our finding in respect of this allegation above. We accept that the Claimant, as evidenced by the contemporaneous documents, made an allegation that Mr Panesar was discriminating against him because of his race. We do not accept that at this stage he alleged that he was being subjected to a detriment because of the health and safety concerns. That is not supported by the evidence, he simply raised the fact that the Respondent owes him a duty of care. Even on the 24th January 2022 his complaint is not one of detriment due to health and safety but one of discrimination.

1.1.2. Were the disclosures of 'information'?

90. When considering whether the disclosures were of information we remind ourselves that as per the Judgment in **Kilraine** there is a requirement for there to be "sufficient factual content and specificity such as is capable of tending to show". In respect of the first alleged disclosure on 7th January 2022 which we did not find, we do not consider the wording that we have found the Claimant used on the 17th January 2022, has factual content and specify. It is simply a general comment that the Respondent owes him a duty of care, that is a statement of a legal duty that all employers owe employees.

91. In relation to the second allegation of the 17th January 2022, namely that Mr Panesar is discriminating against him (we rejected the allegation that he raised

he is subjecting him to a detriment due to health and safety), whilst this has slightly more information, we do not consider that it is sufficient to meet the test of being of information. There is no detail or particularisation within the comments that have been made, it was simply a broad allegation that he is being discriminated against. We therefore do not consider that this meets the test of being *of information*.

1.1.3. Did the claimant believe the disclosures of information were made in the public Interest?

1.1.4.Was that belief reasonable?

92. The Claimant's own evidence in cross examination was that both allegations made were personal to him, rather than being in the wider public interest. We therefore conclude that the claimant did not believe the disclosures (even if they were made out) were made in the public interest. The only evidence of how many others would be affected was the Claimant's account that it was only him. Given his own position we do not consider that it was reasonable to believe it was in the public interest.

1.1.5. Did the claimant believe that the information tended to show that:

1.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;

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

1.1.6. Was that belief reasonable?

93. In relation to the alleged health and safety disclosure, so far as that we have found it as having happened on 17th January 2022, we do not consider that the Claimant believed it to show that the health and safety of himself or any individual was being or likely to be endangered. The comment as we found was a general comment about a duty of care, and his focus of cross examination was that the respondent did not care about his health and safety. We do not consider that his comments show that his health and safety was likely to be endangered. Even if we did consider that he believed that his health and safety was or likely to be endangered we do not consider that belief was reasonable. He had never been to the site known as St Pauls, he had not seen it, nor the risk assessments (until they were produced on day 1), he did not know what it was like. At its highest his evidence was someone in the office told him that there were needles present. We also note the Claimant's evidence was that he was prepared to go and the reason the visit did not happen was because someone at the placement cancelled the visit.

94. In respect of the second allegation in relation to discrimination, we accept that the Claimant believed that showed that there was a breach of obligation not to discriminate. However, the other elements which are required to be in place we do not consider are made out.

1.2 If the claimant made a qualifying disclosure, it is accepted that it was a protected disclosure because it was made to the claimant's employer.

95. We do not therefore conclude that any qualifying disclosure has been made.

*2. **Dismissal (Employment Rights Act s. 103A ERA 1996)***

2.3 Was the making of any proven protected disclosure the principal reason for the claimant's dismissal?

2.4 The claimant did not have at least two years' continuous employment and the burden is therefore on the claimant to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosure(s)

96. We have concluded that there was no qualifying disclosure and therefore there was no protected disclosure. However, even if our position was incorrect the Claimant has not proven the reason for his dismissal was due to him having made a protected disclosure. Further, although the burden is not on them, we are satisfied that the reason for the Claimant's dismissal was his performance and accept the Respondent's evidence in respect of this.

97. Ms Oladipupo set out objectives in her probation meetings at weeks 4, 8 and 12, although we accept that she did not put them in the way in which she did to Mr Panesar. Mr Panesar raised concerns in respect of the Claimant's performance both at weeks 16 and week 20. It was within the week 20 meeting on the 7th January 2022 that Mr Panesar indicated he would be utilising the suitability process in respect of the Claimants performance and that, on our findings, occurred before the Claimant made the allegation in respect of the respondent owing him a duty of care and the allegation of discrimination made on 17th January 2022.

98. We accept the evidence of Mr Panesar that he was concerned about the Claimant's performance and that was his genuine belief, which we find was reasonably held, on the information, which was available to him, even when taking into account the fact there were clearly times, as Mr Panesar had accepted, where the claimant was able to do his job, and do it well. We do not accept the contention put in cross examination that Mr Panesar had not managed him for a long enough period of time to be able to know about his performance.

99. We therefore reject the allegation that any protected disclosure, even if they had been found, was the principal reason for the Claimant's dismissal.

3. Dismissal (Employment Rights Act s. 100 ERA 1996)

3.1 Was there a health and safety committee or appointed employee health and safety representative within the respondent?

3.1 If so, was it reasonably practicable for the claimant to raise the matter by those

means?

3.2 If not, did the Claimant bring to the Respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety? In particular, on 7

January 2022 did the claimant inform Mr Panesar that a site in St Pauls, Bournemouth which he was instructed to visit represented a health and safety risk because of a risk of a needle stick injury being caused to the claimant or others needles and sharps had not been safely disposed of and littered the site?

100. We were told that there was a nominated employee within the Respondent, but the Claimant's evidence was clear that he did not know who that individual was. The Claimant instead raised during his suitability meeting on the 17th January 2022 to Mr Marsden of HR and Mr Panesar his manager that he is owed a duty of care. We do not consider that the Claimant has raised a concern over circumstances that he reasonably believed were potentially harmful to himself or others. The allegation as summarised is not what was said, as per our findings, what was said was a mere assertion that he is owed a duty of care in respect of health and safety, and we do not consider that there was a reasonable belief that there were such circumstances as would be required.

3.3 Alternatively, did the claimant believe those circumstances to be serious and imminent, and so refuse to attend the St Paul's site.

3.5 If so, was that belief reasonable?

101. No, even on his own case the Claimant has not alleged that there was a serious and imminent risk to refuse to attend the St Paul's site. His own case is he would have gone in November 2021 but for the person who he was due to meet cancelling.

3.6 Was either the claimant's actions at 3.5 or 3.6 the reason or principal reason for the claimant's dismissal?

102. No, as set out above in respect of our conclusion in respect of the claim under section 103A of the Employment Rights Act 1996 and for the same reasons we conclude that the reason for the Claimant's dismissal was his performance, any health and safety disclosure was not the reason or principal reason for the dismissal. The Claimant has not proven that the reason or principal reason for his dismissal was a health and safety disclosure.

4. Detriment (Employment Rights Act 1996 section 47B)

4.1 Did the respondent do the following things:

4.1.1 On 17 January 2022 Mr Panesar referred the claimant to HR in relation to a false allegation against the claimant that he was failing to follow management instructions, such as to attend sites, that his attitude towards colleagues was not positive, and he lacked capability to generate service charges or answering general service charge queries?

4.1.2 Dismissing him on 28 January 2022 [this is accepted]

4.1.3 Rejecting his appeal on 9 June 2022 [this is accepted]

103. Mr Panesar did refer the Claimant to HR on 17th January 2022. We have as part of our findings had to consider the Claimant's performance because the allegation raised is that the allegations made by Mr Panesar as part of his referral to HR were false and knowingly false. On the basis of the information we have considered we do not consider that they were false allegations, we are satisfied that there were concerns in relation to his performance for the reasons we have outlined. That included him not attending sites as were identified within his objectives, concerns over his communication with other colleagues, and lacking in an ability to undertake service charges. Whoever is right on the concerns with Exeter, and we were unable to make a finding on who was correct, there was a genuine belief by Mr Panesar over these charges and whether they were correct.

104. It is right that as part of the meeting that Mr Panesar raised concerns over the Claimant's performance as is alleged.

105. The remaining two allegations are accepted.

4.2 By doing so, did it subject the claimant to detriment?

4.3 If so, was it done on the ground that the claimant had made the protected disclosures set out above?

106. A detriment has a broad definition, and we need to consider subjectively the Claimant's perspective but also objectively whether a reasonable employee may consider that a Claimant has been placed at a disadvantage. We are satisfied that subjecting someone to a suitability process which could, and in this case did, result in dismissal would amount to subjecting to a detriment. We also consider that dismissing an appeal, effectively because someone had made a protected disclosure would also amount to a detriment. We make plain however, that our finding was the appeal was thorough and detailed.

107. A dismissal cannot be a detriment in law.

108. We rejected the contention that the Claimant has made a protected disclosure, but the reason why he was referred to HR by Mr Panesar was because he had concerns over the Claimant's performance which we found were reasonably held. They are the same reasons why he was dismissed, and why his appeal was subsequently dismissed. We are satisfied that the Respondent has proven that none of the actions were taken because of a protected disclosure (even if we had found that one existed) and each of them were taken because of there being concerns over the Claimant's performance as we have found as part of our findings of fact.

5. Direct race discrimination (Equality Act 2010 section 13)

5.1 The claimant describes himself a Black African Male.

5.2 Did the respondent do the following things:

5.2.1 On 7 January 2021 did Mr Budh Panesar denigrate and criticise the claimant by criticising him in respect of the rejection of the service charges payment by Exeter Local Authority, saying that he

did not know how to prepare fixed and variable service charges and that he asked too many questions of Mr Panesar and other work colleagues without reasonable or proper cause?

109. The dispute in respect of this allegation appears to come down to whether or not Mr Panesar denigrated the Claimant. The definition of denigrate includes to sully or stain a character or reputation. It is accepted that Mr Panesar raised concerns in relation to the charges by Exeter City Council and commenting that he did not know how to prepare fixed and variable charges and asked too many questions. The Claimant clearly does not agree that there were any concerns in respect of his performance and therefore characterises the concerns and questioning of his performance as denigration. We do not agree that it amounted to this.

5.2.2 On 17 January 2022 Mr Panesar referred the claimant to HR in relation allegations against the claimant which he knew to be false, namely that the claimant had failed to follow management instructions, such as to attend sites, that his attitude towards colleagues was not positive, and he lacked capability to generate service charges or answering general service charge queries?

110. The key component of this allegation is that the allegations made against the Claimant by Mr Panesar were false. We have considered the question of the Claimant's performance as part of our findings of fact as it was necessary to consider whether they were false. We do not agree that the concerns raised were false, nor do we consider that Mr Panesar knew that they were false, he was merely doing his job by raising the concerns. We have set out above in relation to our conclusions on detriment due to a protected disclosure and within our findings of fact the reason why we reject this allegation and rely on them as part of this conclusion.

5.3 Was that less favourable treatment? The claimant relies upon Mr Mark Sager as a comparator.

5.4 If so, was it because of the claimant's race, nationality or ethnicity?

111. We have been assisted by the approach set out by Lord Nicholls in **Shamoon**, in focusing on the reason for the action and whether it was because of the Claimant's protected characteristic, namely his race nationality of ethnicity. We therefore deal with this causative aspect first.

112. We do not consider that the action taken by Mr Panesar such that we have found them, namely raising concerns about the Claimant's performance and ability to his job which the Claimant characterises as denigrating him, and referring the claimant to HR and implementing the suitability process was because of the Claimant's race, nationality or ethnicity.

113. The reason he did what he did was, we accept, because Mr Panesar had concerns over the Claimant's performance, and our findings are such that we have found that to be the case, and in any event, Mr Panesar had reasonable grounds for believing there were concerns over the Claimant's performance. We found that the concerns were shared by Ms Oladipupo (although she did not

share them with the Claimant), and we consider they were reasonably held. The Claimant does not agree, but the fact he does not agree does not mean that the action taken by Mr Panesar was because of his race nationality or ethnicity.

114. We do not agree that Mark Sager was an appropriate comparator. A comparator needs to be in the same position as the claimant, and Mr Sager was not. His role was different (although he had assisted in some tasks), it was a lower grade role, and it is accepted that he was not managed by Mr Panesar. He may well have made mistakes, but we therefore do not consider he is an appropriate comparator.

115. We have considered whether or not the Claimant was treated less favourably than a hypothetical comparator and we do not consider that there is any evidence to suggest that he was.

6. Victimisation (Equality Act 2010 s. 27)

6.1 Did the claimant do a protected act as follows:

6.1.1 On 7 January 2022 informing Mr Panesar that he was discriminating against the claimant?

6.1.2 On 17 January 2022 informing Mr Marsden that Mr Panesar was discriminating against him?

6.1.3 Issuing these Tribunal proceedings

6.1.4 It is admitted that the respondent:

6.1.4.1 Dismissed the claimant on 28 January 2022

6.1.4.2 Rejected the claimant's appeal on 9 June 2022.

6.2 By doing so, did the respondent subject the claimant to detriment?

6.3 If so, was it because the claimant had done the protected acts?

116. It is clear and it appears accepted that the Claimant did the protected acts as are set out. The actions taken namely the dismissal and rejecting the appeal are also admitted, and it is clear to us that they would amount to a detriment and consider that a reasonable employee would consider that they placed the Claimant at a disadvantage.

117. We do not however, consider that the dismissal, nor the rejection of the Claimant's appeal, were because of the protected acts. They were, as we have set out within our findings and these conclusions, because there were concerns over the claimant's performance and those concerns were reasonably held. We accept the Respondent's case in this regard. The investigation into the appeal and the grievance were thorough and detailed. This was an employer who took the allegations seriously and investigated them properly.

7. Breach of contract: notice pay

7.1 What was the claimant's notice period? The claimant asserts it was one week, amounting to 5 working days

7.2 Was the claimant paid for that notice period?

118. The Claimant's notice period was one week, namely 5 working days. The last day of employment was the 28th January 2022. He was then paid from 29th January 2022 as payment in lieu of notice and then for the four days in February. The Respondent has provided evidence as to the calculation and the sums paid to support their position. The Claimant simply states that he stands by his calculation.

119. We are satisfied that the Claimant has therefore received his payment in lieu of notice and there is therefore no claim for breach of contract is made out.

8. Holiday Pay (Working Time Regulations 1998)

8.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended? The claimant says that has not paid for 2 days of annual leave.

8.2 What was the claimant's leave year?

8.3 How much of the leave year had passed when the claimant's employment ended?

8.4 How much leave had accrued for the year by that date?

8.5 How much paid leave had the claimant taken in the year?

8.6 Were any days carried over from previous holiday years?

8.7 How many days remain unpaid?

8.8 What is the relevant daily rate of pay?

120. The Claimant's holiday allowance for 2021 – 2022 was set out within his contract of employment at page 4 (under the title Annual Leave). For the year from 2nd August 2021 to 31st March 2022 it was 119 hours (it would have been 180 hours for a full year). The period of 2nd August 2021 to 31st March 2022 is a period of 243 days. [Nb. The parties should note that the Judge had incorrectly noted it as a lower period of time during the hearing which impacted on the calculation undertaken when asking the Respondent about it in submissions. In post hearing discussions however, the correct period was noted as set out herein].

121. The Claimant's employment commenced on 2nd August 2021 and ended on 28th January 2022. That amounts to a period of 179 days.

122. To work out how much of the leave year had passed, dividing 179 days (the days worked) by 243 (the days expected to be worked from 2nd August 2021-31st March 2022) and multiplying by 100 gives the percentage of the relevant year which had elapsed namely 73.6%.

123. 73.6% of the holiday entitlement for the holiday year (namely 119 x 0.736) gives a holiday allowance of 87.65 hours.

124. The calculation of pay by the Respondent calculates a higher entitlement of 88.5 hours (they calculated 49% of the full leave year had been worked). The Claimant had taken 82.5 hours leaving 6 hours to be paid. He was paid for those at his hourly rate of £17.14, giving a total payment of £102.84 and we have been provided with the calculation. That exceeds the calculation we have undertaken and therefore we do not consider that there is any outstanding claim for holiday pay.

Conclusion

125. We therefore do not consider any of the claims are made out and dismiss them all.

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Employment Judge Lang

_____

Date 21st July 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

7 August 2024

Jade Lobb
FOR EMPLOYMENT TRIBUNALS