EMPLOYMENT TRIBUNALS

Claimant: Mr R Marks

Respondent: BDW Trading Limited

Heard at: Bristol Employment Tribunal

On: 7th, 8th, 9th, 10th and 11th October 2024.

Before: Employment Judge Lambert

Representation:

Claimant: in person

Respondent: Miss Smith, Counsel

JUDGMENT

Oral judgment was provided on 11th October 2024 to the parties. The Claimant subsequently requested written reasons.

The complaint that the Claimant was subjected to a detriment on grounds of raising a protected disclosure contrary to Section 47B and 48 of the Employment Rights Act 1996 ("the **ERA**") is well founded and succeeds. I have previously given orders to the parties for this matter to be listed for a remedies hearing.

The claims raised on or before 22nd July 2022 have been raised outside of the relevant time limit and the Tribunal lacks jurisdiction to hear them.

The following complaints are not well-founded and are dismissed:-

1. Automatic unfair dismissal (contrary to section 103A of the ERA);

2. Constructive unfair dismissal (contrary to sections 94, 95, 98 and 111 of the ERA);

3. Unlawful deductions of wages (contrary to sections 13 and 23 of the ERA).

REASONS

INTRODUCTION

1. The Claimant, Mr Marks, presented a Claim Form on 12th December 2022 complaining of:-

   1.1 constructive unfair dismissal, contrary to sections 94, 95, 98 and 111 of the Employment Rights Act 1996 ("the **ERA**"),

   1.2 automatic unfair dismissal, contrary to sections 103A, 94 and 111 of the ERA;

   1.3 detriment(s) on the ground of protected disclosure(s), contrary to sections 47B and 48 of the ERA; and

   1.4 unlawful deduction from wages, contrary to sections 13 and 23 of the ERA.

THE HEARING

2. The hearing took place at Bristol CJC.

3. The parties presented an agreed trial bundle of 411 pages including the pleadings.

4. The Claimant presented a witness statement for himself and gave live evidence before me and was cross examined on his evidence.

5. The Respondent relied upon 5 witnesses, who all provided statements, gave live evidence before me and were cross examined by the Claimant. Those appearing were:

   5.1 Bradley Freer, Site Manager,

   5.2 Stephen Akehurst, Project Manager,

   5.3 Alex Baxter, Group Senior Internal Audit Manager,

   5.4 James Dunne, Managing Director (Barratt Southampton),

   5.5 Matthew Nicklin, previous Construction Manager (but who is no longer employed by the Respondent).

6. I read the statements and the documents referred to within those statements and any documents I was directed to in cross examination of the witnesses.

APPLICATIONS

7. At the outset of the hearing, the Respondent applied for Mr Nicklin to give evidence remotely. He was no longer employed by the Respondent and his new employer, whilst not preventing him from participating, understandably wanted to minimise the time he spent travelling to and from the Tribunal for a matter it was not invested in. The Claimant raised no objections to this application, which I granted.

8. The Claimant made several applications for documents that had not been disclosed and which he asserted were relevant to the issues in dispute. These included the site diary and telematic data from a second forklift on the site where he mainly worked. This application was opposed by the Respondent on the basis that the documents were not relevant to the issues and it would cause prejudice to have to disclose documents so late in the proceedings.

9. I rejected the Claimant's application primarily because I was not satisfied that they were relevant to the issues. Additionally, I noted that there had been a Preliminary Hearing in these proceedings where the Claimant sought, and was granted, an order for specific disclosure of telematic data from a forklift he used during the material time. He was aware of the process and there was no reason why such an application could not be made earlier.

10. The page numbers referred to in this judgment are references to the pages set out in the trial bundle, unless otherwise stated. Any wording in [square brackets] has been inserted by the Tribunal to aid the reader of this judgment.

THE ISSUES

11. The issues were agreed at a Preliminary Hearing before EJ Horder on 1st June 2023. An order was sent to the parties on 4th June 2023 (pages 24 – 40).

12. A subsequent Preliminary Hearing took place before EJ Gray on 18th December 2023 and an additional claim of automatic unfair dismissal for raising a protected disclosure (Section 103A of ERA) was added to the existing claims. In addition, a further detriment was identified, that the Claimant was provided with an unmanageable workload after his first disclosure in July 2021 until around sometime in August 2022.

13. The issues as set out in the above Orders from those Preliminary Hearings and as discussed at the outset of this hearing were:

Constructive unfair dismissal

14. It is agreed that the Claimant resigned without notice on 5th October 2022.

15. Did the Respondent do the following:

    15.1 Fail to properly address health and safety concerns that the Claimant had raised, namely;

        15.1.1 July 2021 - breach of covid guidelines ("**Breach 1**");

        15.1.2 March 2022 - concerns about bricklayers being permitted to move scaffolding planks ("**Breach 2**");

15.1.3 July 2022 - the fact that the Respondent had instructed subcontractors to enter a Network Rail exclusion zone on the Portsmouth to London line ("**Breach 3**");

15.2 Subject the Claimant to detrimental treatment as result of making the above complaints including:

15.2.1 Moving him from a site in Bedhampton to one in Canford, Dorset ("**Breach 4**");

15.2.2 Not paying him his full contractual sickness entitlement when off from work unwell ("**Breach 5**")

15.2.3 A subcontractor making a death threat in July 2022 ("**Breach 6**")

15.2.4 Unreasonably commencing disciplinary proceeding against him ("**Breach 7**")

15.2.5 Unreasonably commencing disciplinary proceedings against him relating to social media posts ("**Breach 8**")

15.2.6 Fail to properly address formal grievances that he made in July 2021 and on 14th August 2022 ("**Breach 9(i)** and **Breach 9(ii)**")

16. Did any or all of the above breach the implied term of trust and confidence? The Tribunal will need to decide whether the Respondent:

16.1 behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

16.2 whether it had reasonable and proper cause for doing so.

17. Did the Claimant resign in response to the breach(es)? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

18. Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Protected Disclosure ('whistle blowing')

19. Did the Claimant make one or more qualifying disclosures as defined in section 43B of the ERA? The Tribunal will decide:

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

19.1.1 July 2021. He raised concerns with his employer, via the Safecall portal, that Covid guidelines had been breached and that there was a lack of adequate on-site welfare facilities on site, namely inadequate toilet or hand washing facilities. This concern was repeated in a formal grievance submitted in July 2021 ("**PID 1**").

19.1.2 March 2022. He raised health and safety concerns about bricklayers being permitted to move scaffolding planks, firstly via the Safecall portal then to site manager Brad Freer. This practice resulted in a serious injury to a subcontractor in Jun 2022 when a carpenter fell through scaffolding boards ("**PID 2**").

19.1.3 July 2022 he reported the fact that the Respondent had instructed subcontractors to enter a Network Rail exclusion zone on the Portsmouth to London line, putting workers and passengers at risk. This was reported to Stephen Akehurst, senior project manager, Derek Orchard, foreman and Network Rail ("**PID 3**").

19.2 Were the disclosures of 'information'?

19.3 Did he believe the disclosure of information was made in the public interest?

19.4 Was that belief reasonable?

19.5 Did he believe it tended to show that:

19.5.1 a criminal offence had been, was being or was likely to be committed;

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

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

19.5.4 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

19.6 Was that belief reasonable?

19.7 If the Claimant made a qualifying disclosure, was a protected disclosure because it was made to the Claimant's employer?

Detriment (Section 47B of ERA)

20. Did the Respondent do the following things:

20.1 Move him from a site in Bedhampton to one in Canford, Dorset ("**Detriment 1**");

20.2 Fail to pay him his full contractual sickness entitlement when off from work unwell ("**Detriment 2**");

20.3 Via a subcontractor make a death threat to him in July 2022 ("**Detriment 3**");

20.4 Commence disciplinary proceeding against him ("**Detriment 4**");

20.5 Overworked him ("**Detriment 5**");

20.6 Fail to deal with his grievance made in July 2021 ("**Detriment 6**");

20.7 Fail to dealt with his grievance made on 14th August 2021 ("**Detriment 7**");

20.8 Provide the Claimant with an unmanageable workload from July 2021 until August 2022 ("**Detriment 8**").

21. By doing so, did it subject the Claimant to detriment?

22. If so, was it done on the grounds that he had made the protected disclosure(s) set out above?

Automatic Unfair Dismissal (Section 103 of ERA)

23. Was the reason or principal reason for dismissal that the Claimant made a protected disclosure(s)? If so, the Claimant will be regarded as unfairly dismissed.

Unauthorised Deductions

24. Did the Respondent make unauthorised deductions from the Claimant's wages (he asserts sick pay contractually due) and if so, how much was deducted?

Time Limit (Jurisdiction)

25. Was the complaint made within the time limit in section 48 of the Employment Rights Act 1996?

26. The Tribunal will decide:

26.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act/detriment complained about?

26.2 If not, was there a series of similar acts/detriments and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

26.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

26.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

27. Was the unauthorised deductions complaint made within the time limit in s.23 of the ERA, specifically:

27.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of wages from which the deduction was made?

27.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

27.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

27.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

28. The issues supporting the claim of constructive dismissal, set out in paragraph 15 above, were set out in the Case Management Order in a manner more usual for a detriments on grounds of a protected disclosure claim, which requires the detriments to be identified. The law around constructive unfair dismissal requires one or more repudiatory breaches to be identified. In discussion with the parties during the hearing, I confirmed that I was treating the issues identified in paragraph 15 above as 9 separate and distinct allegations of repudiatory breaches. No party raised objection to this.

THE LAW

Constructive unfair dismissal

29. The Tribunal will need to decide (in accordance with the authorities of *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221* and *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*) whether the Respondent committed a repudiatory breach of the implied term of trust and confidence.

30. I remind myself that the burden of proof rests with the Claimant to establish there has been one or more repudiatory breaches of contract. If he fails to do so, his claim for constructive unfair dismissal ends there. If he can, then I will look at the other elements as set out in paragraphs 16 - 18 above.

Protected Disclosure ('Whistleblowing')

30 The starting point for any consideration of a public interest disclosure claim is to understand whether the Claimant has actually raised a protected disclosure.

31 Section 43A of the ERA provides:

> *"…'a protected disclosure' means a qualifying disclosure (as defined in Section 43B) which is made by a worker in accordance with any of sections 43C to 43H."*

32 The relevant sections of 43B of the ERA (as applicable to the Claimant's case), provides:

> *"(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) …*
> *(c) …*
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered."*

33 Section 43C of the ERA is satisfied if the worker makes a qualifying disclosure to their employer.

34 If the Claimant is not found by the Tribunal to have made a protected disclosure then that is the end of his claims of detriment and/or automatic unfair dismissal for making a protected disclosure.

Detriment:

35 The Claimant complains that he has suffered a number of detriments on grounds that he made a protected disclosure.

36 Section 47B(1) of the ERA provides:

> *"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."*

37 In a claim for detriment, the Claimant has to prove that he has (i) made a protected disclosure, (ii) he has suffered a detriment and that the protected disclosure had a material influence upon the detriment suffered. In **NHS Manchester v Fecitt and others [2012] IRLR 64**, the Court of Appeal held that the causation test in detriment cases is different to the test in automatic unfair dismissal cases under Section 103A of the ERA. A detriment claim is made out if

> *"the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"*.

38 If he does so, the Respondent has the burden of establishing that the reason for the detriment is not because of the protected disclosure: Section 48(2) of the ERA. If the Respondent does not prove an admissible reason for the treatment, the Tribunal is entitled to infer that the detriment was on the ground that the worker made a protected disclosure: **Ibekwe v Sussex Partnership NHS Foundation Trust UKEAT/0072/14.**

Unfair Dismissal: Automatic S.103A

39 In this case, the Claimant resigned with immediate effect. Therefore, he has the burden of establishing that his resignation was a dismissal. In accordance with Section 95(1)(c) of the ERA, a resignation can be a dismissal if the Claimant can establish that he:

> *"terminate[d] the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the [Respondent's] conduct."*

40 Section 103A of the ERA 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"*

41 In order to succeed in his claim, the Claimant must establish that (i) he has made a protected disclosure and that (ii) he was dismissed (in this case that he resigned in circumstances in which he is entitled to do so without notice by reason of the Respondent's conduct). If he does so, then the burden of establishing the reason for his dismissal falls upon the Respondent to show that it was not because the Claimant made a protected disclosure. It can be seen that the legal tests are different between establishing a detriment and for automatic unfair dismissal and there is a higher hurdle for the Claimant to succeed in his claim of automatic unfair dismissal than for his detriment claims.

Unauthorised Deductions

42 The Claimant's complaint is that he should have been paid his normal wage during a period when he was absent due to sickness. He bears the burden of establishing this.

43 Section 13(3) of the ERA provides:

> *"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated … as a deduction made by the employer from the worker's wages on that occasion."*

44 If the Respondent can establish that it paid the Claimant what was "properly payable" to him on that occasion, then this element of the Claimant's claim will fail.

Findings of Fact

45 The Claimant relies upon ten separate events to support claims of constructive unfair dismissal, automatic unfair dismissal, detriments on grounds of a protected disclosure and unlawful deductions of wages. In an attempt to simplify the understanding of my conclusions for each claim the Claimant pursues, I have set out my findings of facts by, wherever possible, following a chronological order. At appropriate points, I have set out what facts relate to what claim before setting out

my conclusions. I have provided headings referring to the Issues section of this Judgment, to aid the reader.

46 I make the following findings of fact based on the balance of probabilities. Where it was necessary to resolve a conflict of evidence, I have set out how I have approached that task below. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in these reasons. I read every document referred to during the hearing, including those referenced in the witness statements and in cross examination, but I have not referred to every document within the findings below.

47 The Respondent builds houses and other buildings across the UK. It operates through several brands including Barratt Homes and David Wilson.

48 The Claimant was employed with the Respondent from 18th May 2015 as a Forklift Driver. These details were confirmed in a contract of employment issued to the Claimant on 13th May 2015 (pages 76 – 80) ("the **Contract**"). Whilst this was not signed, there was no dispute between the parties that this document accurately reflected the terms and conditions of the Claimant's employment. I accept the accuracy of this document. It was agreed that the Claimant resigned with immediate effect on 5th October 2022.

SSP (Claims for Unlawful Deduction of Wages/Breach 5/Detriment 2)

49 The relevant sections of the Contract detail the Claimant's pay but also refer to overtime and pay increases being in line with the Construction Industry Joint Council Working Rule Agreement, referred to as the "**CIJC WRA**". The Contract confirms at Clause 6 that, subject to the Claimant's compliance with the Respondent's sickness absence provisions, he will be entitled to receive sick pay *"in accordance with the SSP Regulations".*

50 The Contract also contains, at clause 9, details of the Claimant's entitlements to flexible benefits. This states that the benefits offered included amongst other benefits listed, access to a healthcare cash plan and also critical illness cover.

51 The Claimant claims that the Respondent failed to pay him full pay during a period of sickness absence between July 2022 and August 2022 in accordance with the Contract. I have referred to the relevant sections from the Contract and there was no other documentary evidence put before me that contradicted the Contract. Therefore, I am satisfied that during a period of sickness absence, the Claimant was entitled to receive SSP only. As it happened, under the CIJC WRA, the Claimant received an uplift on his sickness pay whilst receiving what was properly payable to him under the Contract.

Conclusion (Unlawful Deduction of Wages/Breach 5/Detriment 2)

52 This finding means that the Claimant's complaint of unauthorised deductions of wages fails. He was paid what was properly payable to him under the Contract. This finding also means that his claims that this alleged failure amounts to a

repudiatory breach of the Contract and a detriment on grounds of raising a protected disclosure also fail.

53 Moving back to the finding of facts, for the material time relevant to the Claimant's claims before me, he worked from the Respondent's site at Harbour Place in Southampton ("the **Site**"). The Site, although often referred to in evidence as one site because it was a single location, was actually split between two of the Respondent's brands: Barratt Homes and David Wilson. The brands had separate site management. Initially the Claimant worked for Barratt Homes and his line manager was Mr Bradley Freer, Assistant Site Manager Barratt. Mr Freer, in turn reported into Mr Mick Aldridge, Site Manager. On the David Wilson side, Mr Jon Cowan was the Site Manager reporting into a Mr Peter Scott. Of these individuals, I heard evidence from the Claimant and Mr Freer.

First Grievance (Breach 1, 9(i) and Detriment 6)

54 On 21st June 2021, the Claimant sent an email to Mr Peter Scott entitled "Grievance" (page 163). The Claimant claims that the Respondent failed to properly address this formal grievance, by this he meant in accordance with the Respondent's Grievance Procedure (pages 83 – 87).

55 As is typical of such procedures, the Respondent's grievance procedure provides for an informal and a formal approach. It acknowledges that the majority of grievances will be resolved through an informal approach but if a grievance cannot be resolved informally, then the employee should raise it formally in writing. It confirms that managers have a responsibility to deal with all grievances raised. The Claimant's email begins:

"Hi Pete further to our conversation earlier I think it's only right I raise a grievance…"

56 It is clear that the Claimant intended to raise a formal grievance complaint. The grievance included complaints that the Claimant felt that he was being unfairly targeted because he was reprimanded for not wearing his seat belt when operating the forklift; that he was the only person on site on some weekends, despite the Respondent's policy that there should be some management on site; the lack of adequate dust suppression and the state of the welfare facilities on site.

PID 1

57 The Respondent has a Whistleblowing Procedure which encourages employees to raise any issues that they feel is improper, unethical, illegal or fraudulent, to their manager (p.98 – 100). If the employee feels that they cannot speak to their manager about the matter, then they are encouraged to report it to Safecall, an external third party that operates systems allowing individuals to raise concerns anonymously. As part of his role, Mr Baxter, the Respondent's Group Senior Internal Audit Manager, who gave evidence before the Tribunal, manages Safecall referrals for the Respondent by triaging the concern to determine whether it warrants further investigation and if so, by whom, within the Respondent. He monitors any concern raised to ensure that it is investigated and concluded. This

may involve contacting the complainant, which can be done through the Safecall portal. Whilst there is the option for a complainant to be anonymous, they can also confirm their identity.

58 Mr Baxter confirmed he received an anonymous report from Safecall, dated 22nd June 2021, relating to the lack of working welfare facilities, issues over weekend working and other issues relating to the Harbour Place site (pages 164 – 166). He assessed the complaint and concluded that it was a health and safety issue and forwarded it by email to the Respondent's Group Construction Director, Mr Vince Coyle that same day. On 24th June 2021, Mr Coyle responded by email (p.167) stating:

> *[Mr Baxter]*
>
> *I asked the SHE Manager to review.*
>
> *An individual on site apparently has admitted he sent in the report as he was disgruntled about a matter brought to his attention earlier in the week.*
>
> *However, the below has been provided by the SHE Manager.*

59 The email then sets out the SHE Manager's response in relation to the complaints raised. The Claimant's grievance and the Safecall report raise similar issues. The Claimant's evidence was that he was the complainant, a fact acknowledged by the Respondent.

60 The Claimant asserted that this was a protected disclosure because he held a reasonable belief that it was made in the public interest and tended to show that the health and safety of himself and others working on the Site was being, or was likely to be, endangered. This was therefore a qualifying disclosure and making it to Safecall made it protected for the purposes of the ERA. The Respondent accepted that this was a protected disclosure. I agree.

61 The Respondent's answer to the Claimant's claim is that it dealt with his concerns via the SHE Manager's investigation and whilst this may not have been in accordance with its formal grievance procedure, it was a response which was consistent with its informal procedure. It says that if this was a breach of its procedure, it was inadvertent and certainly not because the Claimant had raised a protected disclosure. Further, that this was not an issue for the Claimant because he did not complain about this until over 1 year later through a second grievance, in August 2022. Consequently, it relies upon the time limit point to assert that the Tribunal does not have jurisdiction to hear this claim.

<u>Conclusion (Breach 1, 9(i) and Detriment 6)</u>

62 From the evidence, I am satisfied that the Respondent did not respond to the Claimant's grievance in accordance with its formal grievance procedure. However, I am also satisfied that this was because it considered the matters were looked into via its SHE Manager and the Claimant was aware of this. If this wasn't the case, I

can see no reason why the Claimant would not chase Mr Scott through email or make a further referral through Safecall.

63 I consider that the reason the Claimant did not follow up this matter was because he was provided with a response and, at that time, he was satisfied with it. It follows that whilst I accept that the Respondent did not follow its formal grievance procedure, it did provide an outcome. I do not consider this to be of any detriment to the Claimant, nor was the Respondent's failure to follow its formal grievance procedure on grounds that the Claimant had raised a protected disclosure. It was because it provided a response to the Claimant and considered the matter concluded. For the same reasons, I do not consider this amounted to a repudiatory breach of contract. I deal with the time point later.

64 For ease of reference, these findings dispose of the Claimant's claims of Breach 1, Breach 9(i) and Detriment 6.

Unmanageable Workload (Detriment 5 and 8)

65 The Claimant claimed that between July 2021 and August 2022, he was provided with an unmanageable workload. The evidence he put forward was limited to this bald assertion and a reference to the telematic data from the forklift he was using at the material time (page 151). This data broke down the forklift's activity in months by engine hours (when the engine was on and being used) and idle hours (when the engine was on but idling). The Claimant asserted that an analysis of this data showed that he was being given an unmanageable workload.

66 In cross examination he accepted that the figures were variable from month to month, they ranged in the lowest month from 78 engine hours to the highest month to 139.7 engine hours. However, the Claimant was not able to explain why this evidence supported his claim. I am satisfied that it did not. The Respondent denied that it had provided the Claimant with an unmanageable workload as the Claimant contended. It accepted that the Claimant was sometimes asked to do other tasks on sites, but this was consistent with his role.

Conclusion (Detriment 5 and 8)

67 Based on the evidence before me, the Claimant's bald assertion which was not supported by the forklift data is simply not sufficient for me to make any finding that the Claimant's workload was unmanageable at all. This element of the Claimant's complaint fails.

68 This finding disposes of claims of Detriments 5 and 8.

PID 2

69 Turning to PID 2, the Claimant says that in March 2022, he raised further health and safety concerns about bricklayers on site being permitted to move scaffolding planks, through Safecall and also to Mr Freer. The Respondent denies that the Claimant made this disclosure.

70 Mr Baxter gave evidence confirming that he had reviewed the Safecall records from February 2022 until April 2022 and there was no reference in any reports received to scaffolding boards, bricklayers or similar issues at the site. However, he did find two other Safecall reports from the Claimant on 30th June 2022 and 15th August 2022, which, whilst not relevant to these proceedings, demonstrates that if a call was made, there should be a report. There wasn't.

71 Similarly, Mr Freer denied that he had ever had a conversation with the Claimant around bricklayers moving scaffolding boards. His unchallenged evidence, which I accept, was that there was a process in place for boards to be checked weekly by himself and/or by a colleague from health and safety. If there were any issues, these would be addressed and the boards were replaced fairly regularly in any event. In cross examination he stated that bricklayers moving scaffolding boards can be an issue on sites and it was drilled into all of the bricklayers that they should not move any scaffolding equipment.

72 I found both Mr Baxter and Mr Freer to be credible witnesses. Mr Baxter gave concise answers to the questions asked of him which were, in the main, supported by documentary evidence. On this issue, there was no supporting documentary evidence because he disputed that the Claimant had made such a reference to Safecall. I consider this to be correct and do not accept that the Claimant made such a reference to Safecall about this issue.

73 Mr Freer answered all of the questions put to him without hesitation, with one notable exception. This was that he confirmed that whilst the Claimant was an excellent worker, Mr Freer found him difficult to manage and he did so by maintaining a good working relationship with the Claimant. This seemed to me to be a frank admission of the reality of the situation and Mr Freer's reluctance in answering the question stemmed from not wanting to cause upset or embarrassment to the Claimant. It seems to me that if the bricklayers were moving scaffolding planks and the Claimant had informed Mr Freer of this, then Mr Freer would have addressed this with the bricklayers.

74 I do not accept that the Claimant made this disclosure (PID 2).

PID 3

75 It was accepted that the Claimant initially worked on the Barratt side of the Site. His uncontested evidence was that he agreed to switch to the David Wilson side because the forklift driver who was working on that side, Mr Lockyer, had a difficult working relationship with Mr Scott and was going to resign. To avoid this outcome, the Claimant agreed to switch sides with Mr Lockyer, so the Claimant came under the management of Mr Scott.

76 The evidence from the Claimant and Mr Akehurst was that Mr Scott was difficult to work with. Mr Nicklin did not accept this but confirmed that Mr Scott was in a pressured role and he achieved results. I suspect a person's view of Mr Scott would depend upon whether they were more senior or more junior to Mr Scott in

the management hierarchy, with people more senior than Mr Scott likely to have a more favourable view of him.

77 At the time of the events leading up to PID 3, the Claimant was working on the David Wilson side of the Site under the management of Mr Scott.

78 I heard evidence from Mr Stephen Akehurst, Project Manager for the Respondent, who has responsibility for, or as he put it, "looking after" all of the Respondent's projects which affect Network Rail. His evidence, which was unchallenged by the Claimant and which I accept, was that when a building site is located close to an active railway line, an exclusion zone will be put in place. This will usually be of 30 metres and where such a zone is in place, no operations can take place within it unless Network Rail has specifically approved the exception. Approval is via a formal process requiring the Respondent to provide Network Rail with appropriate documentation. If Network Rail approve the works, then the Respondent will receive confirmation via a DRN Number confirming approval. No works should be undertaken without approval and when such works are being carried out, a Site Manager must be present.

79 Clearly, the rationale for this process is to protect the health and safety of rail users, the workers on site and the general public within the vicinity, by controlling building operations near to an active railway.

80 The Site is very close to a section of the Portsmouth to London railway line. It has a 30 metre exclusion zone.

81 On Friday 1st July 2022, Mr Akehurst spoke with Mr Peter Scott (then the Respondent's Contracts Manager) and was informed by Mr Scott that he would be instructing workers at the Site to carry out works within the exclusion zone the next day. Mr Scott was well aware of the Network Rail approval process and that the process had not been started, so there was no authorisation in place to carry out work. This was a breach of the Respondent's policy and its legal and contractual obligations towards Network Rail.

82 Quite correctly, Mr Akehurst objected to this and reminded Mr Scott that this would be a breach of health and safety requirements and the Respondent's procedure. Despite Mr Akehurst's objections, the work went ahead the next day, Saturday 2nd July 2022. Mr Akehurst's evidence was that Mr Scott was more senior in the Respondent's management hierarchy and he felt there was little he could do to prevent Mr Scott from acting in this way. Mr Akehurst was understandably concerned because he was responsible for any breaches of the authorisation process.

83 Whilst not in his statement, Mr Akehurst accepted in response to a question from the Claimant, that the Claimant had called him on Friday 1st July 2022 to inform him of Mr Scott's intentions. This had led Mr Akehurst to speak with Mr Scott. I accept that the Claimant raised his concerns with Mr Akehurst, which was the catalyst for Mr Akehurst's later discussion with Mr Scott.

84 In addition, I heard evidence from Mr Nicklin, then the Respondent's Construction Manager and at the time Mr Scott's line manager, who had also become aware of Mr Scott's intentions. Mr Nicklin called Mr Scott on Friday 1st July 2022 and instructed him not to proceed with the works.

85 Despite the objections from Mr Akehurst and the instruction from his line manager, Mr Nicklin, Mr Scott disregarded these entreaties and the works went ahead on Saturday 2nd July 2022. The Claimant was on site at the time. He contacted Mr Akehurst to confirm that the works were proceeding. Mr Akehurst confirmed that he could hear raised voices and swearing in the background but could not determine what was being said and by whom.

86 Mr Nicklin stated that he contacted Mr Scott later that day and instructed him to stop the works and place barriers across the exclusion zone.

87 On Monday 4th July 2022, Mr Akehurst attended the Site and met Mr Craig Charnock, the Respondent's SHE Manager to investigate matters. Mr Charnock completed a SHE Monitoring Report, a document the Respondent used to carry out inspections of its sites (page 179 – 182). This Report sets a target rating of 94 and requires the author to rate the site against 24 items, which are split into 3 sections: documentation, site activities and principal risks. The latter of these sections are rated on a 1 – 6 scale. The overall rating was 89 out of 94. In the section headed "Site Comment" on page 179 it states:

> *Unfortunately a PR [Principal Risk] has been issued for this site for a blatant disregard to safety and working within the Network Rail 30m exclusion zone. This was after consultation on permits and what is required to access this area and work safely.*

88 Under the section headed "Site Activities" on page 180 it states:

> *-A meeting was held today on site reference a Safe call submission over the weekend.*
>
> *Photographs and statements were sent showing Gracelands [a sub contractor] working within the 30m exclusion zone next to a Network Rail line. Works being carried out were, removal of rubble from an historic demolition, the work carried out took place on 02-07-2022.*
>
> *Gracelands [sic] Site Supervisor was questioned on why he was working within the zone, he replied that the [Respondent's] Contract Manager [Mr Scott] had told him to do it and the all [sic] permits and permissions were in place. This was in fact untrue as the [Respondent's] rail representative [Mr Akehurst] was aware of the works however, he had advised that works should not go ahead until the correct permits were in place, this advice was disregarded and works commenced.*
>
> *After some investigation, it appears that the DWH site did not have any cover from [the Respondent] and the ground workers were working alone on site.*

> *A PR has been raised retrospectively after the SafeCall notification.*
>
> *Discussed with the SHE Operations Manager that a PR should be raised as there was no other way to communicate this breach in safety effectively or communicate the Contract Manager's [Mr Scott's] disregard for safe systems and permits required when working next to the Network Rail lines.*
>
> *The only positive that has come out of this episode is the fact Network Rail were not notified and their Safety Team did not visit site. This could have been uncomfortable for [the Respondent].*
>
> *(My emphasis)*

89 The Report further states:

> *-The directly employed forklift operator has attended site this morning, however, he left early as he felt his safety was being compromised and he did not agree with the site working activities he was being asked to do."*

90 This last point referenced the fact that the Claimant attended site on 4th July 2022 but left because he felt unsafe.

91 Pausing there: the Claimant asserts that his two notifications to Mr Akehurst on 1st July 2022 and 2nd July 2022 were protected disclosures because he held a reasonable belief that it was made in the public interest and tended to show that the health and safety of travelling passengers, the workers on site and the general public was being or was likely to be endangered. This was therefore a qualifying disclosure and making it to Mr Akehurst, a manager with the Respondent, made it a protected disclosure. The Respondent accepted that this was a protected disclosure. I agree.

92 Reviewing the SHE Monitoring Report, I was struck by how it curiously downplays the incident. This was the highest level of risk and, read with the comment about Network Rail not being informed, suggested to me that the Respondent would not have disclosed this to Network Rail of its own motion.

93 The evidence before me was that the Claimant did so and Network Rail subsequently warned the Respondent about its conduct. Network Rail also warned Mr Akehurst and reminded him that he could be prosecuted personally and/or fined up to £20,000 for any further breaches. I consider that Mr Akehurst was placed in an incredibly difficult position by Mr Scott's actions and, it appears, that he could do little to prevent Mr Scott's wilfully ignoring the Respondent's procedures.

94 In evidence, Mr Nicklin confirmed that he took no disciplinary action against Mr Scott. I find this to be very surprising in the light of his evidence that Mr Scott had misled him; had failed to follow a lawful instruction that Mr Nicklin had issued; had breached health and safety obligations and, according to Mr Nicklin, the seriousness with which the Respondent treated breaches of health and safety obligations.

95 Mr Nicklin's evidence was that Mr Keen, the Respondent's Managing Director, dealt with this issue. However, both Mr Nicklin and Mr Akehurst confirmed that no formal disciplinary action was taken against Mr Scott.

96 I heard evidence from Mr Dunne, the Respondent's Managing Director (Barratt, Southampton) that the Respondent takes its health and safety obligations very seriously. Mr Dunne is subordinate in the Respondent's management structure to Mr Keen and he had not started in his new role until mid-July 2022, after this incident on Site. Mr Dunne confirmed that whilst Mr Scott did not have any formal disciplinary action taken against him, he was given a "talking to" by Mr Keen.

97 This lack of any formal disciplinary action struck me as very odd, bearing in mind Mr Scott's actions and the seriousness with which the Respondent asserted it treated breaches of health and safety. From this, I have concluded that despite the case the Respondent advanced that it viewed Mr Scott's actions as a serious breach of health and safety, this was not in fact the case. Indeed, Mr Dunne gave evidence that the actual works carried out within the exclusion zone involved the removal of material from an earlier demolition and was not a significant risk. This appeared to me to be an attempt to minimise the nature of the Respondent's breach, rather than genuinely accepting that entry of machinery into the exclusion zone to carry out works was a serious breach of procedure, irrespective of the reasons why that breach occurred. From its actions and my observations upon the SHE monitoring report, I conclude that the Respondent was more concerned that Network Rail did not find out about the breach than any other matter.

Death Threat (Breach 6/ Detriment 3)

98 Going back to 2nd July 2022, when the Claimant was speaking with Mr Akehurst. At this point, the Claimant says that he was standing in front of a third party contractor's machine telling the operator that they should not enter the exclusion zone. The machine operator told the Claimant that it was authorised and he should move out of the way or the machine operator would run the Claimant over. In his statement, the Claimant referred to receiving a death threat. He added the detail in oral evidence.

99 The Claimant's evidence was uncontested on this point. I accept his evidence. The Claimant relies upon this issue as a repudiatory breach of contract and as a detriment on the grounds of making a protected disclosure.

Conclusion (Breach 6/Detriment 3)

100 The action complained of by the Claimant was carried out by a third party contractor. There was no evidence before me that the third party contractor had knowledge of the protected disclosure (PID 3) that the Claimant had made to Mr Akehurst or the Respondent. Without such evidence, it is not possible for me to find that the third party contractor could be liable for a detriment on grounds of the protected disclosure. It is clear that the protected disclosure did not have a

material influence on the third party contractor's actions because it was unaware that a protected disclosure had been made.

101 In any event, I consider that the reason for the third party contractor's actions was solely related to the Claimant standing in front of his machine and the third party contractor's instructions to complete the works. The detriment claim fails.

102 In relation to the alleged repudiatory breach, this was not an action carried out by the Respondent. It was a third party contractor for whom the Respondent is not liable. For this reason, the repudiatory breach claim fails.

103 These findings dispose of Breach 6 and Detriment 3.

Moving him from a site in Bedhampton to one in Canford, Dorset (Breach 4/Detriment 1)

104 After leaving site, the Claimant sent three emails to Lucy Drew, the Respondent's HR Co-ordinator on 4th and 5th July 2022 (pages 183 – 185). The last email was also sent to Mr Scott and the Respondent's Managing Director, Mr Mark Keen. This email confirms the Claimant left site on 4th July 2022 (p.184) and states:

> *…I really do want to come to work tomorrow but I don't want it to be under the control of [Mr Scott] I'm happy to go to the same site but I just don't want to have to deal with [Mr Scott] there is an agency driver on the [B]arratt side that is run by [M]ick not [P]ete they have two forklifts there can they not just send the agency driver over the [sic] [P]eter instead of me?*

105 It goes on to state (p.185):

> *Saturday was the final straw I simply cannot stand back an[d] watch until [P]eter seriously hurts some one. All I want is to be responsible to some one like [M]ick [Aldridge] who will work with you not just tell you to man up an[d] get on with it.*

106 The Claimant commenced sickness absence from 4th July 2022 and remained off work until 5th August 2022, when he attended a return to work interview with Mr Nicklin. Notes of this meeting, which were accepted by both parties as accurate but not verbatim, appeared at pages 198-199. Mr Nicklin confirmed that he was supported through this process by Lucy Drew, HR Co-ordinator.

107 Mr Nicklin confirmed that, when he attended the return to work meeting, he was aware that the Claimant did not want to work under Mr Scott's management and because of this, he looked for another site for the Claimant to work from. Mr Nicklin's evidence was that the only site where the Respondent had a full time vacancy was at a site in Winborne, according to Mr Nicklin, a commute for the Claimant of around 45 minutes.

108 Mr Nicklin's evidence was that he was not aware that the Claimant would be prepared to work from the Barratt side of the Site and he wanted to support the Claimant by offering a relocation to the Winborne site. It was common ground that

the Claimant responded to Mr Nicklin's suggestion at the return to work meeting by stating that this would be a financial hit for him and that he felt he was being punished for raising concerns. I accept that the reference to "raising concerns" was a reference to the last protected disclosure, PID 3.

109 Mr Nicklin acknowledged the Claimant's concerns about travel and confirmed that he would speak with Mr Mark Keen, the Respondent's Managing Director. Mr Nicklin's evidence was that he spoke with Mr Keen but Mr Keen refused to provide the Claimant with any financial support to assist with travel. His reason for doing so was because the Respondent had a policy not to pay expenses for staff to travel to work. It had received several requests for this over the years but the Respondent did not want to set a precedent.

110 The Respondent's view was that the reason for moving the Claimant was not due to the protected disclosure, PID 3, but because of the Claimant's refusal to work at the Site. Moreover, the Claimant had previously worked from Winborne and there was no breach of contract.

111 The Claimant's position was that requiring him to move to the Winborne site was a punishment for raising protected disclosure, PID 3.

Conclusion (Breach 4/Detriment 1)

112 From the evidence before me, I was satisfied that Mr Keen was well aware of the incident involving the Claimant and Mr Scott on 2nd July 2022. Mr Nicklin, Mr Akehurst and Mr Dunne gave evidence that Mr Keen did not deal with Mr Scott's behaviour formally. The Claimant copied in Mr Keen into his email of 4th July 2022 explaining the difficulties that he had in continuing to work with Mr Scott and raises the question of whether he can be returned to the Barrett side of the Site. Mr Nicklin also confirmed that he spoke with Mr Scott about possibly assisting the Claimant financially to relocate to the Winborne site, which Mr Keen rejected.

113 From this evidence, I have concluded that Mr Keen was aware:-

113.1 that Mr Scott had disregarded the Respondent's policies, had breached health and safety obligations and had failed to comply with a lawful and reasonable instruction from Mr Nicklin. These were all detailed in the SHE report which Mr Dunne confirmed would have been sent to all senior management and led to Mr Keen "talking to" Mr Scott.

113.2 that the Claimant had reported the matter in advance to Mr Akehurst.

113.3 of the Claimant's request not to continue working with Mr Scott. This was an understandable request from the Claimant.

113.4 of the Claimant's request, as set out in his email of 4th July 2022, to transfer to the Barratt side of the Site away from Mr Scott's line management responsibilities.

113.5 of Mr Nicklin's proposal to relocate the Claimant to the Winborne site, a further away.

113.6 of the additional financial burden that this transfer would have upon the Claimant as a result of the Claimant's request for travel expenses which Mr Nicklin informed Mr Keen of and which Mr Keen refused.

114 I should add that Mr Keen was not called to give evidence and the Tribunal did not have the opportunity to hear from him directly.

115 The Claimant complains that the decision to transfer him to the Winborne site was a detriment on grounds of him raising a protected disclosure (PID 3). The Respondent denies this and advances the case that this was a consequence of the Claimant refusing to work with Mr Scott. It reviewed the vacancies it had available for a full time forklift driver and Winborne was the only site available. It could not accede to the Claimant's request for financial assistance towards the additional travel expenses he would incur because the Respondent had always rejected such requests and it did not want to set a precedent.

116 I remind myself that the legal tests for causation are different in respect of detriment claims and dismissal claims for protected disclosures. To succeed in a dismissal claim, the question is whether the reason or principal reason was the protected disclosure. This is a high hurdle.

117 However, the test for detriment is different and as set out in **Fecitt** above, it requires an analysis to determine whether the protected disclosure had a material influence on the detriment claimed. This is a lower hurdle for the Claimant. If he can establish that he has raised a protected disclosure, has suffered a detriment which has been materially influenced by the Claimant raising the protected disclsoure, then it is for the Respondent to show, in accordance with Section 48(2) of the ERA, the ground upon which that detriment was done: **Ibekwe**.

118 It is clear to me that relocating an employee to a site further away, meaning that they will incur greater financial travel expenses and spend more time commuting, is a detriment. The question is whether the protected disclosure had a material influence on that decision.

119 In my view, Mr Keen was aware of the protected disclosure and that the Claimant did not want to work with Mr Scott as his line manager. He could have:-

119.1 directed that the Claimant work from the Barratt side of the Site as the Claimant requested;

119.2 disciplined Mr Scott formally;

119.3 offered to contribute towards the additional travel expenses the Claimant would incur in travelling to Winborne;

119.4 directed that Mr Scott be relocated away from the Site.

120 He did not do any of these things. I do not consider the Respondent's reason for rejecting the Claimant's request for financial assistance to be credible because this was a situation where Mr Scott was clearly at fault by committing a serious breach of health and safety obligations. The Claimant brought that to the Respondent's attention and, quite understandably, confirmed he did not want Mr Scott to continue to be his line manager. By acting in the way it did, I consider that the Respondent was materially influenced by the Claimant's protected disclosure and treated the Claimant detrimentally because of it. The Respondent has not been able to satisfy me of an alternative reason why the Claimant was treated as he was and I conclude that the Claimant's complaint of detriment is well founded and succeeds.

121 This finding means that the Claimant's claim in respect of Detriment 1 succeeds. The claim that the decision to relocate the Claimant to a different site is a repudiatory breach fails. I heard evidence from the Claimant that he had previously worked at Winborne and the Contract permitted him to work from any location within the area. Contractually, he could be required to relocate. For reasons set out below, I did not find that the reason for the Claimant's resignation was related to any alleged repudiatory breach of contract, but because he wanted to avoid a disciplinary hearing.

Second Grievance (Breach 9(ii)/Detriment 7)

122 On 11th August 2022, the Claimant sent an email to Nicola Carr, the Respondent's Managing Director PA, asking for details of the Group Health and Safety Director's email address because he had *"…some very serious concerns"* he wanted to raise (p.202 – 203). This led to several emails passing between Ms Carr and the Claimant, which Ms Carr sent on to Ms Drew.

123 On 14th August 2022, the Claimant sent an email to the Respondent headed "Grievance" (pages 205 – 210). This set out several complaints raised above.

124 The Claimant's complaints are that the Respondent failed to properly address this grievance.

125 On 26th August 2022, the Claimant attended an investigation meeting relating to his grievance. This was chaired by Karly Williams, Operations Director. Notes of the meeting appeared in the bundle (pages 226 – 232). These were sent to the Claimant after the meeting and he had the opportunity to add further details, which he did. In cross examination, the Claimant accepted that he was able to put forward all of his allegations and these were considered by Ms Williams.

126 On 7th October 2022, Ms Williams, Operations Director, emailed the Claimant with a grievance outcome letter (pages 281 – 284). The Claimant accepted in cross examination that this dealt with all of the points he had raised and whilst he may not have agreed with the outcome, the Respondent's process was followed.

127 On 13th October 2022, the Claimant appealed the grievance outcome. This was heard by Mr James Dunne, the Respondent's Managing Director. He met with the Claimant on 26th October 2022 and notes were taken (pages 287 – 290). On 27th October 2022, the Claimant sent a further email to the Respondent raising additional issues in respect of his appeal. Mr Dunne reviewed all of the matters raised and provided the Claimant with a grievance appeal outcome on 3rd November 2022 (pages 294 – 296).

128 Again in cross examination, the Claimant accepted that he had the opportunity to raise all of his concerns, comment upon them and they were all considered by Mr Dunne. Whilst he disagreed with the outcome, he accepted that the Respondent had properly dealt with the Second Grievance.

Conclusion (Breach 9(ii)/Detriment 7)

129 As a consequence of the Claimant's admissions in relation to the initial grievance process and the appeal, but I should also add, after my own consideration of the various documents, I am satisfied that the Respondent dealt with the Claimant's Second Grievance properly. This element of the Claimant's claim fails.

130 This finding disposes of the Claimant's claims in Breach 9(ii) and Detriment 7.

Disciplinary Hearing (Breach 7 and 8)

131 On 20th August 2022, the Respondent became aware of posts that had emanated from the Claimant's Linked In account, replying to posts made by the Respondent. These stated:

> *How are you so accurate I can second this a[s] a serving employee. They can't even manage to ensure a safe place to work it's truly disgusting management at all levels needs a good shake up truly shocking company to work for.*
>
> *I wonder if he could look into the numerous safety concerns in the [S]outhampton division. All I want to do is work my contracted hours in a safe environment. Think I've worked four days in the last month. Seems to do lots of work for charity's veterans e[t]c but what about your own employees.* ***#ashamedtoworkforbarratt***
>
> *Family like feel my eye. You can't even provide loyal worke[r]s of 7 years a safe site to work on!! Barratt are fast becoming an embarrassment to work for. I'd say if you do work for them start looki[n]g else where if you don't make sure you never need to the[ir] are (sic) much better company's to work for the holiday is a lie too disgusting way to operate.*

132 The Claimant asserted in evidence that his brother posted these messages from the Claimant's account. However, he accepted in cross examination that the posts were from his account and that he was responsible for the posts that appeared. From this evidence, I was satisfied that the Claimant was not asserting that he bore no responsibility for these posts. Even without his evidence, I would have

been satisfied that the Claimant was responsible for these posts appearing from his Linked In account.

133 On 23rd August 2022, Mr Nicklin spoke with the Claimant and suspended him on full pay pending an investigation into an alleged breach of the Respondent's IT Acceptable Use Policy, by bringing the Respondent into disrepute. This was confirmed in writing by letter to the Claimant of the same date (page 222).

134 On 26th August 2022, the Respondent requested the Claimant attend a disciplinary investigation meeting scheduled for 30th August 2022. This meeting was postponed at the Claimant's request because it was not convenient for his union representative to attend (page 233). The meeting was subsequently rearranged to 6th September 2022, with the meeting being chaired by Mr O'Nion, the Respondent's Finance Director. The Claimant and Miksha Patel, HR Administrator, also attended. Notes of the meeting were taken (pages 241 – 243) during which the Claimant asked whether he should take down the posts. Miksha Patel responded that she thought this would be a good idea and the Claimant subsequently removed the posts.

135 On 21st September 2022 the Claimant was requested to attend a disciplinary hearing on 23rd September 2022 to consider the allegation that he had brought the Respondent into disrepute. The Claimant responded by email the same day requesting a postponement due to the seriousness of the allegations, the short period between the notification and the date for the hearing and the unavailability of a companion to attend with him (pages 244 – 248). He also refused to participate in a Teams meeting using his own IT equipment and requested the Respondent to provide a private room with internet access.

136 On 22nd September 2022, the Claimant emailed the Respondent stating:

> *Do you think me posting this comment on social media would also lead to me being accused of bringing the company into disrepute??*

137 This was in response to a message that the Respondent had issued on social media stating:

> *As a mark of respect for Queen Elizabeth II, we will be closed on the day of her funeral, Monday 19th September.*

138 The Claimant proposed to respond with:

> *As a mark of your total disrespect I don't think you were in fact I have proof to the contrary*

139 The Respondent's HR Business Partner, Peter Chisnall, responded to the Claimant and requested that he provide the evidence so that Mr Chisnall could investigate. Despite this request, the Claimant did not provide Mr Chisnall with such evidence and on 23rd September 2022 reposted his earlier posts together with the above post.

140 On 27th September 2022, the Respondent requested the Claimant attend a rescheduled disciplinary hearing and added further allegations relating to this later post. The Claimant responded on 30th September 2022 reminding the Respondent that he would not attend a Teams meeting using his own internet.

141 On 3rd October 2022, the Respondent requested the Claimant to attend a rescheduled disciplinary hearing on 6th October 2022. On 5th October 2022, the Claimant resigned with immediate effect.

Conclusion (Breach 7 and 8)

142 The Claimant complains that the Respondent unreasonably commenced disciplinary proceeding against him (Breach 7) and that it unreasonably commenced disciplinary proceedings against him relating to social media posts (Breach 8). To my mind there is no meaningful difference between these allegations and I will adopt the broader wording of Breach 7.

143 The key question in terms of whether these alleged breaches amount to a repudiatory breach of contract is whether the Respondent had reasonable and proper cause for commencing disciplinary proceedings against him. Looking at the posts from the Claimant's linked in account set out above, I have no hesitation in concluding that the Respondent had reasonable and proper cause for commencing disciplinary proceedings against him. The Claimant was its employee and the posts were clearly capable of bringing it into disrepute.

144 From a constructive dismissal point of view, this conclusion disposes of Breaches 7 and 8.

Conclusion (automatic unfair dismissal, Section 103A)

145 In relation to the automatic unfair dismissal claim, the Claimant asserts that the reason (or if more than one reason, the principal reason) he was dismissed was because he had made a protected disclosure. I do not agree. The Claimant resigned in advance of his scheduled attendance at a disciplinary hearing, where the Respondent was considering allegations of gross misconduct relating to his posts. In my view, the Claimant wanted to avoid attendance at this hearing because he suspected that he would be dismissed and his resignation allowed him to do so. This was the reason for his dismissal.

146 It follows from this determination that the Claimant's complaint of automatic unfair dismissal in accordance with Section 103A of the ERA is not well founded and fails.

Time Limit

147 The Respondent contends that the Claimant's complaints that occurred on or before 22nd July 2022 have been raised outside the relevant time limit and the Tribunal lacks jurisdiction to hear those claims.

The Law

148 Section 48(3) of the ERA provides:

> *"An [employment tribunal] shall not consider a complaint under this section unless it is presented –*
>
> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure to act is part of a series of similar acts or failures, the last of them, or*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*

149 The starting point is to assess whether any of the claims have been raised out of time. This analysis will need to consider whether there are a series of acts or a course of conduct linking events which are out of time with those which are in time, so that there is a continuing act. If so, the out of time claims will be deemed to have been raised in time.

150 If not, then the test for extending time has two limbs to it, both of which must be satisfied before the Tribunal will extend time:

150.1 It is for the Claimant to satisfy the Tribunal that it was not reasonably practicable for the complaint to be presented before the end of the three month primary time limit; and

150.2 If so, he must also show that the time which elapsed after the expiry of the three month time limit before the claim was in fact presented was itself a reasonable period.

151 The Court of Appeal in **Marks & Spencer plc v Williams-Ryan [2005] EWCA Civ 470** set out a number of legal principles distilled from a review of previous case law:

151.1 section 48(3) of the ERA 1996 should be given a liberal interpretation in favour of the employee (based on the same wording under S.111 of the ERA);

151.2 regard should be had to what, if anything, the employee knew about the right to complain to a tribunal and of the time limit for doing so; and

151.3 regard should also be had to what knowledge the employee should have had, had they acted reasonably in the circumstances. Knowledge of the right to make a claim does not, as a matter of law, mean that ignorance of the time limits will never be reasonable. It merely makes it more difficult for the employee to prove that their ignorance was reasonable.

152 In this case, the Claimant resigned with immediate effect on 5th October 2022. He contacted ACAS on 22nd October 2022 triggering the Early Conciliation process which ended when the certificate was issued on 29th November 2022.

153 From these dates, the Claimant had until 4th January 2023 to present his claim. He did so on 12th December 2022.

154 The Respondent's case is that all claims that have been raised on or before 22nd July 2022 have been raised outside the relevant time limit of 3 months.

155 The first question to determine is whether there were a series of similar acts or a course of conduct linking events which are out of time with those in time, so that there is, in effect, a continuing event? I do not consider there was. The acts complained of and which have been raised out of time occurred in July 2021, with the alleged failure to deal with the Claimant's first grievance. The next act complained of occurred on 2nd July 2022 involving the alleged death threat from the third party contractor. This was not a course of conduct from the Respondent. The incidents following this occurred in August 2022 and are clearly in time. The actual time difference between July 2021 and August 2022, as well as the differing nature of the complaints (arising from a failure to properly manage the first grievance) indicates to me that these are separate, unconnected events which are not part of a series of similar acts or a course of conduct.

156 The Claimant's evidence before the Tribunal was that he was well aware of the respective 3 month time limits applicable to his claims. He confirmed that he sought advice from his union throughout as well as advice from Citizen's Advice Bureau. He also confirmed that he had received advice from a legal advice clinic run by Portsmouth University.

157 From these facts, it is clear that the Claimant was not ignorant of his rights, had actual knowledge of the time limits and was able to access legal advice, which he did. No reasons were put forward by the Claimant why he could not present his claim earlier than he did and he does not appear to have had any technical issues when he decided to present his claim. Case law confirms that this test is strict. If it was reasonably practicable for the Claimant to present his claims within the relevant time limit, then no extension should be granted. I have concluded from my findings above that it was reasonably practicable for the Claimant to raise his claims in time. Therefore, all claims that arose on or before 22nd July 2022 are out of time and the Tribunal does not have jurisdiction to hear them. This concerns Breaches 1 – 3, 6, 9(i) and Detriments 3 and 6.

Constructive Dismissal

158 From my conclusions above, I have found that there were no repudiatory breaches of contract. I have also found that the Claimant's reason for resignation was to avoid the disciplinary hearing. It was not for any other reason.

159 For completeness, even if the Claimant had succeeded in his claims for unfair dismissal (whether constructive or automatically unfair under Section 103A of the

ERA) I would have considered that there were strong grounds for a reduction in any compensation awarded to the Claimant due to his considerable contribution in posting messages on linked in, which were derogatory of the Respondent and would have led to a substantial reduction in any compensation due to his own contributory fault.

Employment Judge Lambert

Date: 21 November 2024

JUDGMENT SENT TO THE PARTIES ON

5 December 2024

Jade Lobb
FOR THE TRIBUNAL OFFICE