EMPLOYMENT TRIBUNALS

Claimant: Mr J Glass

Respondent: Crest Nicholson Operations Limited

Heard at: Bury St Edmunds

On: 23, 24, 25, 26, 27, 30 September, 1 October 2024
2 October and 28 November (in chambers)
29 November

Before: Employment Judge Graham

Members: Mrs A Buck
Mr S Holford

Representation:
Claimant: Mr P Glass (Claimant's father)
Respondent: Mr T Cordrey, Counsel

JUDGMENT having been sent to the parties on 3 January 2025, and written reasons having already been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and procedural history

1. ACAS Early Conciliation took place between 3 and 13 September 2023. By ET1 dated 14 September 2023 the Claimant brought proceedings for ordinary unfair dismissal, automatically unfair dismissal for having made protected disclosures, detriment for having made protected disclosures, and also wrongful dismissal (notice pay). The claim was originally brought against a second and third Respondent however these were dismissed upon withdrawal. An earlier application for interim relief was unsuccessful.

2. By ET3 dated 20 November 2023 the Respondent resisted the claim.

3. A private preliminary hearing for case management took place on 20 March 2024 before Employment Judge Ord where the legal issues were discussed and directions were made for the final hearing. That case management summary does not include the list of issues to be decided and it was left to the parties to finalise.

4. At the start of this final hearing I reviewed the agreed list of issues and noted that the Claimant was saying that the information he alleged he disclosed tended to show a breach of a legal obligation. Having looked in detail at what the Claimant alleges he disclosed, it appeared to me that the Claimant might also be saying that the information tended to show endangerment to health and safety. I raised this with the parties as the list of issues had not been set out in the previous case management summary and I wanted to ensure that the Claimant's complaints had been properly identified and recorded. Put simply I considered that this additional complaint called out from the papers and that it was incumbent upon me (so far as possible) to ensure that the Claimant, as a litigant in person, was placed on an equal footing with the Respondent which was professionally legally represented. The Tribunal was also mindful of the guidance that a tribunal should not stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence - ***Parekh v Brent LBC*** **[2012], EWCA Civ 1630** [at paragraph 31].

5. Mr P Glass for the Claimant confirmed that he also wished to rely upon endangerment to health and safety, and the Respondent did not object to my suggestion. Whereas this was a small amendment to the list of issues it did not in fact require any additional work to be undertaken, it was no more than a relabeling (or an additional label) being added. The most which this amendment required was some additional questioning from Mr Cordrey as the Respondent's counsel, relating to endangerment to health and safety, and it did not extend the hearing time nor did it cause any injustice or hardship to the Respondent. Mr Cordrey helpfully produced an updated version of the list of issues which was then adopted.

6. We were provided with a hearing bundle of 1058 pages over two volumes, and were also provided with a photograph showing where the Claimant worked. We were also provided with opening notes from the parties and also an unagreed chronology from the Respondent. We received witness statements for the Claimant from himself, Mr P Glass (Claimant's father), James Roberts (former Trainee Site Manager), Peter Yohane (former Site Manager) and Darron Ludgrove (Labourer).

7. We received witness statements for the Respondent from Ben Ackerley (Build Manager), Gary Neal (Project Manager, former Build Manager), Steve Oliver (former Head of Commercial), Ashton Tame (Head of HR Operations), Dan Donovan (HR Business Partner), Eileen Guihen (Sales and Marketing Director and Deputy Managing Director), and Trudy Joyice (HR Business Partner).

8. The Claimant's witnesses gave evidence first. Mr P Glass did not give evidence as his evidence was not challenged and we noted that he did not witness any of the matters in issue in this case. The Claimant gave

evidence on 24 and 25 September. Mr Ludgrove gave evidence in person on 25 September, and Mr Roberts gave evidence via video on the same date as he was overseas in the Cayman Islands. There were no issues with the connection.

9. The Respondent's witnesses then gave evidence and we heard from Mr Oliver and Ms Guihen on 26 September, followed by Mr Neal on 26 and 27 September, and Mr Ackerley and Ms Tame also on 27 September. Ms Tame's evidence was completed on 30 September, and we heard evidence from Mr Donovan and Ms Joyice on 30 September by video. There were no issues with the connection.

10. Closing oral submissions took place on 1 October 2024 via video and we received detailed written submissions from both parties in advance.

List of issues

11. The legal issues to be determined by the Tribunal were as follows.

PROTECTED DISCLOSURE (ERA 1996 S 43B)

1. Did the Claimant make the following disclosures (the Claimant relies on three distinct disclosures, Disclosure 1, Disclosure 5 and Disclosure 10, each of which he relies on as having repeated to other people / on other occasions):

1.1. **DISCLOSURE 1**: On 25 April 2023 the Claimant informed Ben Ackerley during a meeting that by imposing regular and / or long working hours the Respondent was not complying with its duty of care. The Claimant cannot recall if he specifically referenced the Respondent's Stress Policy and their duty of care under the Health and Safety at Work Act 1974;

1.2. **DISCLOSURE 2**: On 23 May 2023 the Claimant informed Ben Ackerley and Dan Donovan during a meeting that by imposing regular and / or long working hours the Respondent was failing to comply with its Stress Policy and their duty of care under the Health and Safety at Work Act 1974;

1.3. **DISCLOSURE 3**: By a grievance letter of 25 June 2023 and in a meeting on 3 July 2023 and in the email of 7 July (titled Expanded Points) the Claimant informed Eleanor Streeter and Ashton Tame that by imposing regular and / or long working hours the Respondent was failing to comply with its Stress Policy and their duty of care under the Health and Safety at Work Act 1974 and Construction (Design & Management) (CDM) Regulations 2015;

1.4. **DISCLOSURE 4**: On 7 August 2023 the Claimant informed Trudy Joyice and Sebastian Skinner in the grievance appeal letter that by imposing regular and / or long working hours the Respondent was failing to ensure a safe working environment with regard to defining and dealing with stress at work;

1.5. **DISCLOSURE 5**: On 13 June 2023 at 20:17 the Claimant emailed Gary Neal and stated that there were potential health and safety risks to the

public and site operatives arising from a lack of resources with which to safely manage the site and a failure to maintain a secure site with adequate segregation between vehicles, public and construction workers;

1.6. **DISCLOSURE 6**: On 14 June 2023 at 22:27 the Claimant emailed Gary Neal and stated that there were potential health and safety risks to the public and site operatives arising from a lack of resources with which to safely manage the site and a failure to maintain a secure site with adequate segregation between vehicles, public and construction workers;

1.7. **DISCLOSURE 7**: On 21 June 2023 at 09:16 the Claimant emailed Gary Neal and stated that there were potential health and safety risks to the public and site operatives arising from a lack of resources with which to safely manage the site and a failure to maintain a secure site with adequate segregation between vehicles, public and construction workers;

1.8. **DISCLOSURE 8**: In the grievance letter of 25 June 2023, in the 3 July 2023 meeting, and in the email of 7 July (titled Expanded Points), the Claimant informed Eleanor Streeter and Ashton Tame that there were potential health and safety risks to the public and site operatives arising from a lack of resources with which to safely manage the site and that the failure to maintain a secure site with adequate segregation between vehicles, public and construction workers was in breach of the Respondent's obligations under the Health and Safety at Work Act 1974 and CDM Regulations 2015;

1.9. **DISCLOSURE 9**: On 7 August 2023 the Claimant sent a grievance appeal letter to Trudy Joyice, asking "Does the company not have a responsibility to ensure a safe working environment";

1.10. **DISCLOSURE 10**: In meetings on 30 August 2023 and 7 September 2023 the Claimant informed Stephen Oliver and Dan Donovan, and provided photographic and other evidence, that: 1) there were ongoing health and safety risks to the public and site operatives arising from unsecured site entrances and forklifts operating without bankman control at Towergate; 2) the Managing Director, Adrian Sims, was present on site while it was left in an unsecured condition; and 3) there had been a recent site collision between a forklift and a vehicle parked on site. The Claimant informed Stephen Oliver and Dan Donovan during that meeting that there was a failure to maintain a secure site with adequate segregation between vehicles, public and construction workers; and

2. If so, in relation to each disclosure:

2.1. Did it amount to a disclosure of information;

2.2. Did the Claimant, at the time of the disclosure, have a reasonable belief that the information disclosed tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject or that the health or safety of any individual has been, is being or is likely to be endangered (Employment Rights Act 1996 s 43B(1)(b) and s43B(1)(d)). In relation to Disclosures 1-10, the legal obligation the Claimant relies on is: a) the following provisions of the Respondent's Stress Policy:

2.2.1. It is a manager's responsibility to be sensitive and aware of changes to the attitude and behaviour of their staff. Particular in times of change, people can become more vulnerable to stress as a result of: Unreasonable time pressures or deadlines and irregular or long hours;

2.2.2. It is the responsibility of line managers to be aware of the causes and signs of stress and ensure the fair and consistent application of these stress management procedures within their area of responsibility;

2.2.3. It is the responsibility of the Group HR department to raise and maintain awareness of our stress management procedures and to provide advice to management and staff on their application;

2.2.4. Whilst putting people under pressure often improves performance, excessive demands and pressure can lead to stress creating the opposite effect; and

and b) the following duties under the HSWA 1974:

2.2.5. the duty of every employer to ensure, so far is reasonably practicable, the health, safety and welfare at work of all his employees and the public;

2.2.6. the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health and CDM Regulations 2015; and

2.2.7. so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks.

2.3. Did the Claimant have a reasonable belief that the disclosure was in the public interest? The Claimant relies on the information disclosed concerning the wellbeing of his fellow employees and the health and safety of members of the public and site operatives; and

2.4. Was it made to his employer in accordance with ERA 1996 s 43C?

DETRIMENT (ERA 1996 S 47B)

3. Did the following acts take place as alleged or at all:

3.1. **DETRIMENT 1:** Gary Neal on 13 June 2023, 14 June 2023 and 21 June 2023 failing to meaningfully respond to the Claimant's requests for resources to manage Health and Safety issues at Towergate;

3.2. **DETRIMENT 2:** Gary Neal, in the period 5 – 9 June 2023, in the presence of Peter Yohanne and the Claimant, making the comment "people need to face up to their problems head on, like I do. Not like these wobbly heads";

3.3. **DETRIMENT 3:** Gary Neal, instead of responding to the Claimant's request for resources to manage Health and Safety issues at Towergate, telling Peter Yohanne on 14 June 2023 to tell the Claimant to "get back in his box";

3.4. **DETRIMENT 4:** In the grievance outcome letter of 3 August 2023, Eleanor Streeter and Ashton Tame dismissing and belittling the concerns raised by the Claimant in his grievance; and grievance appeal with Sebastian Skinner and Trudy Joyice grievance appeal outcome 25th August 2023

3.5. Breaching the ACAS Code by:

3.5.1. **DETRIMENT 5:** Inadequate investigation of the misconduct the Claimant was charged with in that: a) there was no independent contemporaneous investigation: Greg Bacon was appointed to chair the disciplinary and denied the Claimant's request for an investigation and Eleanor Streeter, Sebastian Skinner, Ashton Tame, Stephen Oliver, Eileen Guihen and Adrian Sims failed to take opportunities to correct that; b) the Respondent relied on statements from Peter Yohanne over the testimony of the Claimant; and Gary Neal, Greg Bacon, Dan Donovan, Ben Ackerley c) Stephen Oliver added charges of collusion and loss of trust and confidence without investigating them or providing evidence; d) Stephen Oliver and Eileen Guihen failed to inform C that the original allegation of leaving site along with his fellow (Senior) Site Manager on Friday 16 June 2023, resulting in no Crest Nicholson personnel being present on site where C was actually dismissed when allegations had been amended such that justification for dismissing him was on the basis that he failed to comply with the Crest Nicholson Specification for Managing Site Manager Absence and Temporary Site Cover.

3.5.2. **DETRIMENT 6:** A failure to be impartial by Dan Donovan during the disciplinary process in that: a) he was party to discussions associated with the decisions to charge the Claimant with gross misconduct prior to the completion of an investigation; b) he acted as interrogator at the disciplinary hearing; c) he did not advise Stephen Oliver to take account of the Claimant's evidence; d) he sought to dismiss and deceive the Claimant by alleging false interpretations of the Specification for Managing Site Manager Absence and Temporary Site Cover; and e) he refused to include or consider the Claimant's notes of meetings**;**

3.5.3. **DETRIMENT 7:** Stephen Oliver not affording the Claimant sufficient time to prepare for the disciplinary hearing, allowing the Claimant one working day's notice;

3.5.4. **DETRIMENT 8:** Dan Donovan disbarring the Claimant's preferred companion, Peter Yohanne, and his alternative companion, his father, from the disciplinary hearing; and

3.5.5. **DETRIMENT 9:** Altering Gary Neal's witness statement in order to implicate the Claimant;

3.6. **DETRIMENT 10:** Gary Neal and Greg Bacon erroneously charging the Claimant with gross misconduct on 20 June 2023 and summoning him to a disciplinary hearing;

3.7. **DETRIMENT 11:** Failing to impartially investigate the Claimant's grievance raised on 25 June 2023;

3.8. **DETRIMENT 12:** Sebastian Skinner, Ashton Tame, Trudy Joyice and Eleanor Streeter fabricating an erroneous accusation of collusion and loss of trust in his letter dated 25 August 2023;

3.9. **DETRIMENT 13:** The Claimant not being given an opportunity to respond to the allegations of collusion and loss of trust and confidence; and

3.10. **DETRIMENT 14:** A false allegation of gross misconduct in the dismissal letter?

4. If so, did they amount, in law, to a detriment?

5. If so, was that detriment done on the ground that the Claimant had made a protected disclosure (the Claimant relies on DISCLOSURE 1-10)?

AUTOMATICALLY UNFAIR DISMISSAL (ERA 1996 S 103A)

6. Were any or all of the Disclosures 1-10 the sole or principal reason for the dismissal (ERA 1996 s 103A)?

ORDINARY UNFAIR DISMISSAL (ERA 1996 SS 94, 111)

7. What was the reason for the dismissal? The burden is on the Respondent to show the reason for the dismissal (ERA s 98(1)(a)).

8. Was the reason for the dismissal a potentially fair reason within the categories set out in ERA s 98(2) or as some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held? The burden is on the Respondent to show this (ERA s 98(1)(b)).

9. In all the circumstances (including the size and administrative resources of the Respondent) did the Respondent act reasonably or unreasonably in treating the reason for dismissal as a sufficient reason? That question is to be determined in accordance with the equity and substantial merits of the case (ERA s 98(4)). The burden of proof is neutral. In answering this question, in accordance with *British Home Stores Ltd v Burchell* [1980] ICR 303:

    9.1. Did the Respondent have a reasonable suspicion amounting to a belief that the Claimant was guilty of the misconduct at the time of dismissal;

    9.2. Were there reasonable grounds in the Respondent's mind to sustain the belief in the misconduct;

9.3. Had the Respondent carried out as much investigation as was reasonable in the circumstances; and

9.4. Was the dismissal fair having regard to all the circumstances and to the equity and substantial merits of the case: did the Respondent act reasonably in treating the Claimant's conduct as a sufficient reason for dismissal?

10. To the extent that it is held the dismissal was in any way unfair:

10.1. Should any compensation awarded be reduced in accordance with *Polkey v AE Dayton Services Ltd [1987] ICR 142* and, if so, what reduction is appropriate?

10.2. Should any compensatory and/or basic award awarded be reduced on the grounds that the Claimant's actions caused or contributed to his dismissal and / or the Claimant's conduct before the dismissal was such that it would be just and equitable to do so? If so, what reduction is appropriate?

BREACH OF CONTRACT (EMPLOYMENT TRIBUNALS EXTENSION OF JURISDICTION (ENGLAND AND WALES) ORDER 1994, ART 3)

11. Did the Respondent breach the Claimant's contract by failing to pay him notice pay?

JURISDICTION

12. Are any or all of the claims within time? To the extent that any claims are not in time:

12.1. was it not reasonably practicable for the complaint to have been presented in time and, if so, was the complaint submitted within such further period as the tribunal considers reasonable; and/or

12.2. with regard to the detriment claim, are any or all of the detriments part of a series of similar acts or failures within the meaning of ERA s 48(3)?

Findings of fact

12. From the information and evidence before the Tribunal it made the following findings of fact. We made our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgment all the evidence which we heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the issues to be decided.

13. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against any contemporaneous documents. We have not referred to every document we

read or were directed or taken to in the findings below, but that does not mean they were not considered.

14. The Respondent is an established property developer which specialises in building new homes. The Claimant was employed by the Respondent as a Site Manager, and his employment commenced on 5 August 2019 and it ended on 7 September 2023.

15. The role of Site Manager is a senior role within the organisation and involves overseeing the running of a construction site and this includes ensuring that it is a safe place of work.

16. The role of Build Manager is a more senior position and involves overseeing the sites, monitoring health and safety, subcontractors, quality, and managing the site teams.

17. The Respondent is required to comply with the Construction (Design and Management) Regulations 2015. Regulation 13 sets out the duties of a principal contractor in relation to health and safety at the construction phase and it provides that:

    "The principal contractor must plan, manage and monitor the construction phase and coordinate matters relating to health and safety during the construction phase to ensure that, so far as is reasonably practicable, construction work is carried out without risks to health or safety."

18. Pursuant to that Regulation, the Respondent has a policy document entitled *"Specification for Managing Site Manager Absence and Temporary Site Cover."* This is a detailed two page document which sets out the Respondent's requirement that a *"competent Crest Site Manager should be on site at all times during normal working hours to manage and supervise the construction work."*

19. The Specification provides that the person who the Company places in charge of their construction sites must have the skills, knowledge, experience, and organisational capability to carry out the work. In his oral evidence the Claimant agreed with paragraph 21 of witness statement of Greg Neal (Build Manager) that it was a legal requirement to have someone on site with an SMSTS (Site Manager Safety Training Scheme) qualification when the site is live and operatives are working.

20. The Specification recognises there may be situations whereby a Site Manager is unable to attend the site due to planned or unplanned absence and it sets out in detail how the Specification should be implemented. The Specification is clear that a Trainee Site Manager should not be left in charge of a construction site unless they are fully competent and sufficiently advanced in their Site Management training.

21. Planned absence is where the Site Manager requires absence from work such as leave, or where the line manager requires the Site Manager to leave the site for business reasons. In either situation the Specification provides that the line manager is responsible for arranging either a competent Crest Site Manager (or Build Manager) or Crest Assistant Site Manager. Where

this is not possible it is permitted to utilise a competent Agency Site Manager or a Trainee Site Manager to provide cover, but prior to doing so the Build Manager must complete a risk assessment form known as HSF011J and this must be authorised (signed) by both the Build Manager and Managing Director.

22. Unplanned absence is defined as where the Site Manager is unable to attend site at the normal start time or within an hour, or where a situation has arisen where they must leave site during working hours, such as a family emergency or sickness. The Site Manager must contact the Build Manager who must then arrange cover either from a competent Crest Site Manager or a suitably qualified Trainee Site Manager, or the Build Manager should attend site and provide cover themselves, or they should close the Site.

23. The Specification provides that:

"Work at height and work involving the use of plant and equipment must not commence until a competent site manager is in attendance - work preparation i.e. taking hand tools to the place or work (except work on scaffolding etc) or low risk activities such as low-level painting may commence."

24. The Specification also sets out the risk assessment and factors for consideration when arranging temporary cover.

25. It is uncontroversial to say that construction sites by their nature carry an element of risk for those either working on them or attending them and this includes members of the public who may wander onto them. Various forms of equipment are used on site such as telehandlers which we understand to be similar to a forklift, as well as scaffolding which of course involves working at various heights, and there are power tools in use such as angle grinders. We also understand that dry liners may work on site and these are skilled trades people who use plasterboard and panels to build internal walls etc.

26. We understand that the Health and Safety Executive ("HSE"), the local planning authority and also the Environment Agency are empowered to make visits to construction sites and may take enforcement action where they identify violations of safety requirements, and this could include attending a site and finding no Site Manager present. We are informed that enforcement action could include temporarily closing down a site, conducting an investigation, or both, and this could result in reputational damage for a developer, and potential for legal action.

27. It is generally accepted that it is a cardinal rule within the Respondent and the house building industry that a Site Manager must not leave the site unattended without appropriate arrangements having been put in place first. The Claimant has also accepted in his oral evidence that it would be unlawful for a Site Manager to leave an active construction site unattended and that it could be a serious health and safety issue.

28. Paragraph 3.4 of the Claimant's contract of employment provides that:

"The Company attaches great importance to the health, welfare and safety of all its employees, contractors, visitors and the public, and has established health and safety rules. It is an express term of your employment that you will be required at all times to comply with the Company's health and safety policies, rules, regulations and working practices"

29. Paragraph 12.1 of the Claimant's contract of employment provides that he was ordinarily entitled to one month's written notice however paragraph 12.4 provides that the Respondent may dismiss without notice where the employee is guilty of gross misconduct. Examples of gross misconduct are provided and include wilful breach of health and safety regulations, serious neglect of duties, and failure to comply in any material respect with any policy.

30. Whereas we were not referred specifically to the Respondent's disciplinary policy it appears in the hearing bundle and it provides that when a potential disciplinary matter arises the company may make necessary investigations to establish the facts promptly. The policy provides that the first step is to let the employee know verbally and in writing what the allegations are together with the supporting evidence gathered at the investigation stage. The policy provides that the Respondent will invite the employee to a disciplinary hearing to discuss the allegations and will inform them of their right to be accompanied.

31. The policy also lists examples of gross misconduct such as reckless acts or omission constituting a serious danger to the health and safety of any person and it provides that staff may be suspended whilst investigations are conducted.

32. We were referred to the Respondent's grievance policy which provides that appeals may be conducted at a hearing or in writing where a further hearing is not required. In addition it states that in the event that the investigating manager believes that the grievance may have been lodged maliciously or vexatiously in an attempt to mislead the company, they may decide to recommend that the case is looked at under the disciplinary policy.

33. We were also referred to the Respondent's whistleblowing policy entitled "Speaking Up" and which sets out how whistleblowing complaints may be raised, either internally or through a confidential external provider.

34. During January 2023 the Claimant joined the Respondent's Verla construction site in St Albans and he was line managed by Ben Ackerley the Build Manager. We note that the Claimant has not disagreed that the Build Manager was his line manager on that project. This was an incredibly busy project. The impression we gained of the Claimant was that he was hard working and enthusiastic and liked by his colleagues and well regarded by senior management. We understand that the Claimant was working long hours, including working weekends on a routine basis. At some point during 2023 when the Claimant had exhausted his sick pay entitlement the Respondent decided not to deduct £2,000 salary from his pay in view of how hard he had been working. We also noted the Claimant had a

reputation as someone who would turn around sites and was regarded as someone who drove projects forward and got them done.

35. The Claimant was signed off sick with work related stress from 30 March 2023. The Claimant's text message to the Respondent on 4 April 2023 said that work had been very stressful and he was struggling to cope.

36. The Claimant attended a return to work meeting with Mr Ackerley on 25 April 2023. The return to work interview notes contain scant details of the discussions, Mr Ackerley says that the Claimant did not say a great deal during the meeting and was keen to get back to work, although he agrees that the Claimant mentioned he had gone off sick due to work related stress. The Claimant now says he said that by imposing regular and a long working hours the Respondent was not complying with its duty of care although he did not cite the Respondent's Stress Policy or the Health and Safety at Work Act 1974 in name.

37. In his oral evidence it was put to the Claimant that what he was disclosing related to his own personal circumstances to which he said *"Yes ok I will go along with that."* Having listened to the Claimant's oral evidence to the Tribunal we are not satisfied that he mentioned anything about legal obligations, health and safety, the public interest or anything to do with the impact upon other employees. We find that the most the Claimant said was to explain his own absence which he said was due to work related stress. We note that in the Claimant's email of 4 May 2023 to Mr Ackerley and Dan Donovan in HR he did not express any of these matters either.

38. There was a second return to work meeting on 23 May 2023 which the Claimant attended with Mr Ackerley and Mr Donovan. During that meeting the Claimant said he had been working very long hours and late at night and coming onto site at 3am. The Claimant complained that the Respondent had been very good at recording his previous sickness absences but was not so good at recording when he worked overtime. Whereas the Claimant in his claim says that during the meeting he said that the Respondent was breaching its duty of care, the stress policy and also the Health and Safety at Work Act 1974, in his oral evidence the Claimant said he could not recall yes or no if he mentioned the stress policy and he thinks he mentioned it. Likewise the Claimant was not clear in his oral evidence whether he specifically mentioned endangerment of health and safety. Both Mr Ackerley and Mr Donovan deny that the Claimant mentioned either of these things. It was clear to the Tribunal that what the Claimant was doing was explaining how hard he had been working and that his work related stress was due to working such long hours, however we do not find that the Claimant made reference to the policy or the legislation.

39. The Claimant sent an email after the meeting on 5 June 2023 where he said he had previously broken his foot at work but had been made to walk around on it afterwards for two hours and during a rehabilitation stage he was pressurised to return to work. The Claimant also complained of an unhealthy work life balance, that he was working 14 and 19 days in a row, that the Respondent had a duty to monitor employees' well being which was neglected in his case, that whereas the Respondent was effective at logging absences they were not as prompt to realise the unhealthy amount of

overtime invested by their employee (in the singular). There was no mention of the public interest or other employees in that email, the focus is entirely about the Claimant's own personal situation.

40. Mr Ackerley responded to the Claimant on 12 June and said that whilst they had not discussed all the of the points the Claimant alleged, he would address them. It was a feature of this case that the Claimant would attend a meeting and then write afterwards with additional information, some of which he alleged had been discussed whereas the Respondent said that it had not been. In this instance Mr Ackerley and Mr Donovan's evidence was consistent that the Claimant had not raised all of these matters in the meeting. We noted that Mr Ackerley responded fully to each of the Claimant's emailed concerns and we note that he said he expected site manager weekend working to be shared, that breaks should be taken, and the Claimant should in future report to him when things were becoming too much before they become a bigger problem. The Tribunal found this to be a very supportive email and indicative that the discussions to date concerned solely the Claimant's concerns about his own treatment and the reasons for his own sickness absence.

41. As the Claimant continued to accrue periods of sickness absence after this date the decision was made to transfer him to the Towergate / Morton Park site in Milton Keynes on the basis that it was less high pressure, and he would be working alongside the Senior Site Manager, Peter Yohane, whom he had worked with before. The Build Manager for that site was Gary Neal.

42. One of the disputes of fact in this case concerns whether the site comprised of one or two sites. The Claimant argues that it comprised of two sites, one for Towergate and one for Morton Park. The Respondent argues that it is one site comprised of two phases, that Morton Park was nearing completion and Towergate remained active. We were provided with an aerial image where the Claimant had outlined Towergate in red and Morton Park in green, and they are next to each other on the image. It is not disputed that the site compound, which appears to the administrative hub or office, was located within the Towergate side of the operation. The significance of whether there was one site or two relates to the Claimant's argument that he was only assigned to Towergate and not Morton Park for which he says that Mr Neal was responsible for.

43. Another dispute of fact in this case was who was the Claimant's line manager and who had day to day responsibility for the site or sites. The Claimant in these proceedings argues that Peter Yohane as Senior Site Manager was his line manager, that Mr Yohane had responsibility for Towergate, and further Mr Neal had responsibility for Morton Park. The logical conclusion of that argument is that the Claimant is saying that whilst he was a Site Manager he was not responsible for any site. The Tribunal found this to be a very unlikely proposition.

44. The Claimant has referred us to two documents entitled the Construction Phase Plan or CPP. There is a CPP for Towergate and one for Morton Park. The subtitle is Project Organisational Structure for Health and Safety. The mere fact of two CPPs is not indicative to us that there were two sites as the title suggests they are phases. In addition these appear to be historic

documents. The CPP for Morton Park lists Mr Neal as both Build/Site Manager and Senior Site Manager, and for Towergate it lists Mr Neal as Build Manager, Mr Yohane as Senior Site Manager and another individual as Site Manager. The Claimant's name does not appear on either so it is of limited relevance to us. In any event, we note that the compound was located within the Towergate side of the site, and having viewed the aerial image, and having heard all of the witness evidence on the matter, we are satisfied that this was one site comprised of two phases, with Morton Park far more advanced than Towergate.

45. Even if we are wrong on that and there were two sites rather than one, this is of no overall consequence as will be discussed later in this judgment.

46. As regards the issue of who was the Claimant's line manager, the evidence of the Respondent was that Mr Neal was the line manager of both Mr Yohane and the Claimant, that both were the same grade and had the same responsibilities, that they earned the same salary, and that the title of Senior was a reflection of length of service only. The Respondent's evidence was that Mr Neal as Build Manager was the Claimant's line manager as he approved leave, dealt with sickness absence, and also undertook their performance development reviews or appraisals. None of this was challenged by the Claimant in the hearing although he maintained that Mr Yohane was his line manager, and had authority to send him off site or to approve him doing so, and would allocate him work to do.

47. The Claimant also relied upon the CPPs and we noted that for Morton Park there was no Site Manager listed on there, there was an Assistant Site Manager with a line going from him to the Senior Site Manager, Mr Neal. For the Towergate CPP there was a line going from Trainee Site Manager to Site Manager to Senior Site Manager and then on to Build Manager. As we have already indicated, these documents appeared to relate to a time before the Claimant joined, and in any event they were produced for the purposes of showing organisational structure for health and safety. We noted that the Claimant did not take issue with Mr Ackerley as Build Manager for Verla being his line manager. We also note that on 16 June 2023 when the Claimant emailed the Respondent to say that he could not work one weekend, he was writing on behalf of himself and Mr Yohane and he sent the email to Mr Neal. This is not likely to have been the act of someone who thought that Mr Yohane was his line manager.

48. We have noted the contents of the Claimant's grievance of 25 June 2023. Within that document the Claimant makes references to bullying by his line manager and it was clear that he was referring to Mr Neal. The Claimant said:

"Instead, I have witnessed first hand inappropriate comments made by my line manager, which are slanderous to my name and professional reputation. He has also made derogatory comments about stress in the workplace. As my line manager is in a senior management role, I just hope this is a personal perspective of his doesn't represent the companies stance. I have also witnessed first hand him calling other members of his team "lollipops" and "clowns" which makes me worry that he's saying the same thing to the supply chain or behind closed doors in the office."

49. These were matters which the Claimant has accused Mr Neal of doing. It was abundantly clear that the Claimant recognised at the time that Mr Neal was his line manager. The Claimant also said that there were *"conflicting statements from our line manager to who is actually the lead role in managing the project."* Again it was clear to us that the Claimant recognised that he and Mr Yohane were line managed by Mr Neal.

50. Similarly the Claimant made explicit reference to Mr Yohane whom he described as a colleague. We find that had the Claimant considered at the material time that Mr Yohane was his line manager he would have expressed himself differently in that grievance.

51. Similarly within the subsequent grievance appeal the Claimant complained that he had been told to return to work with the line managers he had raised the problem about, and he specifically said "*To return to the same site and work with the line manager, that the greatest number of issues arise with."* The Claimant had been complaining about Mr Neal, he had not complained about Mr Yohane. Again it is clear to us that the Claimant acknowledged and understood at the material time that Mr Neal was his line manager.

52. During the hearing the Respondent repeatedly argued that the Claimant was the same grade as Mr Yohane and the Claimant did not challenge this. In the Respondent's closing submissions it said that both were a grade 6. In his closing submissions the Claimant refers us to his contract of employment from 2019 which recorded him as a grade 4. This was new evidence, it was not something argued before us in the hearing, and in any event it is of little assistance to us as that is a historic document and there was overwhelming evidence from the Respondent that Mr Neal was the Claimant's line manager as he was responsible for leave, sickness and performance appraisals.

53. For the avoidance of any doubt we find that the Towergate and Morton Park phases were one site, and we also find that Mr Neal was the Claimant's line manager. We also find that both Site Managers were responsible for the whole site although they could divide up their duties between them.

54. This was also another busy site and it also involved Site Managers working long hours, including weekends, and there was considerable pressure to meet deadlines. We heard evidence which we accept that there were project delays and understandably Mr Neal was also under pressure to deliver, and he found the delays to be frustrating. The Respondent also had performance concerns about Mr Yohane who was to be placed on a performance improvement plan by Mr Neal. Mr Neal was inexperienced in formal performance management procedures and was supported by Mr Donovan from HR, and also by Greg Bacon who was a more experienced Build Manager.

55. The Claimant was also frustrated as he found himself working long hours and weekends again which he had done at Verla previously, and it appeared to us that from the Claimant's perspective that whilst he had moved sites he was in the same situation as before and he was getting fed up.

56. The Claimant has alleged that in the period between 5 – 9 June 2023 Mr Neal made a comment that *"people need to face up to their problems head on, like I do. Not like these wobbly heads."* In his oral evidence the Claimant accepted he did not witness it, he says that he heard it from Mr Yohane who maintains it was said, and Mr Neal denies saying it. At most we have one person who says the comment was made, and a second person who denies saying it. We have looked to see whether we can possibly draw an inference as to which version is to be preferred however we have found both Mr Neal and Mr Yohane to have been honest and candid in their evidence before us. None of the contemporaneous documents from that time, which comprise emails between Mr Neal and the Claimant, are suggestive of any hostility towards the Claimant, and they are polite and professional. We therefore must rely on the burden of proof, noting that it is for he who alleges to prove, and accordingly we find that the comment was not made as we are not satisfied to the level that we need to be, which is on the balance of probabilities, that Mr Neal did say it, or if he did, that he was referring to the Claimant.

57. We note that by this time the only protected disclosures the Claimant alleges he had made related to alleged comments to Mr Ackerly on another site and to Mr Donovan, and it was not made clear to us in evidence how Mr Neal would have known about them, nor why Mr Neal would have wished to subject the Claimant to a detriment for alleged disclosures which did not concern him or his work. This did not appear to us to be probable.

58. On 7 June 2023 there was an accident on Morton Park where a bricklayer was injured by an angle grinder and the Claimant reported this by email. Stephen Ross the Group Safety, Health and Environmental Advisor, emailed to set out the process for accident reporting and raised concerns that on 8 June 2023 Towergate had been left under the sole management of a Trainee Assistant Site Manager, James Roberts, for four hours that day. Mr Ross made explicit reference to the Specification and pasted the extract to which we have already referred which provided that *"under no circumstances must a trainee site manager to be left or placed in charge for a construction site or any phase there off unless it can be evidence that they are fully competent and sufficiently advanced in their site management training to do so. This specification applies to all periods of site manager absence."*

59. Mr. Ross said that given the site is a timber frame and therefore high risk he felt that a Trainee Site Manager was not advanced enough in their training to supervise Towergate alone. Mr Ross added *"going forward, if there are scheduled or unscheduled absences meaning your project cannot be properly supervised, please take steps to ensure cover is provided."*

60. Mr Ross said *"had there been a serious incident during the time James Roberts was managing the site alone, it is possible CN Chiltern would have been found in breach of duty of care to Mr Roberts and legal responsibilities to supervise work. I hope you understand the importance of following company procedures, both regarding incident reporting and providing suitable supervision of construction activities."*

61. The Claimant would have been well aware from Mr Ross' email (as well as from the terms of the Specification) that any absences from site needed to be covered. The email from Mr Ross was very clear on this issue.

62. Mr Ross had queried why the Claimant had not called him at the time of the incident and had not obtained a witness statement. The Claimant's response was a little terse and asked how he proposed the Claimant obtain a statement in the circumstances.

63. We note that Mr Ross copied his reply to Mr Neal, Adrian Sims (Managing Director), Mr Bacon and Mr Ackerley. Later that evening Mr Bacon emailed to say "*Jamie's attitude in the emails below stinks"* and he suggested that they could not let this go and they would need to investigate why he didn't do his job and decide if they needed to do a disciplinary. Mr Neal replied earlier the following morning to agree and said that the Claimant did not turn up until 3pm the day before and did not inform him, and that he would be at Morton Park that day and would do some digging.

64. This is an incredibly important email exchange because at this early stage it alludes to the Respondent's concerns about the manner in which the Claimant was conducting himself. It has not been established before us why Mr Ross chose to copy in Mr Bacon however given the names of the other people copied in including Mr Ackerley it appeared to the Tribunal that Mr Ross was attempting to raise concerns with the Build Managers about health and safety compliance at the site generally.

65. The chronology of events in this matter is of particular importance and we note that it was following Mr Ross' email that we can see the Respondent's contemporaneous recording of concerns it had with the Claimant, and this was before emails the Claimant would later send which he now says was whistleblowing.

66. On 13 June 2023 the Claimant emailed Mr Neal and included a photograph of scaffolding boards being piled up and in his email he said it was a prime example of why they required an additional labourer or banksman and he said the current forklift driver had left the scaffold boards in that state and the Claimant added what hope do we have? Mr Neal responded the same evening and said that if the Claimant could demonstrate that the labour would be covered by issuing cleanup notices to the subcontractor he would gladly organise the additional staff member but he was reluctant to do so as other people appeared to be doing more with less.

67. That evening Mr Neal emailed the Claimant, Mr Yohane, and Mr Roberts (copied to Mr Bacon) and said there would be a directors' visit on Thursday and asked them to ensure they were in the best possible position. Mr Neal set a list of tasks for the Claimant, Mr Yohane and Mr Roberts and said he expected them to be able to demonstrate that they were organised. We also understand that on 9 June Mr Neal had attended the site and directed it to be closed for an hour and he required the Claimant and Mr Yohane to go outside and to tidy it up which they found belittling in front of more junior workers on site. We found this decision to require both Site Managers to undertake this work was an indication of performance concerns on the part of Mr Neal.

68. That same evening at 20:17 on 13 June the Claimant sent Mr Neal an email entitled "2nd labourer." The email was copied to Darren Thomas the Commercial Manager and also Mr Yohane. In the email the Claimant listed thirteen bullet points which he said were a breakdown of reasons for a second labourer due to scope gaps. The reference to scope gaps means matters not in the contract. The email does not include any specific concerns about compliance with legal obligations or any specific risks to health and safety. The email says walkways constantly changed "hence the requirement for a labourer to be focused directly on this", and the Claimant went on to list the various tasks that the additional staff resource could be engaged on. Mr Neal did not reply to this specific email.

69. The Claimant subsequently sent to a reply to Mr Neal's earlier email in which he said that they would require a second labourer to get on top of all the housekeeping and to get to the standards required for the Thursday directors' visit. The Claimant said that they could do with 3 labourers *"to get us back to where we need to be, as we are still currently still two sites."* Mr Neal replied to the Claimant and repeated his earlier comment about needing to complete a notice (which is a charge to the subcontractor) in order to get another labourer.

70. The Claimant has complained that Mr Neal did not respond to his emails. During his evidence it was put to the Claimant that Mr Neal had in fact replied to some of them as we have just identified. The Claimant appeared to accept he had replied to some but said that the responses were not valid responses. It was also put to the Claimant that he did not expressly mention health and safety to which the Claimant said he was reiterating things again and again and trying as best as he could.

71. On 14 June Mr Ross emailed the Claimant, Mr Yohane, Mr Roberts and Mr Neal to raise concerns about health and safety matters at the site including the site gates having been left open and a small child less than 50 yards away, and pedestrian and plant segregation was very poor with lots of trip hazards in pedestrian areas. The Claimant emailed Mr Neal that evening at 22:27 to ask for a further two managers to help cover the site as relief as he said that there were only two there at present. The Claimant said that this was due to Mr Ross' email and he suggested taking time off in lieu as an alternative. We note that the Claimant said site in the singular not the plural. It was put to the Claimant in cross examination that he had not mentioned health and safety to which he replied in principle it was about that.

72. It is alleged that around this time Mr Neal had told Mr Yohane to tell the Claimant to get back in his box. The Claimant could not recall in his oral evidence when it was said or if he witnessed it. Mr Neal has been consistent in denying that he said it, and Mr Yohane said that Mr Neal had been annoyed with the Claimant for asking for more resources. There is a lack of clarity on when it is alleged that Mr Neal said it. At most we have one person who says the comment was made, and a second person who denies saying it. We have again looked to see whether we can possibly draw an inference but note that we have found both Mr Neal and Mr Yohane to have been honest and candid in their evidence before us. None of the

contemporaneous documents suggest any hostility from Mr Neal towards the Claimant, and his requests for additional resources were politely responded to. We again rely on the burden of proof, noting that it is for he who alleges to prove, and accordingly we find that the comment was not made.

73. On Friday 16 June 2023 at 12:49pm the Claimant emailed Mr Neal to chase up a reply to his earlier email and he said *"Unfortunately both me and Peter are unavailable this weekend to work (due to family commitments) – can you please organise alternative Saturday cover."* We observed that Mr Neal did not remonstrate with nor seek to force either of them to work and instead decided that the site would need to be closed on the Saturday. This email was one of the factors we took into account as regards our finding that Mr Neal was the Claimant's line manager.

74. The facts of what subsequently happened on the afternoon of 16 June 2023 are a matter of some dispute and some confusion. We have been provided with explanations from the Claimant as to what happened, some of which were not given to the Respondent at the material time, either in the disciplinary or the grievance appeal processes. In addition the Claimant's explanation is similar but not identical to that of Mr Yohane. We have therefore made the following findings based upon the contemporaneous documents, the witness statements and what we inferred from hearing the oral evidence.

75. On the afternoon of 16 June Mr Yohane asked the Claimant to attend to some customer care work at Morton Park. The Claimant left Towergate at around 3:40pm and went by car to the south end where he undertook some tasks including renovating a bath panel. The Claimant then left Morton Park to return to Towergate by car. As the Claimant approached Towergate he observed Mr Yohane outside of the site, he pulled his car over in the street, the Claimant got out of his car and they spoke whilst the Claimant smoked a cigarette, and between them they agreed to go to KFC for some lunch as they had not had a lunch break that day. KFC is directly opposite the site and is around a 3 minute walk. Both then went to KFC and ordered food and they sat in the Claimant's car to eat it whilst Mr Yohane made a number of telephone calls.

76. In his oral evidence before us the Claimant confirmed that he had not checked the signing in sheets before he left the site that day and as such he did not know the exact number of contractors on site at the point he left. The Claimant accepted that when he left there were bricklayers working on scaffolding however he said that they were only working at ground level. It was put to the Claimant that they could change platforms at any time (which meant they could go higher) to which the Claimant said *"I wasn't there."* The Claimant acknowledged in his oral evidence that power tools such as a drill were being used at that time. The Claimant also said that it was his idea for he and Mr Yohane to go to KFC together and that he said *"I'm hungry, I've not had a break, let's go."* Mr Yohane's evidence was different, he says he was the one who suggested going to lunch. Mr Yohane was asked about the timings but told us he did not know as he wasn't looking at the clock.

77. The Claimant said in his oral evidence that he deemed it a minimal risk by them leaving the site because there was one dry liner left on site and Mr Ross who he said was a competent individual and he would have called them as they had had the rapport.

78. Mr Neal and Mr Bacon had arrived on site at or around 4:05pm that day in order to discuss Mr Yohane's performance with him. A meeting had not been scheduled however they were in the area and decided to visit unannounced. At the time of leaving site with Mr Yohane the Claimant did not know that Mr Neal and Mr Bacon were due to arrive. Given what we have read and heard about the concerns about Mr Yohane's performance, and also the email exchange between Mr Neal and Mr Bacon about the Claimant's attitude, it appeared to us that this visit at that time of day on a Friday was to check up on them both due to performance concerns.

79. Mr Neal and Mr Bacon spoke to Mr Ross on their arrival as he was leaving the site and he informed them that the Claimant and Mr Yohane were doing customer care. Both finished speaking to Mr Ross and proceeded to the compound which they reached by approximately 4:10pm and they found the compound and the offices were empty, there were no site team members cars present, and they noted that there were some bricklayers on scaffolding and dry liners working in some plots.

80. Mr Yohane telephoned Mr Neal at 4:13pm. Mr Neal asked Mr Yohane where he and the Claimant were and he replied at KFC having lunch. Mr Neal told him they were to come back to work. Mr Yohane made a number of other calls before both of them returned to the site at around 4:35pm. In his appeal statement the Claimant had said that the call was made whilst at KFC and they then left immediately, although when it was put to him in cross examination they had not left immediately the Claimant said it may have been a dramatised version and he apologised.

81. The Claimant's oral evidence was therefore slightly at odds with his own his witness statement as he said he was not wearing a watch and he could not be sure about the timings, although he accepted that an account he gave about returning at 4:20pm was clearly wrong and it could have been 4:30 – 4:35pm.

82. Upon their arrival Mr Neal directed the Claimant to close the site and both Mr Neal and Mr Bacon then spoke to Mr Yohane about why they had left site and he explained that the Claimant had left to get some lunch and he decided to join him. Mr Neal and Mr Bacon did not speak to the Claimant about having left the site at that time.

83. We find that both Site Managers, the Claimant and Mr Yohane, had left the site without a Site Manager present during operational hours. Accordingly the Claimant's argument which we referenced earlier, that there were two sites, is what might be described as a red herring or at least irrelevant as there were two Site Managers but both of whom left site in the knowledge that there was not any Site Manager "on site" irrespective of whether that was one site or two.

84. The Respondent has argued that the Claimant introduced in these proceedings a number of new defences for his absence on 16 June 2023, including that he had permission from Mr Yohane. The Respondent says that this was not advanced by the Claimant during his disciplinary process, however we have identified that some reference was made to this argument within the disciplinary appeal hearing, save that the notes do not record the Claimant as saying he had permission from Mr Yohane, they simply record him as saying he had permission and the implication is that he was saying it came from Mr Yohane.

85. In any event, we reject that evidence as it was clear that Mr Yohane was not his line manager, and even if he was he would not have had authority under the Specification to agree that both Site Managers could leave the site at the same time. In addition Mr Yohane's evidence was at odds with the Claimant's as he was asked in his oral evidence if the Claimant had sought permission to leave site to which he appeared to express surprise in his answer as he said that he would not expect the Claimant to seek permission.

86. The Claimant also provided evidence to us that he thought that Mr Neal had given permission to Mr Yohane and the Claimant to leave the site. Again this was something which had not been raised before and we also reject that evidence as Mr Yohane did not suggest that this had happened and it was not put to him by the Claimant.

87. The Claimant also argued before us that the site was not left unattended, not simply because Mr Ross was there but also because Mr Neal and Mr Bacon had arrived, although in oral evidence he admitted that he did not know that they had arrived unannounced. Mr Ross was not a competent Site Manager, he was the Group Safety, Health and Environmental Advisor, and in any event the Claimant had not complied with the Specification by discussing his absence with his line manager Mr Neal in advance, and accordingly we find that he left the site unattended in breach of the Specification.

88. In his closing submissions the Claimant has introduced a further variation on the above which was that it was Mr Yohane who was to blame as it was the Claimant who decided to go to lunch first and then Mr Yohane had decided to follow him, and therefore it was Mr Yohane who should be blamed and not the Claimant. We reject that submission as it was clear from the evidence of both the Claimant and Mr Yohane that it was upon the Claimant's return to Towergate from Morton Park that they both agreed to go together. Whereas their evidence was contradictory as to who asked who, the fact remains that they chose to go together.

89. That day on 16 June Mr Bacon sought HR advice from Mr Donovan in HR however he was on leave.

90. On Sunday 18 June Mr Bacon emailed Mr Ross to ask for some clarity about what happened and he indicated in his email that the site had been left unattended for around 30 minutes. Mr Bacon asked Mr Ross to confirm if he had been asked to look after the site. Mr Ross provided a very brief reply in which he said:

"I thought they'd both gone to do some customer care. I wasn't asked to stay and look after sites. I don't know what they thought I was doing. Other than that, I can't remember, I'm afraid."

91. It was clear that Mr Ross was leaving the site at around 4:05pm in the belief that the Claimant and Mr Yohane were on site. The email from Mr Bacon is of importance to the chain of events in this matter and to the issue of causation. The contemporaneous documents show that by 18 June 2023 Mr Bacon had formed a view that the site had been left unattended by the Site Managers.

92. Mr Bacon spoke to Mr Donovan on Monday 19 June who then referred the matter to his manager Ashton Tame, Head of HR Operations, as well as to Mr Sims the Managing Director. The decision was made not to suspend either of them but to proceed with a disciplinary process. A fact finding investigation was not undertaken on the basis that that the Respondent considered that it was already in possession of the key facts from the two Build Managers (Mr Neal and Mr Bacon) that both Site Managers had left the site without a Site Manager present.

93. On 20 June 2023 Mr Neal and Mr Bacon met with the Claimant and Mr Yohane to inform them that a disciplinary hearing would be arranged to discuss why the site was left unattended and unsecured on 16 June 2023. Mr Donovan from HR provided advice to Mr Bacon and we have been referred to the draft bullet points he prepared for use in that conversation. During the meeting the Claimant asked whether this was P45 time. The Tribunal formed the view that by making that comment the Claimant appreciated the seriousness of the situation.

94. Mr Neal was asked by HR to produce a witness statement which he did on 21 June, however Mr Bacon was not asked to do so until it was later requested by Mr Yohane for use in his disciplinary hearing. That statement from Mr Bacon was not provided to the Claimant until these tribunal proceedings. We were provided with two versions of Mr Neal's witness statement, however they are identical save for very minor differences. The first version records:

"Peter when asked in the initial investigation how he came to be with Jamie he confirmed Jamie was leaving to go and get some lunch and decided to join him and left the site unattended."

95. The second version records:

"Peter when asked in the initial conversation on how he came to be with Jamie, confirmed Jamie was leaving to go and get some lunch and he decided to join him and as a result they both left the site unattended."

96. The difference between the two is minor. The first refers to an investigation and the second refers to a conversation. The other difference is in the inclusion of the words "and as a result they both left the site unattended" whereas in the first version it is referring to Mr Yohane leaving the site unattended. It was not explained by the Respondent who made the change

as Mr Neal could not recall doing so but he maintained he drafted his statement himself and he stood by the contents. It did not appear to the Tribunal that there was anything untoward in the changes which had been made as it was accepted that there had not been an investigation, and both the Claimant and Mr Yohane had left the site. At most it appeared to be a simple clarification which we find Mr Neal made but has since forgotten.

97. The statements of Mr Neal and Mr Bacon are consistent and refer to ongoing construction work on site. Mr Neal said that there were bricklayers on scaffold plots 96 and 97 and dry liners working in multiple plots, whereas Mr Bacon said that there were groundworkers and operatives on a scaffold.

98. On 21 June 2023 at 9:16am the Claimant emailed Mr Neal and the title of the email was *"Towergate 3rd Labourer & Gateman."*

"Hi Gary, we need your support on this. I appreciate the prelims are exhausted, but we need to be able to maintain the health and safety on site and smooth operating of the site. The amount of cleanup notices issued and going forward will more than cover a 2nd and even a 3rd labourer. The 3rd labour is critical at this time to overcome the housekeeping issues and to reclaim the site back to the presentation required by Crest. We have a 2nd labourer to use for scope gap items in the 1st labour is used for welfare, banksing the forks and general site logistics. I would also like to put it on record I believe due to such a close public interface we should have a full time gateman, as there is very little presenting a member of the public entering site. In addition to controlling the signing in and out, as a present you have to walk the whole construction site before signing in at the compound. This is all wrong."

99. There was no reference in that email to any legal obligations nor any specific or sufficiently detailed endangerment to health and safety. The email, like the email string below it, appeared to relate to discussions about resourcing. The Claimant admitted in his oral evidence that he had not mentioned legal obligations in any terms.

100. A formal invitation to the disciplinary hearing was sent to a Claimant on 23 June 2023. The Claimant was notified that the allegation was:

"Allegedly leaving site along with your fellow site manager, resulting in no qualified Crest Nicholson personnel being present on site, which could potentially constitute a serious health and safety breach on a number of grounds."

101. The Claimant was notified that the allegation was potentially a gross misconduct offence for which he might be dismissed, and he was notified of his right to be accompanied and he was provided with a copy of the statement from Mr Neal and other documents, and he was advised that he could provide copies of documents he wish to be considered as well. The hearing was listed to take place on 27 June which was four days later however that did not take place as the Claimant raised a grievance on 25 June. Mr Yohane filed a grievance the following day, and both are very similar but not identical. The hearing was intended to be chaired by Mr Bacon.

The Claimant's grievance

102. The Claimant's grievance is a five-page document. Under the heading of "Concerns with work environment and H&S" the Claimant said that he had been on leave due to stress caused by the excessive pressures and workload placed on him.

103. Under the heading of "Management of my stress condition upon my return to work" the Claimant complained that no additional staff had been considered to help assist him in his role, and when he left a previous project he was replaced by two managers which he said showed that the site was not compliant in terms of health and safety. The Claimant said that he had been trying to keep up with demands but was returning to *"unhealthy habits such as late night working, to try and keep up to the work demand set out."* The Claimant alleged he had been bullied into working weekends and the pressure to do so had built up to an unhealthy work environment and stressful lifestyle. The Claimant complained that Sunday working was becoming a normality but there was no effort to provide him with any day in lieu so there was no benefit to working on the weekends so he was being asked to provide free labour. The Claimant also said he had witnessed inappropriate and derogatory comments being made by his line manager whom he had said had called people lollipops and clowns.

104. The Claimant said the situation was complex and confusing as to who was officially in charge of the two sites with conflicting statements from his line manager about who is in the lead role managing the project and he had not been added to the CPP. The Claimant said that he and Mr Yohane had been required to be on both sites concurrently which meant there were instances where one or the other sites have not been attended by either of them and they had only followed the practice applied by the Respondent in allowing competent staff for example long-term full-time trainees or labourers to assist in covering the management of the site when required. The Claimant said that on 23 June he and Mr Yohane were required to do labouring all day which left trainees running the sites.

105. Under the heading of *"Insufficient prelims to facilitate a H&S compliant site"* the Claimant said that there were insufficient resources to ensure health and safety compliance, and that when he had requested additional labour he had been told to get back in his box. The Claimant repeated much of the contents of the email from Mr Ross about site gates being left open with service trenches and plant operating in the area with a young child present within 25 metres, and he said that the site team would be exposed if there were any fatalities or injuries to the public.

106. The Claimant alleged that there were double standards in that *"when on one hand, when it suits we can be penalised. Yet when there is a cost element involved it becomes negated or brushed under the carpet. As the site management presence, H&S ultimately falls on our shoulders, but the stress is caused when we are not given the tools to succeed and this falls in line with the demands in our business role in general."*

107. Under the heading of "disciplinary process not followed" the Claimant said that there had been no investigation and he queried how the length of their absence from site had been calculated.

108. The Claimant alleged that on 16 June a trainee site manager had been utilised to cover a separate site and who was told to leave the site 30 minutes before a manager arrived on site, and that this was not an isolated incident and that he could cite many times when sites were left without a manager present or just solely trainee supervision.

109. The Claimant made numerous references to not being afforded time for breaks, and that for the week of the incident he and Mr Yohane had only one break. The Claimant said *"the whole disciplinary process is caused by the need to have a lunch break after a week, without having a break. This is not helping with my recovery from stress."* We note that at this time the Claimant did not suggest that the disciplinary was due to having made a protected disclosure.

110. Under the heading of "The demands of the business to succeed, within my role set out" the Claimant listed some of his duties and said *"To perform effectively within our roles, the hours within our contracts do not allow us to perform to the tasks set out."* The Claimant complained about constant meetings and audits and said it was rare to non-existent and feasibly impossible to get a break. The Claimant further alleged that stress had been caused by having to work consecutive weekends and 2am starts. The Claimant also referred to poor staffing levels and repeated his earlier comments about using trainees to cover sites and said that there were no assistant site managers at Towergate/Morton Park to ease the burden of Site Managers.

111. Under the heading of "micro-management (Bullying) in position" the Claimant repeated earlier comments about feeling bullied by way of multiple meetings which made it impossible to complete tasks, being harassed to get tasks completed and then a flurry of tasks with no time to complete them. The Claimant mentioned bi-daily walkarounds which could take over a third of a day, and this meant that when things had not been achieved it would be necessary to work late nights. The Claimant also complained of exclusion from meetings and being made to fear for his job.

112. Under the heading of "fractured foot incident" the Claimant complained about being made to walk around with a broken foot on site for two hours and that this highlighted that the Respondent was more interested in the production element of work rather than the human aspect of their employees' well-being (this was in the plural). The Claimant also complained about being forced to return back to work too early during his sick leave for the broken foot.

113. We note that within the grievance the Claimant provided his first version of the events of 16 June 2023 where he said that by taking a break on 16 June he was doing nothing more than could reasonably be expected and he left the site for a short time to cover an adjacent site during which time the site was manned by a Crest Nicholson employee in collaboration with a trade contractor supervisor which was deemed minimal risk to the

public and the site. In the hearing the Claimant said the Crest Nicholson employee was Mr Ross.

114. The Claimant's disciplinary hearing was postponed pending consideration of his grievance. On 26 June 2023 a separate employee who shall be referred to as Employee A was suspended pending an investigation following allegations that they had opened and worked on a site on the bank holiday in breach of planning restrictions, resulting in a planning enforcement officer attending the site, and leaving the site unattended with no other Crest Nicholson employee on site or risk assessment carried out to identify a subcontractor with SMSTS certification to be responsible in their absence.

115. When asked why Employee A was suspended and the matter was investigated, the Respondent's evidence was because part of the allegation came from a third party therefore it needed to establish the facts, whereas in the case of the Claimant and Mr Yohane it already had the facts as Mr Neal and Mr Bacon had found the site unattended.

Claimant's grievance hearing

116. The Claimant attended a grievance hearing on 3 July 2023 which was chaired by Elaine Streeter, Sales Manager, and she was supported by Ms Tame. Mr Yohane accompanied the Claimant. During the hearing the Claimant was able to speak freely and fully about his grievance.

117. The Claimant explained that he had previously been off sick with stress for three weeks which he attributed to his working pattern and he said *"I got to me, did 19 days straight, get in at 2am and leaving at 7am to get in."* The Claimant said he had to put the hours in as he did not want to fail, however he had to chase for a return to work meeting and his reintegration felt causal and he was asked to work that weekend and found himself doing late nights again. The Claimant said he was working until 9 at night to keep up with job demands, he was forced to work over his hours and was expected to work on Saturdays but a day off in lieu was refused. The Claimant complained of derogatory comments such as "clowns" and "lollipops", he said it was confusing who was in charge at Towergate, and he said *"From H&S perspective don't know who is in charge if anything did go wrong."* The Claimant referred to there being only two managers and if you are on site alone it means you cannot leave the site. When Ms Tame asked the Claimant about taking breaks he said that the tradespeople wouldn't leave him alone if he was in the site office.

118. The Claimant also said that standards were not correct at Towergate and *"We will be held responsible for anything that happens on that site but not given the tools to do it."* The Claimant said that he had asked for forklift drivers, an additional labourer and a gateman and that there was an occupied property right by the site gate, they had been told to tell the trade people to shut the gate, the Respondent expected the lorry driver to open the gate and shut it, and *"Anyone, a kid, could wander up in front of the gate."*

119. The Claimant said he had been told by upper management there was no money to cover it and to make do with what they have got. The Claimant said *"if I'm going to prison for something, need to do something about it, I lose sleep over this. It's everyone's responsibility. Don't know who is the senior role on that project right now. It's chaotic. Chaos brings stress, I like order."*

120. The Claimant also referred to the disciplinary process and complained about the lack of investigation, the allegation of gross misconduct was excessive, and he said it was linked with "us" (by which he meant he and Mr Yohane) not opening the site the Saturday before (on 17 June 2023). We again note that on this occasion the Claimant did not attribute the disciplinary to having made a protected disclosure, rather he said it was not working on 17 June 2023.

121. The Claimant also said *"No time in the week for our legally entitled break."* The Claimant said there was a lack of breaks which had a negative effect, micromanagement was making his job impossible to achieve, his reputation was in tatters because he wanted to have a break, and he repeated that he did not think the Respondent had got the right amount of staff.

122. The Claimant said that Mr Neal was a very challenging person to work under with comments being made about the Claimant going bald, being a wobbly head, being a big drinker, which he said was ridiculing and demeaning. The Claimant said that his job security had been threatened by Mr Neal and Mr Ackerley previously. The Claimant said he had been made to do a walk around with a broken foot, and when he was off sick he had received text messages and calls trying to get him back to work which he said was bullying and harassment and that he returned to work before his doctor's note had expired.

123. The Claimant was asked what outcome he was seeking from the grievance to which he replied that policies needed to be reviewed and adhered to with training for managers on how to follow policies, and also a change in culture at the business.

124. After the meeting Ms Tame emailed the Claimant to discuss a return to work at a different site in order to reintegrate him into the business. The Claimant sent a succession of emails on 4 July 2023 in which he expressed dissatisfaction with the grievance process in particular because it did not consider the disciplinary process. The Claimant repeated earlier comments about working weekends and unpaid overtime. The Claimant also declined the suggestion of mediation which had been raised by Ms Tame in the grievance hearing. The Claimant sent a separate email in which he listed what he described as a breakdown of failures. Many of these related to the disciplinary process and he also alleged that Mr Neal should also be charged with misconduct and he also referred to Mr Neal putting a trainee site manager in charge of another site as cover, and then telling him to leave the site unattended.

125. The Claimant then provided a slightly different explanation of his absence and said that they had not been able to take a lunch break and that

following the inspections and meetings they had informed Darren Ludgrove (a Crest employee) and a DFC foreman that they would be absent for part of the day and that they had the means to contact them if needed. The Claimant said that they left at 4pm and returned by 4:20pm. We note that during the Tribunal hearing the Claimant argued that an investigation should have taken place to ascertain the timings of when he left site however he also told us that he had not worn a watch so would not be able to tell us the timings.

126. On 4 July 2023 the Claimant was provided with the grievance hearing minutes for comment and he was notified that he would not be suspended but would remain on paid leave pending the grievance.

127. On 7 July 2023 the Claimant emailed Ms Tame and Ms Streeter with a document entitled grievance meeting Expanded Points. This is a very detailed 11 page document in which the Claimant provides comments or proposed amendments on the grievance minutes together with additional detail about the matters he was complaining about. The Claimant set out some of his employment history with the Respondent including things which occurred on other sites which do not form part of the subject matter of this claim. The Claimant clarified that when he transferred to Verla under the management of Mr Ackerley he worked 19 days straight with multiple days starting work at 2 am in the morning and leaving at 7 pm at night or later on occasion.

128. The Claimant repeated earlier comments that upon his return to work from sick leave with stress he was expected to work the following Saturday and he said *"so it felt like I was almost bullied into doing the Saturday through guilt imposed by my line manager."* The Claimant said he was forced to do late walk around with Mr Ackerley which would excessively exceed his contractual hours, and he complained that he had not been gradually reintegrated into the workplace. The Claimant said that the workload caused him stress and anxiety.

129. The Claimant cited four alleged breaches of the Respondent's Stress Policy which centered around unreasonable time pressure and deadlines and long hours. The Claimant suggested that the effects of stress upon him were apparent but line management had taken no action.

130. The Claimant referred to his weekend working and said that the Stress Policy provided that proactive steps should be taken to avoid creating stress at work and employees should never place unnecessary additional pressure upon themselves to work unacceptable hours. We noted that the latter part of this comment related to duties upon the employee not the employer.

131. The Claimant repeated earlier complaints about comments being made about him by Mr Neal which he said were in breach of the Respondent's Anti-Harassment and Bullying Policy and he complained of micromanagement and the requirement to work excessive hours to catch up. The Claimant repeated his allegation of unrealistic targets and he complained of insufficient labour being provided. The Claimant complained

that he and Mr Yohane were asked to clean the compound which he said could have been done by additional labourers and he found it undermining.

132. The Claimant made reference to the events of 16 June 2023 and said there had not been a thorough investigation and he said that Mr Neal had previously told a trainee to manage the site on their own and had even asked them to leave that site unattended for half an hour until the next manager arrived. The Claimant said that this highlighted selective application of the policy or maliciousness by Mr Neal and Mr Bacon, and that the disciplinary process was instigated by the refusal of him and Mr Yohane to work on a Saturday. We again noted that the Claimant did not attribute the disciplinary to having made protected disclosures.

133. The Claimant repeated earlier complaints that he worked overtime on his first week back from sickness absence for work related stress.

134. The Claimant said there was confusion as to who was nominated to be in charge of Towergate and Morton Park and he said whilst they are in close proximity to each other they were separate sites. The Claimant said Mr Yohane was the Senior Site Manager and the incumbent project leader at Towergate however Mr Yohane had told him that Mr Neal said that the Claimant was to be in charge of Towergate and that Morton Park had not been discussed. The Claimant said the CPP had not been updated to reflect his arrival, and that the Morton Park CPP showed Mr Neal to be both the lead Site Manager and Build Manager for the site.

135. The Claimant said *"More significantly however is that the CPP is a document that demonstrates responsibilities under Health and Safety at Work legislation (Construction design and management regulations 2015. If there was a serious accident or worse still, fatality on the Morton Park project whilst Gary Neal was absent this would be deemed by the HSE as a serious breach of CDM regulations 2015."*

136. The Claimant mentioned "insufficient prelims to facilitate continuous weekend working" which was a reference to insufficient staff resourcing. The Claimant asked that as trainees were deemed to not sufficiently competent to supervise a site on their own, what provisions were in place to cover a site when Site Managers are on mandatory training? The Claimant said there were numerous instances where there had only been one Site Manager on the project and no consideration had been given as to how he or Mr Yohane could supervise both sites when the other was on a course or offsite for meetings or on leave.

137. The Claimant said in previous companies he worked at he would be paid time and a half for Saturday working and there would be two managers which would facilitate the allowance to have a legal 30 minute break. The Claimant also asked if a Site Manager worked on the weekend how could they have a break if they could not leave the site unattended? The Claimant said if he tried to have his lunch in the office he would be disturbed by people which meant technically he would never get a break, and that the set up did not facilitate having a 30 minute break away from site.

138. The Claimant said they were being penalised for health and safety on site due to not being provided with sufficient resources to manage a safe site however the Claimant did not indicate what these health and safety functions were. The Claimant said an additional labourer had been requested to allow housekeeping and general site logistics to be improved. The Claimant referenced short staffing and having to pay for a professional clean for the welfare toilets because of insufficient labour to complete these works. The Claimant said *"it is not fair that trades and managers must go to work each day and not even the basic requirements for clean welfare area provided to them due to restraints on the prelims. This is a minimum requirement under the Health and Safety at Work Act 1974."*

139. The Claimant said that an additional forklift driver had not been provided but as the previous two forklift drivers had left the site in disarray this was required for site logistics to continue on site and retrospective tidying and enabling works to bring the site to an acceptable standard.

140. The Claimant also said *"as outlined the Gateman was requested due to the ever present concerns of the proximity of nearby occupied properties with children in them. We were informed to tell the trades to close the gate after them, but to police this is virtually impossible. I do not have to remind that the HSE deemed there to be a high level of care required when working close to the public. We also explained that a gate man could perform the duty of signing in vehicles and pedestrians. At present the signing in book is in the main compound. Therefore, all pedestrians/vehicles must enter into a live construction site prior to signing in. Therefore, how can it be possible to track the movements of individuals on site and control site correctly?"*

141. The Claimant said that in response to request requesting resources he had been told to get back in his box by Mr Neal and the upper management had responded there was no money to facilitate this. The Claimant said he had said you cannot put money over health and safety and that health and safety concerns were not being dealt with promptly. The Claimant said that money was seemingly superseded any pressing health and safety concerns and the stress and anxiety caused by the lack of action left him worrying that if an accident occurred on site would he and Mr Yohane go to prison. The Claimant said he had been left with insomnia and panic attacks about this.

142. The Claimant again referred to the disciplinary process and said there was a maliciousness in how it came into being, and he repeated that the workflow did not allow "us" (which we understand to mean the Claimant and Mr Yohane) to take the contractually entitled 30 minute break. The Claimant repeated there was a lack of breaks and seemingly insurmountable workload creating an environment of stress and anxiety. The Claimant said "*The only time we managed to get a break was at 4 pm that day. By that time on a Friday afternoon there were only a handful of operatives left on site. No high risk activities were ongoing and trusted directly employed labour and subcontractor foreman had been informed of our absence and have means to contact us should they need to."*

143. The Claimant went on to repeat allegations of bullying and being required to do labouring in front of tradespeople and trainees, alleged

comments made about him by Mr Neal such as *"people need to face up to their problems head on, like I do. Not like these wobbly heads"*, constant fear that his job was in jeopardy, being forced to do a walkaround with a broken foot, being required to return to work early from sick leave, exclusion from meetings by Mr Neal. All of these matters concerned the Claimant's own treatment.

144. The Claimant said that a grievance was not his custom and practice but was simply an act of last resort and the culmination of all these issues combined made his position increasingly untenable, and his hope was that the Respondent could change the ongoing failures to administer and manage its own policies. The Claimant said he was afraid to raise grievances before as he had witnessed failings in how the Respondent managed the whistleblowing policy with other site management previously.

145. As regards the outcomes he was seeking, the Claimant listed a number of outcomes including training for upper management on administering various policies including the stress policy; a safe workplace for all employees free from bullying, discrimination and intimidation; a full review of day-to-day site management; management to be paid for weekend supervision; fully resourcing projects to correct staffing levels; assessment of target completions; a review of procedures for return to work; cessation of the disciplinary process; clear communications; improvements with respect to development and progression; reimbursement for days deducted for sick pay; payment of a bonus; ensuring that all employees get their legal entitlement to brakes; and systems to be introduced to ensure staff are not exceeding excessive hours due to pressure applied in the form of unrealistic targets. We noted that these desired outcomes related specifically to the Claimant personally and the Respondent's employees generally rather than the wider public.

146. Ms Tame advised the Claimant she would include the Claimant's document as an appendix to the minutes.

147. We have reviewed the interview notes between Ms Streeter and Mr Ackerley, Mr Bacon, Mr Neal and Mr Donovan and these demonstrate a very thorough investigation of all the matters which the Claimant sought to complain about. Mr Neal was asked a number of questions about weekend working, time off in lieu, and taking breaks. Ms Streeter asked Mr Neal about his view about trainees covering sites and he replied that no trainees were to be left on site unattended as per the recent directive from Mr Ross. Ms Streeter also explored how the tasks of the Site Managers were shared, and she also questioned Mr Neal about whether there was sufficient labour and a gateman, and how the gates were being closed securely. Mr Neal denied saying the Claimant should get back in his box or making comments about stress or his mental condition.

148. In his interview Mr Donovan was asked a number of questions about his involvement and he explained that an investigation had not been needed as Mr Neal had witnessed the Claimant and Mr Yohane arriving in the car so there was a clear allegation, and it had been decided that Mr Bacon could act as the disciplinary chair. There was also detailed consideration of the management of the Claimant's sickness absence from his time at Verla.

149. We note that in his interview Mr Ackerely was asked about weekend working which he said he tried to avoid but due to the industry it did happen and that it should be shared out and he said that the Claimant had offered to do some even when he had said he would rather close the site for the weekend. Mr Ackerely was also asked about taking breaks and he said that managers should be able to take an uninterrupted break and tell people to come back in half an hour unless it was a health and safety emergency. Mr Ackerley was also asked about the Claimant working long hours which he said he was aware of but he did not know why as it was a two man site team, and he said he did not know that the Claimant was suffering from stress until he went sick. Mr Ackerely was also asked about the management of the Claimant's sickness absence and his return to work.

150. We have also read the interview notes with Mr Bacon and he was asked about the circumstances of 16 June where he confirmed that upon arrival the site was left without the Site Managers, and he explained that he did not expect the same manager to be working every weekend as it would mean that there was something wrong if so. It was clear from Mr Bacon's interview that overtime was common but it was not paid and that time off in lieu was possible and that it would be agreed or arranged informally. Mr Bacon also said it was possible to take an uninterrupted thirty minute break and that trades people could be told to come back later.

Claimant's grievance outcome

151. The Claimant was sent a detailed grievance outcome letter on 1 August 2023 in which he was notified that his complaints about his return to work following his fractured foot and his absence due to stress could have been handled more consistently, and recommendations were made for ensuring a consistent approach in future and recognising signs of stress. We noted that Ms Streeter did find that pressure had been applied to the Claimant to return to work following his foot injury and that action ought to have been considered had the Build Manager remained employed. These allegations were partially upheld.

152. Whereas the remainder of the complaints were not upheld, informal recommendations were made with respect to Mr Neal's communication and that the Build Director should have a conversation with him as to how he handled some situations referred to in the grievance. We understand those related to site walks and the manner he spoke to staff. It was also recorded that Mr Neal acknowledged that he could have been clearer as to the division of duties with the Claimant discharging instructions to subcontractors and Mr Yohane dealing with meetings and reporting. Ms Streeter also found that a disciplinary investigation had not been needed although communication on the process could have been better.

153. We noted that Ms Streeter specifically addressed the issue of breaks and said:

"There are not set break times, it is with a site manager to manage their diaries and time in their day accordingly. It is taken that if a site office needs

to be closed in order for a break to be taken, this is acceptable except in specific circumstances where a H&S risk might be imposed on site."

154. Within the outcome letter Ms Streeter recommended steps be taken to reintegrate the Claimant back to work however this was rejected by the Claimant the following day. We also noted that Ms Streeter restated the offer of mediation. We were also provided with a copy of the investigation report which goes into further detail as to how the outcome was reached and the factors which were taken into account. We noted that Ms Streeter addressed the Claimant's assertion that there was insufficient resourcing for ensuring the site gates remained closed and she referred to a yellow card system which we understand Mr Neal had already identified as a solution.

Claimant's grievance appeal

155. The Claimant filed his appeal on 7 August 2023 and this was a detailed five page letter in which he challenged the findings. The Claimant repeated his earlier complaints about being forced to walk around with a broken foot and the handling of his return to work, and whereas the Claimant said that this was an example of the business culture and he said there was a lack of thought about employees' (in the plural) wellbeing. The Claimant also challenged the outcome with respect to his complaints about insufficient resources or prelims to facilitate a health and safety compliant site, however this consisted of alleging that there had not been adequate investigation other than with respect to provisions of a gateman, and that he had highlighted that there were insufficient arrangements for management, labourers, banksman, a slinger, signallers, and external cleaners. The Claimant repeated that commercial cost seemed to outweigh health and safety and he asked how this had been addressed and he said that these were the causes of his stress.

156. Whereas the Claimant's evidence to us was that he told the Respondent that imposing regular and/or long working hours the Respondent was failing to ensure a safe working environment with regard to defining and dealing with stress at work, we find that he did not make such a comment in his grievance nor did he use words to that effect. The Claimant did however allege specifically that excessive working hours and work pressure were the reason for his mental breakdown and he asked *"Does the company not have a responsibility to ensure a safe working environment?"*

157. The Claimant repeated earlier comments about confusion as to who was in charge, he agreed that the system may record him as Site Manager and Mr Yohane as Senior Site Manager there was confusion and misunderstanding as to the hierarchy which he attributed to poor communication from Mr Neal.

158. The Claimant responded to Ms Streeter's finding that the site office may be closed in order to take a break, and the Claimant said that this was just an ideology and he went on to suggest that everyone would need to be removed from site for it to be shut and locked for this to happen, however we observe that was not what Ms Streeter had said in her outcome report.

159. The Claimant's appeal was allocated to Sebastian Skinner, Associate Strategic Land Director, to deal with and he was supported by Trudy Joyice from HR. Whereas The Claimant asked for a meeting to discuss his appeal, Ms Joyice informed him that it was not always necessary to hold an appeal meeting unless points of clarification were required.

160. On 10 August 2023 Mr Ludgrove reported that a forklift had reversed into his car which had been parked outside the compound fence at Towergate whilst the took his break.

161. On 15 August 2023 the Claimant emailed Ms Joyice the material he sought to rely on and this included the correspondence he sent during the grievance process. The Claimant included a detailed eight page document entitled stage one investigation meeting minute response. Within that document the Claimant went over each of the grievance interviews in considerable detail and provided his own comments. The Tribunal noted that the Claimant alleged that when Mr Neal and Mr Bacon arrived both he and Mr Yohane had been on client care jobs at Morton Park and had they taken the time to ask them they could have avoided erroneous gross misconduct proceedings. The Claimant alleged he had not had an opportunity to explain his side of events although we note that the disciplinary hearing had yet to take place as it was postponed pending the grievance process. The document repeated many of the Claimant's earlier complaints about his treatment, breaks, working hours and resourcing. The Claimant provided further evidence on 15 and 16 August 2023 including correspondence where he had asked Mr Neal for additional labourers.

162. On 18 August 2023 Mr Skinner interviewed Ms Streeter in order to clarify the reasoning in her decision with respect the grievance from the Claimant and Mr Yohane. This meeting was minuted and Ms Joyice attended that meeting. Mr Skinner examined the allegation about insufficient resourcing and said that he could see that options were discussed including a yellow card system and that additional staff were offered, and Ms Streeter said that where concerns had been raised they were not ignored or batted away and there had been offers of help. Mr Skinner explored the issue of a disciplinary investigation and Ms Streeter said that the incident had happened on the Friday and the Claimant and Mr Yohane were told on the Tuesday that there would be a disciplinary case to which Mr Skinner said that both would have the chance to explain their version in the disciplinary hearing.

163. The issue of weekend working was also explored and Ms Streeter said that it was clear that there was flexibility in weekend working and that the Build Managers were consistent in offering time off in lieu but there wasn't any evidence of being forced to work at weekends. Ms Streeter indicated that Mr Neal felt that Site Managers were taking advantage of time off in lieu and he had removed the offer but there was no evidence of any request for it having been refused. Mr Skinner also considered whether there was some ambiguity in job titles which he thought were clear to which Ms Streeter replied that Mr Neal had made it clear that there was no ambiguity.

164. The issue of the Claimant's stress and weekend working was considered, and Ms Streeter advised that there may have been flags for Mr Ackerley to have addressed however there was no evidence of the Claimant being forced to work weekends to which Mr Skinner noted that Mr Ackerely had offered to close the site one weekend as there was not vital work to be done whereas the Claimant had offered to work it and Ms Streeter said that the Claimant did not like to say no. There was also consideration of break times and Mr Skinner is recorded as having observed that it would be down to staff to manage their own time, it would be possible to close the office for 20 minutes, and that if there was a health and safety emergency they would be on site.

165. The minutes also record Mr Skinner's observation that the grievances of Mr Yohane and the Claimant were similar, the content was the same with names changed, and he had noted the timing of their emails.

166. We were referred to a copy of the draft outcome decision which contained a number of yellow highlights however it was clear that these were questions from Mr Skinner for HR to advise on.

167. We were referred to instant messages sent between Mr Skinner and Ms Tame between 23 and 25 August 2023 and these messages make it clear that it was Mr Skinner who made the grievance appeal decision and Ms Tame simply provided HR input. One proposed amendment from Ms Tame concerned deleting a reference to the Claimant and Mr Yohane being on different grades. It was the Respondent's evidence before us that the Claimant and Mr Yohane were both grade 6 and we have already indicated that we accept that evidence as it was not challenged during cross examination. Ms Tame was involved in the outcome letter as Ms Joyice was absent, and we found nothing untoward in Ms Tame having done so as it was clear that her role was simply to advise and not to decide. We observed that all three members of the Respondent's HR team had knowledge of the Claimant's grievance and disciplinary and as such would have been aware of the information which the Claimant disclosed in those processes.

168. The Claimant was not interviewed as part of the grievance appeal, and the Respondent says that this was because it would only have been needed if there was anything to clarify and we note that the Respondent's policy provides for a review rather than a rehearing of the whole grievance at the appeal stage.

Claimant's grievance appeal outcome

169. On 25 August 2023 the Claimant was issued with his appeal outcome. This was a thorough and fully reasoned appeal decision comprised of a five page outcome letter accompanied by three pages of reasoning. Mr Skinner continued to partially uphold Ms Streeter's decision regarding the management of the Claimant's stress condition upon his return to work. The allegation about the fractured foot incident was again upheld as there had been a failure to conduct a return to work process for the Claimant. Mr Skinner continued to not uphold the allegation about insufficient resources to facilitate to health and safety compliant site and he

noted that there were ample resources and that a gateman was not a prerequisite on any site.

170. As regards the conduct of the disciplinary process, Mr Skinner reiterated that a disciplinary investigation was not required and Mr Skinner noted that having raised a grievance and subsequent interviews having been conducted, and a general investigation had been completed which provided a platform to raise concerns.

171. Whereas he noted that sites are busy Mr Skinner said it was disingenuous to state that it was not possible to sit in the office for a break and to tell people to come back in half an hour and he said that an agile approach could be deployed whereby small intermittent brakes could be taken throughout the day to ensure there was time to rest and eat. Mr Skinner also found that at no point was anyone forced to work at the weekend and the site would be shut if it had to, and that a fair rota system would always be deployed and he had seen nothing to the contrary in the Claimant's case.

172. Mr Skinner did not find that the Claimant had been bullied and he saw no problem with staff being asked to go out and labour or clear up for an hour once in a while to assist in the site success. Mr Skinner also confirmed that job titles were clear and viewable by everybody on the Respondent's system with the titles clearly signing the hierarchy of the team.

173. There was also consideration of the Claimant's hours of working and Mr Skinner recorded that Mr Ackerley had said that no one should be sending emails out of hours and that if they felt work was getting too much they should shout so that help could be provided. Mr Skinner observed that the Claimant had not been not been pressured to respond in the timeframe that he chosen to do so.

174. The Claimant's allegation that management were using trainees to cover sites was also addressed and it was recorded that Mr Neal had highlighted in his interview that no trainees were to be left on site unattended as per the recent directive for Mr Ross and it was clear that Mr Skinner took this seriously because he said a notable action was that an advisory note should be issued to all site management to ensure it was not happening.

175. Mr Skinner again addressed the allegation of staff working excessive hours and unrealistic targets. Mr Skinner recorded the site management team needed to organise and liaise with one another to ensure the smooth operation of a site and that no one was expected or pushed to work every weekend and had this been the case the Claimant ought to have raised it with management and that the Claimant and Mr Yohane ought to have alternated the weekends rather than being on site at the same time. We noted that Mr Skinner said that new measures could be explored to ensure a fair working routine between site staff but this should be managed on the site by site basis and this would be for Mr Neal and the divisional team to consider on their sites.

176. Mr Skinner also said he noted that both grievances and appeals and the timeline of events were very similar in nature which raised the question of whether there had been any collusion in order to create a narrative by both parties, which he recommended was investigated further as part of the ongoing disciplinary process. Mr Skinner said both grievances were raised post disciplinary notices having been issued which raised the question of why they had not been raised before. In addition Mr Skinner said that a lot of the issues raised within the appeal were questioning the process rather than the events and facts and detail surrounding the grievances themselves which raised his concern as to the integrity of the appeal. Mr Yohane was informed of the same conclusion in his grievance outcome and as such both individuals were treated in the same way.

Claimant's disciplinary hearing

177. On the same date the Claimant was informed that he would be invited to a disciplinary hearing to take place on 30 August 2023 to be chaired by Steve Oliver, Head of Commercial. Whereas the Claimant said he was only provided one days' notice, the letter provided five calendar day's notice of which only one was a working day due to the bank holiday. The invitation letter included details of the misconduct allegations against the Claimant. The allegation about leaving the site unattended had been reworded but it remained abundantly clear that the allegation was that the Claimant and Mr Yohane had left the site on 16 June 2023 and in doing so there was no qualified Crest Nicholson personnel present on site which could potentially constitute a serious health and safety breach on a number of grounds.

178. The Claimant was also advised that he was accused of allegedly colluding with Mr Yohane in relation to the grievance raised after the initial invitation to the disciplinary hearing, and that the appeal manager had concluded after reviewing all the documentation that the grievances and appeals and timeline of events were very similar in nature which raised the question of whether there had been any collusion in order to create a narrative by both of them.

179. A third allegation was included, which simply said potential loss in trust and confidence in you as an employee. It was not explained to the Claimant in the letter that loss of trust and confidence was not a freestanding allegation but rather a consequence of the first two allegations. The Tribunal found that this was poorly worded however it was clarified by Mr Donovan on 29 August 2023 that it was intended to refer to a consequence of the first two allegations. Whereas this caused the Claimant some initial confusion it had been resolved in advance of the disciplinary hearing itself.

180. The Claimant was informed in the letter that this was potentially a gross misconduct offence and that he had the right to be accompanied to the hearing, relevant documents were included save for Mr Bacon's witness statement which we understand was only produced when requested by Mr Yohane and then only provided to Mr Yohane, and the Claimant was notified that he could provide further documents for consideration if he wished. The Claimant was notified that dismissal may be a potential outcome of that hearing.

181. Whereas the Claimant had requested Mr Yohane to accompany him to the disciplinary as he had done in the grievance, this was rejected by the Respondent as a potential conflict of interest as he was also accused of the same misconduct. The Claimant therefore asked for his father to accompany him as a reasonable adjustment. The Claimant's father had previously worked for the Respondent briefly. This was also rejected by the Respondent as Mr P Glass was not an employee or trade union representative however it was confirmed that he may attend the office and the Claimant may have break to consult with him if he so wished.

182. We have been referred to a copy of the minutes of the hearing of 30 August and note that the Claimant confirmed that he was content to proceed with the hearing.

183. The Claimant was asked to give his version of events about what occurred on 16 June 2023. The Claimant explained that he went to plot 141 around 3:40 pm to deal with the leak under the bath which he addressed he then went to plot 87 and at around 4 pm he went to KFC as Mr Yohane was coming back from Morton Park. The Claimant said that they had not eaten all day and they went to the drive-through and then went to the car park to eat it. The Claimant was asked if KFC was over the road from site to which the Claimant said that was correct and produced a copy of the map of the area, and the Claimant asked *"does that mean technically we are not on site if we are there?"*

184. The Claimant then said there had never been a meeting or an investigation to which Mr Donovan said it was not deemed necessary as both Mr Neal and Mr Bacon arrived on site and found it unattended and they then called Mr Yohane and both arrived back several minutes later so no further witnesses needed to be spoken to. It was explained to the Claimant that the disciplinary hearing was his chance to present his case.

185. Mr Oliver asked the Claimant when he arrived back on site what discussion had there been to which he replied there wasn't one, he had just been sent out to close the plots, and that Mr Yohane had been spoken to. The Claimant said on the day question when they left he had told Razvan from DFC that they were going to do customer care. The Claimant then said on the Saturday Mr Neal opened the site without a Site Manager on site as per an email from Razvan. The Claimant said he had an email from bricklayers that Mr Ackerley also allows it. The Claimant further said Mr Neal had a trainee to run a site on his own at Witney and that he had he told him to leave early and he asked why he was sat there when others are doing it too and authorised by both managers. Mr Donovan explained that these would be passed to Mr Sims the Managing Director but the focus of the hearing was on the allegations against the Claimant.

186. Mr Oliver clarified which way the Claimant was facing whilst he was at KFC, and he put to the Claimant that he knew that a Site Manager should be present, therefore he asked why did they both think it was okay to leave site together and could they not have asked one to bring something back for the other? The Claimant replied they had left the compound to do customer care not to go for lunch and they met back up again as they returned and the Claimant had said let's go for a quick bite to eat and there

were three bricklayers on site and a dry liner and they went to the drive-through and they didn't think it would be as it is now. We noted that the Claimant had not answered the specific question he was asked.

187. The Claimant again repeated that he not been given an opportunity to explain and he was again reminded that the hearing was his opportunity to do so. The Claimant referred to the ACAS Code to which Mr Donovan said that it was guidelines and best practice and that everything should be looked at on the case-by-case basis and investigations were not always necessary.

188. Mr Oliver asked the Claimant if he understood that this could amount to a serious health and safety breach, to which the Claimant replied "100%" but he asked where do you define the site? Mr Oliver then asked the Claimant if something had happened on site what did he feel that the consequences would've been, to which the Claimant said he would have reacted quicker from KFC than he would have done from plot 87, that they were not hiding and they weren't sneaking offsite, and it was 250 metres and they would've been there.

189. The Claimant questioned whether the construction site plan had been updated and he said the phase plan was relevant as it showed who is the one supervising. Mr Oliver asked the Claimant whose responsibility it was to update that plan to which the Claimant said the site team along with the Build Manager. Mr Donovan asked is the reason a site is set up with a Site Manager and an Assistant, or a Senior and a Site Manager, so they could cover for each other? The Claimant's response was that the HSE would ask why the phase plan has not been updated, but he admitted *"we are not whiter than white on this."* We again noted that the Claimant had not answered the specific question he was asked.

190. The Claimant then suggested that Towergate and Morton Park were two different sites and he asked what would happen if they were both working on the same site? Mr Donovan asked the Claimant did they not share the same compound, to which he said they did but they were different sites, and he asked how two people can manage one site. The Claimant then started to talk about whether the construction site plan should have been updated to include him for Morton Park, and he queried whether there were enough managers that day as he said they couldn't have breaks.

191. There was a discussion about the allegation of collusion and the Claimant explained that the grievances had been drafted by the same legal counsel although it later transpired he was referring to the Citizens Advice Bureau.

192. The Claimant then said he raised valid grievances which had been ignored, such as hiring a banksman which he said would have avoided the forklift incident involving Mr Ludgrove's damaged car. The Claimant said he had recently driven around the site and taken pictures and found missing fencing and gates open, and turf facing an occupied area which could have injured a child. The Claimant suggested that he had been whistleblowing and was now been treated as malicious.

193. The Claimant made repeated complaints about a lack of investigation and not having had a grievance appeal hearing to which Mr Donovan explained the hearing was only necessary if any clarification was needed, and the point of the appeal was for the chair to review the original grievance and to determine whether the original decision was fair. Whereas the Claimant now (within the list of issues) says that he disclosed that Mr Sims was on site when it was left unsecured, that is not something which he advanced before us, it is not something which appears in the record of that hearing, and given that it was not established before us that this was said, we make a finding that no such comment was made.

194. The disciplinary hearing was adjourned for Mr Oliver to carry out enquiries and the Claimant was asked to provide a copy of the map he had presented as well as the witness statements he referred to and any other notes which were relevant.

195. The Claimant subsequently produced his disciplinary hearing notes which amounted to four and a half pages and which repeated many of the matters discussed in the hearing including a lack of clarity on the allegations, lack of investigation, criticisms of HR's involvement in the process, the repeated complaints about Mr Neal using a trainee and asking him to leave a site unattended, and conflicting information about who was in charge of the site. The Claimant said that it was Mr Yohane who called Mr Neal, not the other way around, he said that they informed Mr Razvan, Mr Ludgrove and Mr Ross where they were going, and as Mr Ross was present there was a competent person left on site.

196. The Claimant made reference to the forklift incident which damaged Mr Ludgrove's car and he asked if a banksman had been provided to prevent a recurrence with potential for serious injury to personnel or the public. The Claimant referred to having asked for a gateman to ensure site security to prevent unauthorised access as at present any member of the public could enter the site and there was an occupied plot with a young family between two side gates and he had produced a photograph taken the previous day showing the gates were left open and unsecured. The Claimant said he had shown photos of other sites and highlighted that every site he went to had their gates open and unsupervised and forklifts were in operation without any banksmen operating or assisting, and that the issues were being raised to protect the Respondent.

197. During the adjournment Mr Oliver and Mr Donovan spoke to Mr Bacon and Ian Pickering (Build Director) to clarify working practices and if work was able to be undertaken on site without a Site Manager. We have been provided with a copy of the notes of those brief discussions. Mr Bacon advised that a site could be left unattended if one tradesperson was there on their own and that if that tradesperson had an SMSTS qualified supervisor along with the first aid kit and that the task needs to be deemed as low risk and the work has to be signed off by the Build Manager. Mr Bacon said it was not practice and there was a process required to gain sign off.

198. Mr Pickering is recorded as having said that work can be carried out on site without a Site Manager if there is one lowest trade working on site

with an SMSTS qualified supervisor or manager working. Mr Pickering said this needed to be risk assessed on a case by case basis and authorised by a Build Manager or a Build Director, and he said if there were operatives working at high scaffold then a fully qualified Site Manager should be on site who has scaffold awareness along with all the other tickets for CSCS, SMSTS, first aid etc.

199. It was brought to our attention during the hearing that Mr Pickering's comment may not be fully compliant with the Specification as the risk assessment should be authorised by both the Build Manager and Build Director rather than one or the other.

Claimant's disciplinary outcome

200. The Claimant's disciplinary hearing was reconvened on 7 September and he was informed of the decision not to uphold the allegation of collusion. As regards the allegation of leaving the site unattended, Mr Oliver explained his understanding of the process based upon what Mr Bacon and Mr Pickering had advised, and he said that by the Claimant's own admission he and Mr Yohane had both left the site together to go to KFC across the road and parked in the car park whilst they at their meal at which time there were bricklayers and dry liners working on site, and that Mr Neal advised he believed there to be ground workers along with operatives on scaffolding.

201. Mr Oliver noted that there was no indication they had been given authorisation by Mr Neal as the Build Manager to leave site whilst trades people continued to work on site and from statements it appeared that the Claimant took 25 minutes to return to site despite his explanation that he was a short distance away at KFC. Mr Oliver said had the HSE visited it was extremely likely the site would have been closed, causing potential reputational damage to the business and potential significant fees incurred for intervention.

202. The Claimant was informed that the allegation had been upheld, it was found to be gross misconduct and as a result there was a breakdown trust in his ability to safely manage the Respondent's site and that he would be dismissed without paid notice. The decision was confirmed to the Claimant by letter dated 8 September 2023 and he was notified his right to appeal. By letter dated 13 September 2023 Mr Yohane was informed that he would also be dismissed.

203. On 12 September 2023 the Claimant provided his submissions for inclusion in the minutes of the hearing. Mr Donovan informed the Claimant that Mr Oliver had reviewed them and it was noted that there were items that were not discussed in the hearing and these would not be included in the appendix. The Claimant was informed that anything new could be raised in an appeal. The Claimant has again argued (in the issues) that he disclosed that Mr Sims was on site when it was left unsecured, however this again was not advanced before us, it is not recorded in the contemporaneous notes, and we therefore make a finding that this information was not disclosed on this occasion.

Claimant's appeal against dismissal

204. On 14 September 2023 the Claimant notified his intention to appeal the decision on the basis that a disproportionate sanction had been imposed, health and safety issues as raised as part of the grievance process were not dealt with, and the dismissal was unfair.

205. On 3 October 2023 the Claimant provided a copy of Mr Yohane's mobile telephone call log of 16 June 2023. We note following the call with Mr Neal at 4:13 pm that day Mr Yohane made at least five further phone calls to other people up to 4:29 pm that day before he returned to site.

206. On 22 September Ms Joyice wrote to the Claimant to advise that the appeal would be conducted by Eileen Guihen, the Sales and Marketing Director and Deputy Managing Director. The Claimant was advised that whereas he had indicated his intention to appeal the information he provided was very limited and he was asked to provide clarification detailing the grounds of his appeal so it could be reviewed before arranging a meeting with him. The Claimant responded on 27 September to advise he was out of the country and that he was disappointed that Ms Joyice was dealing with the appeal hearing and further he questioned the impartiality the process as those appointed to date had all been drawn from a pool of Mr Sims' former colleagues.

207. The Claimant said as regards information requested she should liaise with Mr Donovan as Mr Oliver refused to include his minutes of the disciplinary hearing which would be of use. On 27 September the Claimant was invited to an appeal hearing scheduled for 5 October and he was advised that if he had further information he wished to be taken into consideration he should provide it by midday on 4 October.

208. The Claimant provided documents at midday on 5 October and these consisted of his notes on both disciplinary hearing minutes, a very detailed 27 page disciplinary appeal statement which repeated earlier assertions about lack of adequate investigation and independence and other matters. The Claimant also repeated that on 16 June 2023 Mr Ross had been present whom he described as qualified Crest Nicholson staff and he said that there were no actual breaches of health and safety. The Claimant also repeated that it was Mr Yohane who had called Mr Neal and not the other way around.

209. Within his appeal the Claimant provided a particularly detailed list of what he said were breaches of the Respondent's own policies including the disciplinary, grievance, stress and capability policies as well as design guidance, the Specification, the health and safety policy, and a number of other policies, procedures and guidance. The Claimant also listed numerous alleged breaches of the CDM Regulations 2015, the Working Time Regulations, and the Health and Safety at Work Act 1974, case law and the ACAS Code. Within the appeal statement the Claimant included a section on protected disclosure health and safety concerns. The Claimant made reference to having raised the issue of the forklift colliding with a parked car and having shared photographs of the compound where there was no segregation of vehicles in personnel.

210. The Claimant said during his suspension there had been a fire in a roof and he asked whether this had been investigated or reported to the HSE, and he said following his dismissal he returned to site to retrieve his belongings and was able to enter the site unchallenged and that the gates were open with no Site Manager on site. The Claimant repeated earlier comments he made about having witnessed children playing close to the site entrance of the gates for open and he repeated the earlier email from Mr Ross 13 June. The Claimant said that Mr Neal had advised the electric gates would be fitted but this had not happened and the site was still not a safe environment to return to.

211. The Claimant said it was possible to see from photographs that side gates were left open and unattended and the forklift was operating on site on a public street without a banksman and he asked if his concerns had been drawn to attention of Mr Sims as Managing Director. The Claimant referred to the Respondent's policy which he said provides that if forklifts have to be used in a public area or near to traffic and or pedestrian route, a vehicle banksman must be in attendance to oversee vehicle movements especially reversing operations.

212. The Claimant said there was an endemic problem on multiple sites deprived of sufficient resources to comply with HSE recommendations, the Respondent's policies, and the Health and Safety At Work 1974, and that he been castigated for raising issues and an email recorded saying that his attitude stinks. The Claimant complained about being made to tidy up and not ever having been provided with a copy of Mr Bacon's witness statement.

213. The Claimant declined to take part in the meeting by MS Teams and asked for an in-person hearing instead and this was approved. The Claimant was advised that Ms Guihen was a well respected and highly professional member of the senior management team and her connection with Mr Sims was irrelevant, and she had no knowledge or involvement in his case before. The Claimant was also informed that the HR team was a finite resource and the role was to advise and support on policy process but they do not make the decision.

214. On 5 October the Claimant forwarded a video and photographs to Ms Guihen and Ms Joyice which he said was a health and safety incident at Towergate involving a forklift and a lorry, and also an electric cable stretching across the road which he said was a trip hazard. Ms Guihen forwarded these on to Mr Sims and also Chris Epps (Group Health and Safety Director). We found that in doing so Ms Guihen had taken seriously the allegations the Claimant was making.

215. During the appeal hearing the Claimant was represented by Mr Morley a trade union representative. Both Mr Morley and the Claimant addressed the appeal hearing and argued that there was no investigation, the sanction was too severe, and that the Claimant had been victimised for raising concerns over a number of years. The notes record that Ms Guihen discussed all of these issues with Mr Morley and the Claimant and asked him to confirm how he had been whistleblowing to which the Claimant said that he had been doing so prior to the disciplinary.

216. The Claimant said that he had permission to leave the site from Mr Yohane to which Ms Guihen asked had Mr Yohane not been there would have still have left the site unattended? The Claimant replied that it had not been left unattended as Mr Ross was on site. Ms Guihen asked the Claimant if he was saying that a Group Health and Safety member of staff would be responsible person to oversee a site, to which the Claimant replied he would be more than competent as he was health and safety qualified.

217. The Claimant also confirmed that there were three bricklayers and one dryliner on site. Ms Joyice asked the Claimant would Mr Ross be responsible for site and managing in his absence to which he replied no, and he added that they were doing customer care at Morton Park, there were two separate sites, they had not asked him to manage the site as they were within the perimeter of the area, and everyone had their contact details and they were not away from site.

218. There was a discussion about who would be suitable to manage the site in the absence of the Site Manager, and Ms Guihen clarified the provisions of the Specification although it was not referred to by name. The Claimant repeated that he would deem Mr Ross a suitable person. The Claimant made references to inconsistent treatment with Mr Neal and Mr Ackerley to which Miss Joyice said they could not discuss other people. We noted that Mr Morley said that the policy needed to be clear as to who would be suitable and the Respondent had not communicated standards and were holding the Claimant to account about something he did not know existed. This was clarified by Ms Guihen as she asked the Claimant if he knew a Site Manager needed to be present at all times whilst construction area was open to contractors, to which the Claimant replied yes and he said he was following the instruction of his line manager.

219. The Claimant was again asked if he understood there needed to be site supervision and there had been training around an appropriate alternative person? The Claimant was asked if he was not trained on this, to which he replied he did not read the policy until the disciplinary came out.

220. The Claimant then repeated earlier comments about Mr Neal allegedly telling a Trainee Assistant Site Manager to leave the site at Witney, and that he was just following what he had been told to do by his line manager. Mr Morley said the procedure (which we take to mean the Specification) had not been included in the disciplinary pack. At the end of the meeting the Claimant said he was curious why the allegation of collusion had been dropped, but trust and confidence had been added.

221. Following the appeal hearing the Claimant provided his comments on the appeal hearing minutes, and on 9 October he provided copies of the witness statement from Darren Ludgrove and Razvan Timofte a DFC dry-lining supervisor which he said confirmed that the Claimant told them he was going to do customer care on that date and if there were any issues to contact him. The statement from Mr Timofte was relied on to support his allegation that on 24 June Mr Neal opened the site without any site supervisor and that he had said the site was unofficially open but officially closed in other words to keep it a secret.

222. Within his email the Claimant reiterated that Mr Ross was competent to manage Towergate in the absence and the Claimant went as far as to suggest that Mr Ross knowingly allowed them to leave Towergate to work on an adjacent site did not question or challenge them prior to leaving, therefore he must also have felt that he was confident to be left at Towergate and that he effectively sanctioned their departure.

Claimant's disciplinary appeal outcome

223. By letter dated 20 October 2023 Ms Guihen informed the Claimant that his appeal had been unsuccessful. It was recorded that a number of the matters raised by the Claimant had been addressed in the grievance process which would not be revisited. With respect to the allegation of insufficient prelims or resources to facilitate a health and safety compliant site, the Claimant was informed that Ms Guihen could not see how this linked to the reason that the Claimant and Mr Yohane left site without an appropriate Site Manager or person present. It was pointed out there was no evidence presented to suggest the site was understaffed but his concerns had been passed on to Group Health and Safety for a full review moving forward although it was not a mitigating reason for both the Claimant and Mr Yohane for leaving the site together.

224. The Claimant was again advised that an investigation was not necessary as it would only serve the purpose to determine whether or not the Claimant was on site, and that had already been established and not disputed.

225. As regards the argument about the demands of the business and breaks, Ms Guihen pointed out that this would require appropriate communication to the person covering the site that somebody was taking a break or leaving the site, and it was further noted that taking a break did not require someone to physically leave the construction site, and there had been no attempt to seek approval from the Build Manager.

226. As regards the allegation that dismissal was disproportionate and the dismissal was unfair, the Claimant was informed the reason for dismissal was due to leaving the site unattended by both the Claimant and the Senior Site Manager leaving together which was undisputed; the requirement to ensure a site was not left unattended and the procedure to follow was set up within the Specification which was accessible by all employees; and Ms Guihen said that whereas it is the employer's responsibility to provide appropriate training, it is also the employee's responsibility to ensure they are aware of the policy and procedures. Ms Guihen said the Claimant had not followed the procedure, and as a result his absence from site was a breach of health safety regulations and the sanction was not disproportionate. The Claimant was notified that the potential impact of the site being unattended had serious health and safety implications.

227. The Claimant was reminded that the third allegation on the outcome letter about loss of trust and confidence was an error and that it was not an allegation but a consequence of the findings of the allegations. The Claimant was informed the decision to dismiss on grounds of gross misconduct had been upheld for the reasons already provided.

Consistency

228. In these proceedings the Claimant has repeatedly argued that others had breached the Specification. We understand that to be an argument about inconsistent treatment. The Claimant has not demonstrated to us that there were similar situations which were treated differently.

229. Ms Joyice referred us to another case where an Assistant Site Manager was dismissed for leaving a site unattended. Ms Joyice's evidence was that the employee had originally been given a warning for leaving a site unattended. The reason for this sanction Ms Joyice said was because the site was relatively inactive as the construction phase had completed, the site was coming to a close, with little activity and very few contractors on the site and the only ongoing work was painting and decorating/cosmetic snagging. Ms Joyice said that this was distinguishable from the Claimant's case which involved a higher health and safety risk on an active site. The Assistant Site Manager was said to have immediately admitted his wrongdoing and shown remorse but was subsequently dismissed following a repeat of the behaviour whilst the warning was active.

230. Ms Tame told us that at the beginning of 2020, a Senior Build Manager was dismissed for gross misconduct because he had not taken appropriate steps to ensure a Site Manager was present at one of the sites he was responsible for. The hearing bundle contains the Tribunal judgment in the matter of Bartram v Crest Nicholson. The outcome of that case is not relevant, however we note that in that matter the Claimant was a Senior Build Manager who had been dismissed by the Respondent for leaving a site unattended.

231. Ms Joyice and Ms Tame referred us to a second example where a Senior Site Manager was suspended and invited to a disciplinary hearing for gross misconduct after also leaving a site unattended, however he resigned. The evidence of Ms Joyice and Ms Tame was that they had no reason to believe he would not have been dismissed for gross misconduct had the disciplinary hearing taken place.

232. Mr Neal was questioned by Mr P Glass about sending a Trainee Assistant Site Manager (John Roberts) to Witney. On the first day of his evidence to the Tribunal Mr Neal accepted that was a breach of the Specification, however on the second day he corrected himself and said it was not a breach and he referred to Mr Roberts' safety qualifications which he said were satisfactory for that purpose given that Witney was a less active site and had a lower risk profile than Towergate. Mr Neal was candid with us and admitted that he had not completed the risk assessment paperwork (which would also have involved seeking higher approval from the Build Director). Whereas this was also a breach of the Specification which Mr Neal admits, it was not the same as leaving the site unattended which is what the Claimant and Mr Yohane had been accused of.

233. The Claimant has alleged, based on the evidence of Mr Roberts, that on 16 June 2023 Mr Neal had advised Mr Roberts to leave the Witney site forty minutes early and thus unattended whilst building work was being

undertaken including high rise works, scaffolding, and bricklaying. Mr Neal does not accept that this occurred. We are not satisfied to the level that we need to be that this did occur. That does not mean that we disbelieve Mr Roberts as we have found his evidence to be as reliable as that of Mr Neal, however given that Mr Roberts did not raise formal concerns about this at the time, we are not satisfied to the level that we need to be that it occurred as alleged. In any event we note that it is not the same as a Site Manager choosing to leave a site unattended, and we were satisfied from the evidence of the Respondent's witnesses that there was a consistent approach as regards other Site Managers who had left sites unattended. In addition we heard evidence which we accept that the Witney site carried far less risk than the Claimant's due to the type of work undertaken there at that time. The two situations were different even had Mr Neal acted as alleged.

234. Mr Roberts has also alleged that on 24 June 2023 Mr Neal allowed a site to be opened by subcontractors to work without Crest management or site supervision. Mr Neal denies this and having read the WhatsApp messages which Mr Roberts relied upon, we are not satisfied that this occurred as alleged. The messages suggest that the site may be opened on that date, they do not demonstrate that it would be unsupervised, and in any event the Specification allows for a site to be opened without a Site Manager present, it is the undertaking of works which requires the presence of a Site Manager. The opening of a site and the undertaking of works are clearly two different scenarios. We are not persuaded that the WhatsApp messages prove that Mr Neal allowed the site to undertake works without a Site Manager present. In the Claimant's case there was work being undertaken on a high risk site when he and Mr Yohane both left the site which was a different scenario and this represented a higher level of risk.

Law

Protected disclosures / whistleblowing

235. The Employment Rights Act 1996 provides:

S. 43B(1) Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) …

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

(c) …

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

…

43C Disclosure to employer or other responsible person.
(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —
(a) to his employer, …

236. A qualifying disclosure becomes a protected disclosure when it is made to the worker's employer or in accordance with the requirements made to external bodies or the press under s.43C-H.

237. In ***Williams v Michelle Brown AM*** **UKEAT0044/19/00**, HHJ Auerbach set out the test for identifying whether a qualifying disclosure has been made:

"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.

Unless all five conditions are satisfied there will be not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn out its reasoning and conclusions in relation to those which are in dispute." [9 and 10]

238. There must be a disclosure of information. In ***Cavendish Munro Professional Risks Management Ltd v Geduld*** **[2010] IRLR 38**, the EAT held that to be protected, a disclosure must involve giving information and must contain facts, and not simply voice a concern or raise an allegation:

"The ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information." [24]

239. However, in ***Kilraine v London Borough of Wandsworth*** **[2018] ICR 1850** the Court of Appeal held that:

"…the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations.

Langstaff J made the same point in the judgment below [2016] IRLR 422, para 30, set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. …

On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1) , not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision." [30 and 31].

…

"The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in the Cavendish Munro case did not meet that standard.

Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in Chesterton Global Ltd v Nurmohamed [2018] ICR 731 , para 8, this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief." [35 and 36].

…

"It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in the Cavendish Munro case [2010] ICR 325, para 24, the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being

indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the 1996 Act, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner" [41].

240. A communication asking for information or making an inquiry is unlikely of itself to be constitute conveying information, nevertheless it is important to view the full context of what is said in order to determine if there has been a disclosure of information.

241. It is possible for several communications together to cumulatively amount to a qualifying disclosure even where each communication is not a qualifying disclosure on its own - ***Simpson v Cantor Fitzgerald Europe* [2020] EWCA Civ 1601.** Here the Court of Appeal agreed with the approach of the EAT in ***Norbrook Laboratories (GB) Ltd v Shaw* UKEAT/0150/13** where it was held that three emails taken together amounted to a qualifying disclosure even where the last email did not have the same recipients as the first two, as the former emails had been embedded in the final email. It will be a question of fact for the tribunal to decide whether two or more communications read together may be aggregated to constitute a qualifying disclosure on a cumulative basis.

242. These cases have reiterated the need to take into account the totality of a group of alleged disclosures in determining whether a qualifying disclosure has been made rather than scrutinising each one separately without the consideration of the wider context.

243. As regards the Claimant's belief about the information disclosed, the question is whether the Claimant believed at the time of the alleged disclosure that the disclosed information tended to show one or more of the matters specified in section 43B(1). Beliefs the Claimant has come to hold after the alleged disclosure are irrelevant. Whether at the time of the alleged disclosure the Claimant held the belief that the information tended to show one or more of the matters specified in s.43B(1) and, if so, which of those matters, is a subjective question to be decided on the evidence as to the Claimant's beliefs. It is important for a tribunal to identify which of the specified matters are relevant, as this will affect the reasonableness question.

244. Account should be taken of the worker's individual circumstances and the focus is on the worker making the disclosure and not on a hypothetical reasonable worker. Workers with a professional or inside knowledge may be held to a higher standard than lay persons in terms of what it is reasonable for them to believe.

245. Whereas the test for reasonable belief is a low threshold, it must still be based upon some evidence. Unfounded suspicions, rumours and uncorroborated allegations are insufficient to establish reasonable belief. In

Norbrook Laboratories (GB) Ltd the court held that a qualifying disclosure had to be of information or facts in the reasonable belief of the employee making the disclosure tended to show that the health and safety of an individual had been, was being, or was likely to be endangered, as opposed to an allegation or an expression of opinion.

246. The belief must be as to what the information tends to show, which is a lower hurdle than having to believe that it does show one or more of the specified matters. There is no rule that there must be a reference in the disclosure to a specific legal obligation or a statement of the relevant obligations nor is there a requirement that an implied reference to legal obligations must be obvious. However, the fact that the disclosure itself does not need to contain an express or even an obvious implied reference to a legal obligation does not dilute the requirement that the Claimant must prove that he had in mind a legal obligation of sufficient specificity at the time he made the disclosure - ***Twist DX and others v Armes and others*** **UKEAT/0030/30/JOJ**.

247. In ***Darnton v University of Surrey*** **[2003] IRLR 133** it was held by HHJ Serota that:

"In our opinion, it is essential to keep the words of the statute firmly in mind; a qualifying disclosure is defined, as we have noted on a number of occasions, as meaning any disclosure of information which in the reasonable belief of the worker making the disclosure tends to show a relevant failure. It is not helpful if these simple words become encrusted with a great deal of authority…" [28] and

"We agree with the learned authors that, for there to be a qualifying disclosure, it must have been reasonable for the worker to believe that the factual basis of what was disclosed was true and that it tends to show a relevant failure, even if the worker was wrong, but reasonably mistaken." [32].

248. The issue of reasonable belief was considered by the EAT in ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** **[2012] IRLR 4** where the following example was provided by way of illustration:

"To take a simple example: a healthy young man who is taken into hospital for an orthopaedic athletic injury should not die on the operating table. A whistleblower who says that that tends to show a breach of duty is required to demonstrate that such belief is reasonable. On the other hand, a surgeon who knows the risk of such procedure and possibly the results of meta-analysis of such procedure is in a good position to evaluate whether there has been such a breach. While it might be reasonable for our lay observer to believe that such death from a simple procedure was the product of a breach of duty, an experienced surgeon might take an entirely different view of what was reasonable given what further information he or she knows about what happened at the table. So in our judgment what is reasonable in s.43B involves of course an objective standard – that is the whole point of the use of the adjective reasonable – and its application to the personal circumstances of the discloser. It works both ways. Our lay observer must expect to be tested on the reasonableness of his belief that some surgical

procedure has gone wrong is a breach of duty. Our consultant surgeon is entitled to respect for his view, knowing what he does from his experience and training, but is expected to look at all the material including the records before making such a disclosure. To bring this back to our own case, many whistleblowers are insiders. That means that they are so much more informed about the goings-on of the organisation of which they make complaint than outsiders, and that that insight entitles their views to respect. Since the test is their 'reasonable' belief, that belief must be subject to what a person in their position would reasonably believe to be wrong-doing." [62]

249. When considering the question of the Claimant's reasonable belief, it must be remembered that motive is not the same as belief - ***Ibrahim v HCA International Limited*** **[2020] IRLR 224**. However, whilst a worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it.

Breach of a legal obligation

250. As regards legal obligation, in ***Boulding v Land Securities Trillium (Media Services)*** **Ltd (2006) UKEAT/0023/06** HHJ McMullen QC held the following:

"The legal principles appear to us to be as follow. The approach in ALM v Bladon is one to be followed in whistle-blowing cases. That is, there is a certain generosity in the construction of the statute and in the treatment of the facts. Whistle-blowing is a form of discrimination claim (see Lucas v Chichester UKEAT/0713/04). As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following:

(a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on.

(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

"Likely" is concisely summarised in the headnote to Kraus v Penna plc [2004] IRLR 260, EAT Cox J and members:

"In this respect 'likely/ requires more than a possibility or risk that the employer (or other person) might fail to comply with a relevant obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable, or more probable than not that the employer (or other person) will fail to comply with the relevant legal obligation. If the Claimant's belief is limited to the possibility or risk of a breach of relevant legislation, this would not meet the statutory test of likely to fail to comply."" [24 and 25].

251. In ***Eiger Securities LLP v Korshunova*** **[2017] ICR 561**, Slade J held:

"In order to fall within ERA s.43B(1)(b)… the ET should have identified the source of the legal obligations to which the claimant believed Mr Ashton or the respondent were subject and how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation…

The decision of the ET as to the nature of the legal obligation the claimant believed to have been breached is a necessary precursor to the decision as to the reasonableness of the claimant's belief that a legal obligation has not been complied with" [46 and 47].

252. Whereas at the time a disclosure is made to an employer the employee need not necessarily state in terms what legal obligation is being or is likely to be breached, but at the time of the tribunal hearing this will be necessary in order for the Tribunal to test whatever at the time of disclosure the claimant had a reasonable belief that it tended to show a breach of that legal obligation - ***Arjomand-Sissan v East Sussex Healthcare NHS Trust UKEAT*/0122/17/BA**.

253. Accordingly, whilst the identification of the legal obligation does not need to be precise or detailed (nor in strict legal language - ***Fincham v HM Prison Service* EAT 0925/01** at paragraph 33), it has to be more than a belief that what was being done was wrong. Nevertheless, the legal obligation may be obvious when seen in context – ***Bolton School v Evans* [2006] IRLR 500, EAT** at paragraph 41.

254. Further in ***Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] EWCA Civ 73** the court considered the time for assessing reasonableness of the belief, and it was held:

"The question of reasonableness must be assessed as at the time the complaint or concern is raised, not with hindsight after the complaint has been examined. If the appellant did reasonably believe that the facts on which he relied were substantially true, this might in principle have justified the disclosure…" [48]

Endangerment of health and safety

255. As regards endangerment of health and safety, the term "health and safety" is a generally well understood phrase and it will usually be clear whether the subject matter of a disclosure could fall within its scope. It was confirmed in the case of ***Hibbins v Hesters Way Neighbourhood Project* [2009] ICR 319**, that the health and safety matter does not necessarily have to fall under the direct control of the employer in order for protection to apply.

256. A disclosure of this nature will require sufficient detail of the perceived risk to health and safety. In ***Fincham v HM Prison Service* EAT 0925/01** the worker was subjected to a campaign of racial harassment and informed the employer that "I feel under constant pressure and stress awaiting the next incident." The Employment Appeal Tribunal concluded that this was sufficient to amount to a qualifying disclosure:

"We found it impossible to see how a statement that says in terms "I am under pressure and stress" is anything other than a statement that her health and safety is being or at least is likely to be endangered. It seems to us, therefore, that it is not a matter which can take its gloss from the particular context in which the statement is made. It may well be that it was relatively minor matter drawn to the attention of the employers in the course of a much more significant letter. We know not. But nonetheless it does seem to us that this was a disclosure tending to show that her own health and safety was likely to endangered..." [30]

Public interest

257. As regards the public interest, there is no statutory definition of this concept and it is not for the tribunal to determine what is or what is not in the public interest. Our task is different and it is the Claimant's reasonable belief that is in issue.

258. The issue of the public interest was considered by the Court of Appeal in ***Chesterton Global Ltd v Nurmohamed*** **[2017] EWCA Civ 979**. In that case the court made reference to the amendment to S. 43B by the Enterprise and Regulatory Reform Act 2013 which introduced the requirement for the worker to have a reasonable belief that the disclosure was in the public interest. The explanatory notes to that Act record that the amendment was introduced following the decision of the EAT in ***Parkins v Sodexho Ltd*** **[2002] IRLR 109** which had found that a disclosure about a breach of the worker's own employment contract could meet the definition of a protected disclosure. In that case the worker had complained about being required to operate a specific machine without supervision which he said was a breach of contract and also a matter of health and safety.

259. The court's decision in ***Parkins v Sodexho Ltd*** was viewed as having gone too far, and the explanatory notes to the Act to which I refer record that the decision had led to claims being lodged about a breach of an individual's own employment contract and was contrary to the intention behind the legislation.

260. The judgment in ***Chesterton*** also refers to the debate in the House of Lords recorded in Hansard following the introduction of the Enterprise and Regulatory Reform Bill where the legislative intention behind the amendment was expressed as encouraging people to recognise and identify with the wider public interest and not just their own private position, and that the amendment would remove the opportunistic use of the legislation for private purposes although it would still permit a worker to complain about a breach of their own contract where the breach itself might have wider public interest implications. Within that debate it was recorded that whereas the subject matter in ***Parkins v Sodexho Ltd*** could have been reframed as a health and safety issue, however minor breaches of health and safety legislation were of no interest to the wider public.

261. The Court of Appeal in ***Chesterton*** urged tribunals to be cautious when deciding whether a worker reasonably believed that a disclosure was in the

public interest. The Tribunal must be careful not to substitute its own view of whether the disclosure was in the public interest.

262. The court reiterated that the necessary belief is simply that the worker believes that the disclosure is in the public interest however the reasons why he believes it to be so are not of the essence, and further a disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to matters which were not in his head at the time he made it. Nevertheless, if the worker cannot give credible reasons why he thought the disclosure was in the public interest at the time, that may cast some doubt and whether he thought so at all. The court held that all that matters is that the worker's subjective belief was objectively reasonable.

263. Moreover, the public interest does not have to be the worker's predominant motive in making the disclosure. The court reiterated that the essential distinction is between disclosures which serve the private or personal interest the worker making the disclosure and those that serve a wider interest.

264. One of the questions considered by the court in ***Chesterton*** is whether a disclosure becomes in the public interest simply because it serves the private interests of other workers as well. The court suggested that there should be consideration of the following four factors:

i. the numbers of the group whose interest the disclosure served,
ii. the nature of the interest affected,
iii. the nature of the wrongdoing disclosed for example whether it is deliberate, and finally
iv. the identity of the alleged wrongdoer.

265. Underhill LJJ held *"It is in my view clear that the question whether a disclosure is in the public interest depends on the character of the interest served by It rather than simply on the numbers of people sharing that interest… Such an interest does not change its character simply because it is shared by another person."* [35]

266. Within ***Chesterton*** the example was given of a disclosure about doctors being required to work excessive hours which might well be in the public interest as well as in the personal interest of the doctors themselves because of the risk to patients due to the nature of the disclosure rather than the numbers of doctors affected. Accordingly we note that it is that wider public interest which is the distinguishing feature.

267. Accordingly the following helpful principles can be taken from the judgment in ***Chesterton***:

i. There is a subjective element - the Tribunal must ask, did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest?

ii. There is then an objective element - was that belief reasonable? That exercise requires that the Tribunal recognise that there may be more

than one reasonable view as to whether a particular disclosure was in the public interest.

iii. The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence.

iv. The reference to public interest involves a distinction between disclosures which serve only the private or personal interest of the worker making the disclosure, and those that serve a wider interest.

v. It is still possible that the disclosure of a breach of the Claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest. In such a case it will be necessary to consider the nature of the wrongdoing and the interests affected, and also the identity of the alleged wrongdoer. These are also referred to as the four factors in ***Chesterton***.

268. It is therefore not for the Tribunal to determine if the disclosure was in the public interest. Rather the questions for the Tribunal are:

i. whether the worker considered the disclosure to be in the public interest;

ii. whether the worker believed the disclosure served that interest; and

iii. whether that belief was reasonably held.

269. In ***Babula v Waltham Forest College*** **[2007] ICR 1026** the court emphasised that a belief may be reasonable even if it is wrong provided that it was objectively reasonable for the worker to have believed that it tended to show that which is relied upon. The court held:

"75. However, I agree with the Employment Appeal Tribunal in Darnton's case [2003] ICR 615 that a belief may be reasonably held and yet be wrong. I am reminded, in a different context, of the well known speech of Lord Hailsham of St Marylebone LC in the adoption case of In re W (An Infant) [1971] AC 682 , 700 d when discussing whether or not a parent could be said to be unreasonable in withholding consent to adoption. He said: "Two reasonable parents can perfectly reasonably come to opposite conclusions … without forfeiting their title to be regarded as reasonable." In my judgment, the position is the same if a whistleblower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed. Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistleblower of the protection afforded by the statute."

Detriment

270. The Employment Rights Act 1996 provides:

S. 47B Protected disclosures.

(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.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

271. Detriment has the same meaning as in discrimination law, meaning that someone is put to a disadvantage – ***Ministry of Defence v Jeremiah*** **[1980] ICR 13 CA**.

272. Further assistance as to the meaning of detriment can be found in the discrimination context from the case of ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** **[2003] IRLR 285,** whilst noting that an unjustified sense of grievance cannot amount to a detriment (following the

decision in *Barclays Bank plc v Kapur and others (No.2)* [1995] IRLR 87) the court held:

"As May LJ put it in De Souza v Automobile Association [1986] IRLR 103, 107, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work." [34].

273. More recently in ***Jesudason v Alder Hey Children's NHS Foundation Trust*** **[2020] EWCA Civ 73** further clarification of the term "detriment" was provided by Elias LJ who held:

"In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases…" [27]

And

"Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective." [28].

Causation

274. As per Linden J in ***Twist DX and others v Armes and others*** **UKEAT/0030/30/JOJ**:

"..the five requirements of section 43B(1) are evidentially exacting for the claimant, who has the burden of proof in relation to this issue. ETs, in my view, can be relied upon to use their common sense and awareness of the aims of the legislation to separate the genuine public interest disclosure cases from claims which are constructed. Moreover, even where the worker has made a qualifying disclosure which is protected, they will not succeed unless the ET concludes that the disclosure of the qualifying information was a, or the, reason for the treatment complained of…" [105].

275. As to the issue of causation the court in ***Jesudason*** summarised the relevant authorities including ***Manchester NHS Trust v Fecitt*** **[2011] EWCA 1190; [2012] ICR 372** where it was held that:

"In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower." [45].

276. In ***Jesudason*** the Court endorsed a reason why test as opposed to a but for test for detriment claims and held:

"Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B." [31].

277. In ***Harrow LBC v Knight*** **[2003] IRLR 140** the Court held that satisfying the *"but for"* test is not sufficient, the Tribunal must assess the conscious and unconscious motivation of the people involved:

"It is thus necessary in a claim under s. 47B to show that the fact that the protected disclosure had been made caused or influenced the employer to act (or not act) in the way complained of: merely to show that "but for" the disclosure the act or omission would not have occurred is not enough (see Khan). In our view, the phrase "related to" imports a different and much looser test than that required by the statute: it merely connotes some connection (not even necessarily causative) between the act done and the disclosure." [16]

278. As regards motivation, it was further held in ***Croydon Health Services NHS Trust v Beatt*** **[2017] ICR 1240** that the motivation of the employer does not have to be malicious in order to amount to a detriment. In that case a factually accurate press release was found to have amounted to a detriment in those specific circumstances.

279. In ***Kong v Gulf International Bank (UK) Ltd (Protect (the Whistleblowing Charity) intervening)*** **[2022] IRLR 854**, the court examined the process for determining the reason for impugned treatment. Simler LJ made reference to the "separability principle" whereby it is possible to distinguish between the protected disclosure of information on the one hand, and conduct associated with or consequent on the making of the disclosure on the other. It is possible to distinguish between engaging in protected conduct and a reason connected to that conduct, but was not because the worker had engaged in the protected conduct. It is necessary to separate out a feature (or features) of the conduct relied on by the decision-maker that is genuinely separate from the making of the protected disclosure itself. It is possible that the protected disclosure is the context for the impugned treatment, but it is not the reason itself. It was held:

"The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way. This factual question is easy to state; but it can be and frequently is difficult to decide because human motivation can be complex, difficult to discern and subtle distinctions might have to be considered. In a proper case, even where the conduct of the whistle-blower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant's conduct that is distinct from the protected disclosure and is the real reason for impugned treatment.

All that said, if a whistle-blower's conduct is blameless, or does not go beyond ordinary unreasonableness, it is less likely that it will be found to be the real reason for an employer's detrimental treatment of the whistle-blower. The detrimental treatment of an innocent whistle-blower will be a powerful basis for particularly close scrutiny of an argument that the real reason for adverse treatment was not the protected disclosure. It will 'cry out' for an explanation from the employer, as Elias LJ observed in Fecitt, and tribunals will need to examine such explanations with particular care." [59-60].

Burden of proof in whistle-blowing detriment claims

280. Section 48(2) Employment Rights Act 1996 provides that it is for the employer to show the ground on which any act, or deliberate failure to act was done.

281. In ***International Petroleum Ltd and others v Osipov and others*** **UKEAT/0058/17/DA** it was held that the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected, is one of the prohibited reasons under s. 47C ERA. By virtue of s. 48(2), the employer must be prepared to show why the detrimental treatment was done. If it does not do so, inferences may be drawn against the employer; however, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

282. Where an employer fails to show the ground on which a claimant was subjected to detriment it does not follow that the claimant's claim must succeed – ***Ibekwe v Sussex Partnership NHS Foundation Trust*** **UKEAT/0072/14**. Here HHJ Peter Clark held that he did not accept that a failure by a respondent to provide an explanation meant that the claim should succeed by default (distinguishing the position under the ordinary discrimination legislation).

283. Additional guidance was provided by the EAT in ***Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust*** **UKEAT/0047/19/BA** which held:

"…Firstly, it will not necessarily follow, from findings that a complainant has made a protected disclosure, and that they have been subjected to a detriment, alone, that these must by themselves lead to a shifting of the burden under Section 48(2) . The Tribunal needs to be satisfied that there is a sufficient prima facie case, such that the conduct calls for an explanation.

Secondly, if the burden does shift in that way, it will fall to the employer to advance an explanation, but, if the Tribunal is not persuaded of its particular explanation, that does not mean that it must necessarily or automatically lose. If the Tribunal is not persuaded of the employer's explanation, that may lead the Tribunal to draw an inference against it, that the conduct was on the ground of the protected disclosure. But in a given case the Tribunal may still feel able to draw inferences, from all of the facts found, that there was an innocent explanation for the conduct (though not the one advanced

by the employer), and that the protected disclosure was not a material influence on the conduct in the requisite sense." [33 and 34]

The Tribunal's approach

284. The Employment Appeal Tribunal in ***Blackbay Ventures Ltd v Gahir*** **[2014] ICR 747** has provided helpful guidance as to the approach to be taken by Tribunals:

"It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.

1. Each disclosure should be identified by reference to date and content.

2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.

3. The basis on which the disclosure is said to be protected and qualifying should be addressed.

4. Each failure or likely failure should be separately identified.

5. Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied on and it will not be possible for the appeal tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.

6. The tribunal should then determine whether or not the claimant had the reasonable belief referred to in section 43B(1) and under the "old" law whether each disclosure was made in good faith; and under the "new" law whether it was made in the public interest.

7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied on by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained

by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

8. The tribunal under the "old" law should then determine whether or not the claimant acted in good faith and under the "new" law whether the disclosure was made in the public interest." [98]

Ordinary Unfair Dismissal

285. Where dismissal is admitted, the first question for the Tribunal is to identify the real reason for the dismissal (as per the Employment Rights Act 1996 (ERA) s 98). The burden is on the employer to show what that reason was (ERA s 98(1)(a)).

286. As held in ***Abernethy v Mott, Hay and Anderson*** **[1974] ICR 323**:

"*A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*".

287. The second question for the Tribunal is whether the real reason for the dismissal was a potentially fair reason within the categories set out in ERA s 98(2) or as some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The burden is on the Respondent to show this - s. 98(1)(b) ERA.

288. The third question is whether the dismissal for that reason was fair or unfair, which depends upon whether in all the circumstances (including the size and administrative resources of the Respondent) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. That question is to be determined in accordance with the equity and substantial merits of the case (ERA s 98(4)). Here the burden of proof is neutral.

289. The proper approach in answering the third question under s. 98(4) ERA was summarised in ***Iceland Frozen Foods v Jones*** **[1982] IRLR 439** (confirmed in ***Foley v Post Office*** **[2000] IRLR 827),** and ***HSBC Bank plc v Madden*** **[2000] IRLR 827**:

i. the starting point should always be the words of s 98(4) themselves;

ii. in applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair;

iii. in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;

iv. in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another might quite reasonably take another;

v. the function of the Employment Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

290. In determining the fairness of the dismissal, procedural fairness and substantive fairness should be viewed in the round. In ***Sharkey v Lloyds* (2015) UKEATS/005/15** it was held that procedural fairness does not:

"*sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together*" [26]

291. It was further held that:

"It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process. It will be and is for the Tribunal to evaluate whether that is so significant as to amount to unfairness". [26]

292. The band of reasonable responses also applies to questions of the fairness of the procedure - ***Whitbread plc v Hall* [2001] EWCA Civ 268**.

293. The entire dismissal procedure, including any appeal, is to be considered as part of the termination and the fairness of the dismissal must be judged accordingly – ***West Midlands Co-operative Society Ltd v Tipton* [1986] ICR 192.**

294. As *per* Donaldson LJ in ***Union of Construction, Allied Trades and Technicians v Brain* [1981] IRLR 224**, when assessing whether the dismissal was fair:

"Whether someone acted reasonably is always a pure question of fact. Where parliament has directed a tribunal to have regard to equity – and that, of course, means common fairness and not a particular branch of the law – and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane."

295. In relation to conduct dismissals, in assessing fairness under s. 98(4) ERA it is well established that a tribunal must consider the factors set out in ***British Home Stores Ltd v Burchell* [1980] ICR 303**, namely:

i. Did the Respondent have a reasonable suspicion amounting to a belief that the Claimant was guilty of the misconduct at the time of dismissal;

ii. Were there reasonable grounds in the Respondent's mind to sustain the belief in the misconduct; and

iii. Had the Respondent carried out as much investigation as was reasonable in the circumstances.

296. As regards the issue of consistency, an employer should consider each disciplinary case on its own merits. In the case of ***Hadjioannou v Coral Casinos Ltd*** **(1981) IRLR 352** the EAT held that the evidence of inconsistency is relevant in a limited range of circumstances namely (i) it may be evidence as to how an employee has been led to believe that certain categories of conduct will be viewed by his employer; (ii) it may suggest that the purported reason for the dismissal advanced by the employer is not the real or genuine and (iii) it may support an argument that the sanction of dismissal was unreasonable.

297. However the EAT has made it clear that inconsistent treatment should only be relied upon where the cases are "truly parallel" or "similar or sufficiently similar" because the emphasis should be on the employee's case. Tribunals should therefore be cautious in finding dismissal to have been on grounds of inconsistent treatment unless it can be satisfied that the cases are truly parallel or sufficiently similar.

Automatic Unfair Dismissal

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

"A*n 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."*

299. The burden of proving the reason or principal reason for dismissal rests with the employer (unless a claimant lacks the required qualifying period of employment).

300. The protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair – ***Fecitt*** [44]. As set out above, the statutory question is what motivated a particular decision maker to act as they did – ***Kong***.

301. In ***Kuzel v Roche Products Limited*** **[2008] IRLR 530**, the court identified the correct questions for a tribunal to ask which had been identified by the EAT:

"(1) Has the claimant shown that there is a real issue as to whether the reason put forward by the employers, some other substantial reason, was not the true reason? Has she raised some doubt as to that reason by advancing the section 103A reason? (2) If so, have the employers proved their reason for dismissal? (3) If not, have the employers disproved the section 103A reason advanced by the claimant? (4) If not, dismissal is for the section 103A reason. In answering those questions it follows: (a) that failure by the employers to prove the potentially fair reason relied on does not automatically result in a finding of unfair dismissal under section 103A; (b) however, rejection of the employers' reason coupled with the claimant having raised a prima facie case that the reason is a section 103A reason

entitles the tribunal to infer that the section 103A reason is the true reason for dismissal, but (c) it remains open to the employers to satisfy the tribunal that the making of the protected disclosures was not the reason or principal reason for dismissal, even if the real reason as found by the tribunal is not that advanced by the employers; (d) it is not at any stage for the claimant (with qualifying service) to prove the section 103A reason." [30]

302. The court further held:

"The tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the tribunal that the reason was what he asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason." [59 and 60]

303. The reason or principal reason for the dismissal means the employer's reason. This can be the reason of the dismissing officer, but it may be necessary to look beyond that decision. In ***Royal Mail v Jhuti*** **[2019] UKSC 55** (at paragraph 60), the Supreme Court held that where the reason for dismissal is hidden from the decision maker behind an invented reason, it is for the Tribunal to look behind the invention rather than to allow it to infect its decision, and provided the invented reason belongs to a person placed in the hierarchy of responsibility above the employee, there is no difficultly attributing that person's state of mind to the employer, rather than that of the decision maker.

304. A case of whistleblowing dismissal is not made out simply by a "coincidence of timing" between the making of disclosures and the termination of employment - ***Parsons v Airplus International Ltd*** **[2017] UKEAT/0111/17** [43].

Wrongful dismissal

305. The issue we have to decide in relation to the wrongful dismissal complaint is whether the Claimant was guilty of a repudiatory breach of his contract of employment, or what is normally labelled 'gross misconduct'?

306. A repudiatory breach is one going to the root of the contract displaying an intention on the part of the "contract-breaker" no longer to be bound by the contract's terms.

307. It is clear from the ***British Heart Foundation v Roy*** **UKEAT/0049/15/RN** the ability of an employer to dismiss without notice does not depend upon there being a specific contractual term which stipulates that particular conduct will (or will not) constitute gross misconduct warranting summary dismissal –

"It seems that the Judge in paragraph 56 was looking to find a contractual entitlement to dismiss. The error here, in my view, was in assuming that the dismissal was effected under the contract by the exercise of contractual powers contained in that contract, whereas it was at common law quite simply a response by the employer to conduct by the employee, which indicated in the clearest way, by stealing from her employer, that she was not honouring the contract. If a employee shows that she is not going to honour it, an employer is not bound to its side of the employment bargain. Since the right to notice is part of that bargain the employer was not bound to provide it." [18]

308. More recently it was expressed as whether the conduct *"so undermine[s] the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment"* - ***Neary v Dean of Westminster*** **[1999] IRLR 288.**

309. A breach of the implied term of mutual trust and confidence by employee occurs where an employee without reasonable and proper cause conducts himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee - ***Malik v BCCI*** **[1997] ICR 606, HL**. Conduct which is sufficiently serious and which breached the implied term can amount to gross misconduct warranting summary dismissal - ***Williams v Leeds United Football Club*** **[2015] IRLR 383 [**55] and further:

"Similarly if, viewed objectively, the conduct does amount to a repudiatory breach by the employee, then the employer is entitled to rely upon that repudiatory breach as justifying the dismissal irrespective of the employer's motives or reasons for wishing to do so." [83]

310. The question of what level of misconduct is required for an employee's behaviour to amount to a repudiatory breach is a question of fact for the tribunal. Guidance can be found in the case of ***Laws v London Chronicle (Indicator Newspapers Ltd)*** **[1959] 2 All ER 285** where the question was set out as being *"whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service"*. It was also stated in that case that "the disobedience must at least have the quality that it is 'wilful': in other words a deliberate flouting of the essential contractual conditions". The court further upheld the following statement:

"Misconduct, inconsistent with the due and faithful discharge by the servant of the duties for which he was engaged, is good cause for his dismissal, but there is no fixed rule of law defining the degree of misconduct which will justify dismissal."

311. When considering the issue of summary dismissal for gross misconduct the Privy Council decision in ***Jupiter General Insurance Co Ltd v Ardeshir Bomanji Shroff*** **[1937] 3 All ER 67, PC** is of relevance. Here it was held that the test to be applied must vary with the nature of the business and the position held by the employee, and that decisions in other cases are of little value.

312. Whether there has been deliberate wrongdoing that is sufficiently serious to repudiate the contract is a fact sensitive question. Attitudes change as to what is or is not particularly unacceptable conduct. Therefore, the courts have not laid down any specific guidelines dealing with what is sufficient misconduct to justify dismissal.

313. When determining whether something is gross misconduct justifying summary dismissal, all the circumstances of a particular case will be relevant, including whether that type of conduct is listed in the employer's disciplinary policy or company handbook as amounting to gross misconduct. However, just because conduct is listed as being gross misconduct in a contract or a contractual disciplinary procedure, it does not automatically follow that summary dismissal will be justified if the employee conducts himself in that way. It is for the Tribunal to decide whether the conduct is sufficiently serious to be repudiatory - ***British Bakeries Ltd v O'Brien*** **UKEAT/1479/00**.

314. The question for us to decide is whether the Respondent has proved the Claimant did in fact do something that fundamentally breached his contract of employment? We are not concerned, unlike unfair dismissal, with what the Respondent believed, reasonably or otherwise, nor whether the Respondent acted within the 'band of reasonable responses.' The test for wrongful dismissal is different. In a wrongful dismissal claim, the Tribunal is concerned with whether a repudiatory breach of contract occurred.

Time

315. Section 48 Employment Rights Act 1996 provides:

Complaints to employment tribunals

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

…

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

…

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

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

316. The Employment Rights Act 1996 provides:

S. 111 Complaints to employment tribunal

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal —

(a) before the end of the period of three months beginning with the effective date of termination, 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.

Submissions

317. This is already a long judgment and we intend no disrespect to either party by not reciting all of their written and oral submissions in this judgment, save to record that we have paid attention to what we have read and heard, and we have addressed the relevant parts in our findings of fact and our conclusions which will be addressed shortly.

318. We would record however that there were parts of the Claimant's submissions which were either new, such as the argument about his grade and Mr Yohane choosing to follow the Claimant to lunch, and there were also parts which were not accurate. None of the Respondent's witnesses conceded that the Claimant made protected disclosures as he appears to argue in his closing submissions, although we agree that some of the witnesses accepted that the Claimant genuinely believed what he had said. Those are two different things.

319. The Claimant has argued in his submissions that Mr Neal accepted in his oral evidence that he had not closed the site on 24 June 2023 when Mr Yohane called in sick and that he had agreed this was a breach of the Specification. That is not correct, Mr Neal did not make any such concession. Mr Neal's concession was solely in respect to not having completed the risk assessment form on a separate occasion. We reject that submission.

320. In addition some of the Claimant's submissions appear to focus on the veracity of the what the Claimant was saying and what he says he was intending to address, however our focus is on what information the Claimant actually disclosed, whether he reasonably believed that it tended to show the endangerment of health and safety or a breach of a legal obligation, and whether he reasonably believed that it was a disclosure in the public interest. The focus on how the Claimant now says that the Respondent was operating its business or its sites is again a different issue. We are concerned with what was disclosed not whether it was true or not. The issue is whether the worker had a reasonable belief that the information disclosed was true at the time of making the disclosure.

321. We have already referenced the caselaw to which we were referred.

Conclusions and analysis

Protected disclosures

322. We will address these in chronological order. Our approach will be as follows. We will look to identify what information was disclosed, we will then determine whether the Claimant had a belief that this tended to show any of the two failures relied upon under s. 43B ERA 1996 (the subjective element) and then we will determine whether that belief was reasonable (the objective element). We will then determine whether the Claimant believed that this was a disclosure in the public interest (the subjective element) before finally determining whether that belief was reasonable (the objective element). We remind ourselves that a disclosure which "tends to show" is a lower threshold than "does show" but nevertheless there must be some basis for the belief, and further it is not for us to determine what is in the public interest.

Disclosure 1

323. We find that the information disclosed by the Claimant to Mr Ackerley in the return to work meeting on 25 April 2023 was limited to an explanation of the reasons for his own sickness absence which he said was due to work related stress. We do not find that the Claimant disclosed more than that. The Claimant did not reference any legal obligation which he said had been breached, and he said very little save that he wished to return to work.

324. We do not find that at the time the Claimant believed that the disclosed information tended to show either endangerment to health and safety or a breach of a legal obligation as this was simply a return to work meeting where he was explaining the reason for his sickness absence. Even if we are wrong on that, and the Claimant subjectively believed that

the information tended to show either of those two things, we do not find that the Claimant's belief was objectively a reasonable one given the very limited information he disclosed and the lack of factual content and specificity.

325. As regards the public interest, the Claimant has accepted in oral evidence that he was discussing his own position, although his closing submissions argue that he was addressing the Respondent's other employees, however we reject that submission as it conflicts with his own oral evidence.

326. Therefore, even if we are wrong on whether the Claimant had a reasonable belief in what the information tended to show, we find that the Claimant did not have a reasonable belief that this disclosure was in the public interest as it related to his own personal circumstances as an individual employee of the Respondent. There was a lack of connection with the wider public interest. Whereas it is not for this Tribunal to decide whether a disclosure is in the public interest, there needs to be some connection with it in order for us to determine whether the Claimant's belief was a reasonable one. In this example there was no such connection, the information disclosed related to the Claimant alone, and as such even if the Claimant reasonably believed that the information disclosed tended to show endangerment to health and safety, this was not a protected disclosure due to a lack of reasonable belief that it was a disclosure in the public interest.

327. We do not find that this was a protected disclosure.

Disclosure 2

328. We find that the information disclosed by the Claimant at the second return to work meeting on 23 May 2023 with Mr Ackerley and Mr Donovan from HR was limited to the Claimant explaining the reason for his sickness absence which was due to work related stress, and that he was working long hours and at weekends and that the volume of overtime being worked was not being recorded as rigorously as sickness absence.

329. We do not find that at the time the Claimant believed that the disclosed information tended to show either endangerment to health and safety or a breach of a legal obligation as this was simply a further return to work meeting where he was explaining the reason for his sickness absence. Even if we are wrong on that, and the Claimant subjectively believed that the information tended to show either of those two things, we do not find that the Claimant's belief was objectively a reasonable one given the limited information he disclosed and the lack of factual content and specificity and the failure to identify a legal obligation that had been breached.

330. As regards the public interest, whereas the Claimant's submissions now suggest that he was discussing other employees that is not what was said at the time and we reject that submission. We repeat our findings above that there was a lack of reference to the wider public interest, this was simply a private employment matter with no apparent connection to anyone else either within the business or outside of it.

331. We do not find that this was a protected disclosure.

Disclosure 5

332. Whereas in his submissions the Claimant says that he *"reasonably believed that when he requested additional labour he was trying to address serious issues of health and safety at Towergate that he thought might be breaches of the HASAWA 1974 and CDM Regs 2015"* our focus is on what information the Claimant actually disclosed at the time.

333. We have looked to see what information was disclosed in the Claimant's email of 13 June 2023 at 20:17 to Mr Neal. This email was a response to Mr Neal's email of the same date with a list of jobs to complete for a directors' visit. The contents of the Claimant's reply disclosed information about being short staffed however it concerned getting the tasks completed and housekeeping. The Claimant recorded in his particulars of claim that his request for resources was for housekeeping. There was no reference to a breach of a legal obligation nor was there any reference to the endangerment of health and safety within the Claimant's email.

334. We do not find that the Claimant believed that it tended to show either endangerment to health and safety nor a breach of a legal obligation as the Claimant was replying to Mr Neal about the list of jobs he said needed to be completed for a directors' visit and the Claimant was asking for more resources to get them done. Even if we are wrong on that and the Claimant did subjectively hold such a belief, we do not consider that it was objectively a reasonable belief. This is because the Claimant did not identify a legal obligation which he said had been breached, and there was a lack of any detail about endangerment to health and safety. We also noted that the email was copied to the Commercial Manager not the Group Safety, Health and Environmental Advisor (Mr Ross), and whilst this was not determinative of itself, this was of relevance to us as it also suggested that what the Claimant was doing was asking for more resources for the expressed purpose of housekeeping rather than disclosing information about endangerment to health and safety or legal breaches.

335. Furthermore, we do not find that it was reasonable for the Claimant to believe that it was a disclosure in the public interest as there was a lack of any connection at all to that wider public interest. We remind ourselves it is not for us to determine what is in the public interest, but nevertheless there still needs to be some connection in order for the Claimant's belief to have been reasonable. There was no apparent connection with housekeeping on a private construction site and the wider public interest.

336. We do not find that this was a protected disclosure.

Disclosure 6

337. We find that within the Claimants' email of 14 June 2023 at 22:27 to Mr Neal the disclosed information consisted of the Claimant asking for two additional managers to cover the site as relief and to reduce the amount of his weekend working or asking for time off in lieu instead.

338. We do not find that the Claimant believed that it tended to show either endangerment to health and safety nor a breach of a legal obligation as the Claimant's email was sent after the earlier email from Mr Ross who had been raising concerns about health and safety matters on the site. The Claimant's email was of a different nature to that of Mr Ross, the Claimant was asking for resources to get work done or to have time off in lieu instead. Even if we are wrong on that and the Claimant subjectively believed that the email tended to show either of those matters, we do not find that this belief was objectively a reasonable one. This is because there was no reference to a legal obligation which had been breached, and further there was no detail as to the endangerment to health and safety.

339. Even if we are wrong on any of the above, the information disclosed concerned the Claimant's own personal circumstances, and getting tasks completed at work and as such we do not find that the Claimant had a reasonable belief that the disclosure was made in the public interest as there was a lack of reference by the Claimant to anything which might suggest a connection with that wider public interest.

340. We do not find that this was a protected disclosure.

Disclosure 7

341. We find that within the Claimants' email of 21 June 2023 at 09:16 to Mr Neal the disclosed information consisted of a request by the Claimant for a third labourer and a gateman, the expressed purpose of which was for housekeeping and presentation. The Claimant also stated a general principle that they have to be able to maintain standards.

342. We do not find that the Claimant believed that it tended to show either endangerment to health and safety nor a breach of a legal obligation given the lack of reference to a legal obligation which had been breached, and also due to the lack of identification of some form of endangerment to health and safety. Even if the Claimant did have a subjective belief that the disclosed information tended to show either of those things, we do not find that the belief would have been a reasonable one for the reasons we have given, there was a simply a lack of factual content and specificity for this to have amounted to a reasonable belief.

343. Even if we are wrong on that we do not find that the Claimant had a reasonable belief that the disclosure was in the public interest simply because of the absence of any connection to that wider public interest. This was an email from an employee of a private employer asking for more resources in order to be able undertake housekeeping, presentation and to maintain standards. In such circumstances it would not have been reasonable for the Claimant to believe that this was a disclosure in the public interest.

344. We do not find that this was a protected disclosure.

Disclosures 3 and 8

345. Disclosures 3 and 8 relate to the Claimant's grievance of 25 June, comments the Claimant made at the grievance hearing of 3 July, and the Claimant's subsequent email of 7 July 2023 entitled Expanded Points. The same communications are relied upon cumulatively with respect to two separate disclosures. We will deal with each alleged disclosure separately by looking at the three communications cumulatively.

346. We will address **Disclosure 3** first. This is alleged to be a disclosure about imposing regular and / or long working hours and a failure to comply with the Stress Policy and the duty of care under the Health and Safety at Work Act 1974, and the Construction (Design and Management) Regulations 2015.

347. Within the Claimant's grievance of 25 June 2023 he was disclosing information about the management of his stress condition when he returned to work, including bullying him to work weekends and unhealthy habits such as late night working. The Claimant said that his work related stress was caused by the excessive pressures and workload placed on him. The Claimant was clearly complaining about the amount of hours he was working and the lack of breaks or the impossibility of taking them. We note that the Claimant did not make reference to the Health and Safety at Work Act nor the CDM Regulations and there was no reference to legal obligations within the Claimant's grievance of 25 June 2023.

348. As regards the comments made at the 3 July grievance hearing, the Claimant disclosed information about a lack of breaks which he said was his legal entitlement, and that the workload was making him stressed. The Claimant did not make reference to the Health and Safety at Work Act nor the CDM Regulations and he made no reference to legal obligations upon the Respondent.

349. As regards the Expanded Notes of 7 July 2023, this was a long document however the Claimant did not assist us in his oral evidence as he did not explain where the protected disclosure appears. We find that the Claimant disclosed information about the lack of his own breaks which he said was a legal entitlement, and numerous alleged breaches of the Respondent's Stress Policy, including failure to recognise symptoms of stress the Claimant said he was experiencing and failure to take action in response. The Claimant did refer to the Health and Safety at Work Act 1974 but that related to staff coming in to work each day without a clean welfare area, however that is not one of the matters which the Claimant has relied upon. There was no reference to the CDM Regulations.

350. As to whether the Claimant subjectively believed that these disclosures tended to show either endangerment to health and safety or breach of a legal obligation, we find that the Claimant held that subjective belief at the time. The Claimant was clearly disclosing to the Respondent in those three communications that he was working long hours and that he believed that he was not getting his legal entitlement to breaks and he was indicating the impact upon him was that he had suffered from stress. Within the 7 July 2023 Expanded Notes the Claimant said that it was his legal entitlement and his contractual entitlement.

351. As to whether the Claimant's belief was objectively a reasonable one, we again find that it reasonable with respect to endangerment to health and safety. The Claimant provided sufficient factual content and specificity as to what that alleged endangerment was, essentially the workload coupled with the lack of breaks or inability to take breaks, was causing him to feel stressed.

352. As regards the breach of a legal obligation, the position was less clear. The Claimant has referred in these proceedings to the Health and Safety at Work Act 1974 and also the CDM Regulations, however the reference to the Act in the disclosure related to the clean welfare area which is not a matter which is relied upon. There was no reference to the CDM Regulations. We take into consideration that a claimant does not need to provide the precise legal basis for the alleged breach of a legal obligation at the material time but that it should be sufficiently clear by the time of the tribunal hearing at least.

353. We also take into account that a disclosure does not necessarily have to be true provided that a claimant reasonably believes it. Given what was specifically disclosed by the Claimant amounted to him saying that he was being overworked and not taking breaks, we are not satisfied that it was objectively reasonable for the Claimant to believe that the information disclosed tended to show a breach of a legal obligation. The information disclosed falls short of that in our view, the Claimant did not indicate the source of that legal obligation in the 25 June grievance or the 3 July hearing, but he did reference his contract in the Expanded Points of 7 July. However, the latter is not something the Claimant has relied upon in these proceedings, he has instead specifically relied upon the legislation to which we have referred.

354. The Respondent has argued in its submissions that *"The solitary reference to a legal obligation in an 11 page document rather reinforces that this was not about blowing the whistle"* and we agree with that submission. We find that it was not reasonable for the Claimant to hold that belief that the disclosed information tended to show a breach of a legal obligation.

355. In any event we have gone on to consider whether the Claimant had a reasonable belief that the disclosure was made in the public interest. We have taken into account the factors identified in ***Chesterton***. The number of people whose interests were served was very low and consisted of the Claimant and possibly Mr Yohane. The Claimant was predominantly complaining about his own treatment with passing reference to he and Mr Yohane not getting breaks. Whereas the Claimant now refers to staff in general, at the immediate time he was only addressing his treatment about his workload making him unwell, as both he and Mr Yohane not having breaks. The interests affected concern the private employment interests of both of them. The nature of the alleged wrongdoing was about requiring the Claimant to work long hours without breaks, and finally the identity of the wrongdoer is a private employer.

356. Taking all of these factors into account, we find that it would not have been reasonable to believe that this was a disclosure in the public interest as it concerned only the private or personal interests of the Claimant himself

and potentially Mr Yohane as employees of the Respondent. There was an absence of any connection with that wider public interest. As was explicitly noted in ***Chesterton*** (by reference to the debate in Parliament referred to above), minor health and safety breaches are of no interest to the wider public.

357. Having cumulatively examined the grievance of 25 June, the comments at the grievance of 3 July, and also the Expanded Notes of 7 July, we do not consider that Disclosure 3 meets the legal definition of a protected disclosure under s. 43B Employment Rights Act 1996.

358. We will now address **Disclosure 8.** This is alleged to be a disclosure about potential health and safety risks to the public and site operatives arising from a lack of resources with which to safety manage the site and the failure to maintain a secure site with adequate segregation between vehicles, public and construction workers in breach of the Health and Safety at Work Act 1974, and the Construction (Design and Management) Regulations 2015.

359. We start again with the Claimant's grievance of 25 June 2023. We find that the Claimant disclosed information about site gates being left open near service trenches and plant operating in the area, and with a young child outside no more than 25 metres away in an occupied site.

360. As regards the grievance hearing of 3 July 2023, the Claimant repeated the disclosure of information about gates being left open and the difficulties in enforcing trades people and lorry drivers to shut the gate, and that there was an occupied property by the site gate and that a child could wander up.

361. As regards the Expanded Notes of 7 July, the Claimant again disclosed the proximity of nearby occupied properties with children in them and that staff had been told to tell the trades people to close the gates after them but this was virtually impossible to police, and that the HSE deem there to be a higher level of care required when working close to the public. The Claimant went on to state that the signing in book was in the main compound therefore all pedestrians and vehicles must enter a live construction site prior to signing in. Whereas the Claimant asked the question how can it be possible to track the movements of individuals on site and to control the site correctly, in this context this was still a disclosure of information as the Claimant was explaining that people were coming on to site but it was difficult to keep track of them.

362. The Respondent makes the point that the Claimant does not specifically mention inadequate segregation in the 25 June grievance nor the 3 July grievance hearing. Whilst the specific words were not used, it was clear us from a reading of all three documents (the grievance, the grievance hearing notes, and the Expanded Notes) that it is what was being referred to as there is repeated reference to gates being left open and open trenches in the vicinity of where a young child resided. The 7 July Expanded Notes are more specific about the endangerment, and when the three are read cumulatively we are satisfied that this is what the Claimant was disclosing. We also take into account that the Claimant like the Respondent

are specialists in home building construction and would understand the information to have been referring to inadequate segregation based upon what was specifically disclosed.

363. We have found that the Claimant subjectively believed that this tended to show an endangerment to health and safety because of the risks the Claimant identified by allegedly leaving gates open where there are trenches and plant operating or having the signing in book so far into the site which created a risk of not being able to track who was on site. We also find that the disclosed information contained sufficient factual content and specificity for it to have been reasonable for the Claimant to believe that it showed such endangerment. The Claimant had sufficiently explained what the potential endangerment was with respect to the gates being left open, the open trenches, and the proximity to the public as well as the location of the signing in book.

364. We repeat our findings above that we do not find that the Claimant believed that it tended to show a breach of a legal obligation as the reference to the Health and Safety at Work Act 1974 in the 11 page Expanded Notes related to the cleanliness of the welfare area and this is also not a matter which is relied upon in these proceedings. Whereas the Claimant now refers to the CDM Regulations, this is not what the Claimant expressed at the time. Even if we are wrong about the Claimant's subjective belief, we do not consider that it would have been objectively reasonable for the Claimant to believe that the disclosure tended to show a breach of a legal obligation as the information disclosed lacked sufficient specificity as to the legal obligation being breached.

365. By applying the factors in ***Chesterton*** we note that whereas this was a private employer, the disclosure concerned the health and safety of members of the public living nearby rather than the Claimant's own personal circumstances or that of his immediate colleagues. We find that it was reasonable for the Claimant to believe therefore that it was a disclosure in the public interest. The fact that the Claimant was in effect repeating the contents of the earlier email from Mr Ross does not alter our view on these matters, and the fact that this was raised after the commencement of the disciplinary process also does not impact our finding – whereas the Claimant's motivation may not necessarily have been entirely altruistic, it served the dual purpose of raising these concerns and seeking to protect or to defend himself, and the issue of motivation is not directly relevant at this stage although we acknowledge it can have a bearing on whether there was a reasonable belief. Nevertheless we find that the Claimant had a reasonable belief that the disclosure was in the public interest.

366. Whereas the Respondent argues that the information may have been disclosed as a personal defence of the Claimant's position, we find that it had the dual purpose of defending the Claimant's position in the disciplinary, and secondly raising matters of health and safety which the Claimant reasonably believed to be in the public interest.

367. We therefore find that Disclosure 8 was a protected disclosure with respect to the information disclosed about endangerment of health and safety only. Given the lack of clarity on the breach of a legal obligation we

did not consider that it would have met the legal definition of a protected disclosure on that basis, but nevertheless we have found Disclosure 8 to be a protected disclosure for the reasons we have given above.

Disclosure 4

368. The Claimant says in the list of issues that he informed Trudy Joyice and Sebastian Skinner in the grievance appeal letter that by imposing regular and / or long working hours the Respondent was failing to ensure a safe working environment with regard to defining and dealing with stress at work. This information is not explicitly contained within the grievance appeal letter.

369. Within the grievance appeal the Claimant did state that the excessive hours were a direct reason for his mental health breakdown; that cost outweighed health and safety; and that he disagreed that it would be possible to shut the site down in order to take a break. The reference to excessive hours was a disclosure of information as it contained sufficient factual content and specificity. The reference to cost outweighing health and safety was no more than a bare allegation, and whereas we are mindful of the guidance to avoid a rigid dichotomy between disclosing information on the one hand and making allegations on the other, it appeared to us that this lacked sufficient detail. As regards the Claimant's expressed disagreement that he would be able to shut the site in order to take a break, this was no more than a statement of general opinion on the part of the Claimant without sufficient detail, it was not the conveying of information.

370. As regards the disclosure of working excessive hours causing the Claimant's mental health break down, we repeat our earlier findings that we find that the Claimant subjectively believed that tended to show endangerment to health and safety and we also repeat our earlier finding that it was objectively reasonable for the Claimant to hold that belief as he had been clear that it was his alleged overworking and long hours which had caused his stress. There was a lack of any reference to a legal obligation which had been breached therefore we do not find that the Claimant subjectively believed that the disclosed information tended to show such a breach, and even if he did, it was not objectively reasonable for him to believe that it did for the same reason – namely the lack of reference to any legal obligation.

371. As regards the Claimant's belief that this was a disclosure in the public interest, we do not consider that he held such a belief at the time, and even if he did it would not have been a reasonable belief. This is because the Claimant was discussing his own situation, his own alleged treatment and his own illness. There was a lack of connection or impact upon anyone else other than the Claimant himself, and accordingly it would not have been reasonable to for him to believe that this was a disclosure in the public interest.

372. We do not find that this was a protected disclosure.

Disclosure 9

373. Within the grievance appeal letter the Claimant asked "Does the company not have a responsibility to ensure a safe working environment" however asking a question is not conveying information and it lacks sufficient factual content and specificity. We do not need to go on to consider the issue of whether the Claimant reasonably believed that this tended to show either endangerment to health and safety nor a breach of a legal obligation. We also do not need to go on to consider whether the Claimant reasonably believed that this was a disclosure in the public interest given that nothing was disclosed.

374. We do not find that this was a protected disclosure.

Disclosure 10

375. We find that during the disciplinary hearing on 30 August 2023 the Claimant disclosed information that fencing was missing on site, that gates had been left open, and that turf had been left facing an occupied area which could have injured a child. We also find that the Claimant referred to the damage to Mr Ludgrove's car where he said that this could have been avoided had the Respondent provided a banksman.

376. We have taken into account that this was a disciplinary hearing where the Claimant was defending himself from the charges against him. There was undoubtedly an attempt by the Claimant to use the Respondent's alleged failings as an attempt either to deflect attention or to try and defend himself. Nevertheless, we find that the Claimant subjectively believed that the information disclosed tended to show endangerment to health and safety as the Claimant set out sufficient factual content and specificity for it to be clear what the alleged failing was and what the potential risk of endangerment to health and safety was.

377. We further find that the Claimant had a reasonable belief that this was a disclosure in the public interest as it concerned an alleged risk to the health and safety of other people nearby including the public. We find that the disclosure had the dual purpose of deflecting attention in order to try and defend himself from serious charges as well as raising concerns about the alleged failings identified. We have reminded ourselves that the public interest does not have to the sole motivation when making a protected disclosure.

378. We therefore find that the information the Claimant disclosed was a protected disclosure solely with respect to health and safety.

379. Whereas the Claimant has since come to believe that this also tended to show a breach of a legal obligation, we find that he did not have a reasonable belief of that as there was no reference to legal obligations expressed at that time. We do not find that the Claimant disclosed anything about Mr Sims being on site at the time that it was allegedly left unsecured, nor do we find that the Claimant disclosed any information on 7 September at the reconvened disciplinary hearing.

Detriments

380. We make it clear that the earliest time that we find that the Claimant made a protected disclosure was on 25 June 2023. Any of the alleged detriments occurring before that time could not have been due to making a protected disclosure which had yet to take place.

381. We have looked to see first whether the Claimant suffered a detriment, and if so, we have then gone on to consider the cause of that detriment, and specifically whether the protected disclosure(s) materially influenced the Respondent, that is whether they had a more than trivial influence. We remind ourselves that this is a different test to that for automatic unfair dismissal which will be dealt with separately.

382. As regards **Detriment 1**, we find that Mr Neal had responded to the Claimant's email of 13 June 2023, he had engaged on the issue of additional resources setting out what he would be prepared to agree to if notices were put in so that subcontractors could be charged, and whereas he may not have replied to every single email from the Claimant on 14 and 21 June, there was a flurry of emails at that time often sent late at night. We do not find that the Claimant suffered a detriment as his correspondence was answered for the most part, and at most there was a delay in responding to some of them. Mr Neal did respond to the Claimant on 13 June 2023 and whereas the Claimant now says that the reply was not valid we find that the Claimant received a meaningful reply.

383. If we are wrong on that we have gone on to look at the issue of causation. We have found that the Claimant's first protected disclosure did not take place until 25 June, some 11 days after the alleged failure to respond to the Claimant's email of 14 June. The failure to reply cannot possibly have been caused by something which had yet to occur. This made no sense at all. Moreover, even if we are wrong on that, and the Claimant had made protected disclosures to Mr Ackerley and Mr Donovan on 25 April and 23 May 2023, it was not explained to us how Mr Neal would have known about either of them, nor why he would choose to effectively victimise the Claimant for things he had said to Mr Ackerley which did not concern Mr Neal. This was implausible. The Claimant told us that Mr Donovan knew about the alleged disclosures, but again that does not help address how Mr Neal could possibly have known about them, nor why he would have chosen to victimise the Claimant by choosing to reply to some but not all of his emails. This complaint was totally without any merit.

384. We dismiss this allegation.

385. As regards **Detriment 2**, we have not found that the comment was made by Mr Neal. The Claimant now admits that he did not even witness it and it has not been clarified before us when this was even said in the period of 5 – 9 June 2023.

386. Even if we are wrong on that and the comment was made to Mr Yohane in the absence of the Claimant, this would amount to a detriment but it could not have been due to any protected disclosures which had yet to take place on 25 June 2023 or thereafter.

387. Again, even if we are wrong about the Claimant having made disclosures to Mr Ackerley or Mr Donovan on 25 April and 23 May, it was not demonstrated to us how Mr Neal would have known about either of them, nor why he would make a comment about the Claimant being a wobbly head between 5 – 9 June 2023. The complaint suffers from a lack of causation and we dismiss it.

388. As regards **Detriment 3**, we have not found that the comment was made by Mr Neal to Mr Yohane in the absence of the Claimant on 14 June 2023.

389. If we are wrong on that and the comment was made, it would have amounted to a detriment as telling someone to get in their box is a dismissive manner to speak about or to a colleague however it would not have been due to the Claimant having made a protected disclosure. The Claimant's email of 13 June 2023 to Mr Neal is alleged to have been the cause of Mr Neal making the comment about getting back into his box, however that email was not a protected disclosure. The earliest time that we find that the Claimant made a protected disclosure was on 25 June 2023, therefore even if the comment was made, it could not have been due to a protected disclosure which did not take place for a further 12 days. We dismiss that allegation.

390. As regards **Detriment 4**, Ms Streeter and Mr Skinner would have been aware of the Claimant having made Disclosure 8 on 25 June, 3 and 7 July 2023 as they were tasked with dealing with the grievance and the appeal. Ms Streeter was present at the meeting on 3 July and both would have seen the Expanded Points in reaching their decisions.

391. We do not find that the Claimant's concerns were belittled either in the grievance outcome of 1 August or the appeal outcome of 25 August 2023. We have spent a great deal of this judgment recounting what information disclosed, the steps taken to deal with the Claimant's concerns, including speaking to the relevant people and getting their version of events. All the matters raised by the Claimant were taken seriously and we find that the conduct of the grievance process, both the initial stage and the appeal, were conducted fairly and thoroughly, and there was no evidence at all that the Claimant's concerns were belittled. The assertion that the Claimant's concerns were belittled was totally without any merit.

392. As regards the dismissal of the grievance, we have already found that some of the grievance was upheld and recommendations were made for future handling. Even where the grievance was not upheld recommendations were made for improvements in future which demonstrates that the Claimant's concerns were taken seriously. The fact that the complaint was not upheld in full does not mean that the Claimant was subjected to a detriment as the process adopted was entirely fair and both Ms Streeter and Mr Skinner reached conclusions which they were entitled to meet based upon the evidence provided and the procedure adopted.

393. Even if the dismissal of part of the grievance or appeal did amount to a detriment, we find that the reasons for doing so were not influenced in any

material way by any protected disclosures, rather these were conclusions which the decision makers were entitled to reach after a thorough and fair process.

394. We dismiss this allegation.

395. As regards **Detriment 5A**, the timing of the decision to proceed to a disciplinary without an investigation must have occurred before the Claimant's grievance of 25 June 2023 as that was one of the matters that he complained about.

396. We accept the Respondent's argument that there was no need for a separate investigation stage when the key facts had been attested to by two Build Managers who were eye witnesses, when those same facts were not substantially in dispute, and the Claimant was given a full opportunity to explain his own position and provide any witness or documentary evidence during the disciplinary process. This was also compliant with the Respondent's policy which says that an investigation may be undertaken, it does not provide that it must in every case. This can be distinguished from the other case to which we were referred as in that case it was an external body which had attended the site and closed it down, whereas in the Claimant's case it was Mr Neal and Mr Bacon who had observed the site being left unattended, and Mr Bacon had engaged with Mr Ross soon after the event to establish what he knew.

397. We did not consider that this amounted to a detriment as the Claimant did not suffer any specific detriment here. The separate investigation would not have added anything to the process. The Claimant has indicated in this hearing that an investigation would have established the precise timings, however we note that the Claimant says he was not wearing a watch, Mr Yohane says he was not looking at the clock, and the disciplinary hearing was the appropriate forum for findings to be made about timings.

398. Even if we are wrong on the issue of detriment, we have found that the decision not to conduct a separate investigation occurred before the date of the Claimant's first protected disclosure on 25 June 2023, it could not therefore have been caused by something which it pre-dates.

399. Even if we are wrong on any of the earlier matters which we have not found to be protected disclosures, we find no connection whatsoever between them and the decision to move straight to a disciplinary hearing without a distinct investigation stage. The decision to proceed in this way was permissible under the Respondent's policy, there were entirely plausible reason for having done so, and we do not find that the decision was influenced in material way by the disclosure(s) the Claimant alleges that he made leading up to that time. We dismiss this allegation.

400. As regards **Detriment 5B**, Mr Oliver would have been aware of Disclosures 8 (25 June, 3 and 7 July 2023) and also Disclosure 10 which consisted of comments the Claimant made to Mr Oliver in the disciplinary hearing.

401. We repeat our earlier findings on the absence of a separate investigation, and we find that Mr Oliver spent a great deal of time establishing the facts before reaching his decision. We also note that Mr Oliver dismissed one of the allegations against the Claimant and his approach was entirely fair. We identified no detriment to the Claimant, there was no need for a separate investigation, and the disciplinary hearing was the opportunity for the Claimant to give his own version of events.

402. Even if we are wrong on the issue of detriment we do not find that the protected disclosure(s) had any influence whatsoever on the conduct of the disciplinary process by Mr Oliver. We dismiss this allegation.

403. As regards **Detriment 5C**, this concerns the decision to add collusion and loss of trust and confidence to the allegations against the Claimant. The Claimant accuses Mr Oliver of subjecting him to this alleged detriment, however we find that this was done before the disciplinary hearing as it was set out in the invitation letter to him of 25 August 2023 from Mr Oliver and the reference to collusion was taken from the grievance appeal outcome letter of the same date from Mr Skinner who noted the close similarity between the grievances from Mr Yohane and the Claimant.

404. By this time Mr Skinner would have been aware of Disclosure 8 (which we have found to be a protected disclosure) as he was tasked with dealing with the appeal into the Claimant's grievance of 25 June 2023 and he would have been aware of the comments the Claimant made in the first grievance hearing of 3 July and would have been aware of the Claimant's Expanded Points of 7 July 2023.

405. The meaning of the allegation about collusion was not immediately clear from the invitation letter however it was abundantly clear from the outcome of the Claimant's grievance appeal prepared by Mr Skinner and the Claimant had the opportunity to address it in the disciplinary hearing. There was no need for a separate investigation for this issue and we do not find that the Claimant was subjected to a detriment.

406. However, even if we are wrong on that, we have looked for the reason why this was done. We find that this allegation was included because of the clear similarity between the grievances of the Claimant and Mr Yohane, and Mr Skinner's grievance appeal outcome letter provides a plausible account of why the allegation was added. As per ***Kong*** we were able to separate out the making of the protected disclosure within the grievance of 25 June from the reason why the allegation was added which was due to the very close similarity between the Claimant's grievance and that of Mr Yohane. It was the similarity of the two documents which caused the allegation to be added, it was not act of making the protected disclosure contained therein which was the cause. Mr Yohane does not claim to have made a protected disclosure, only the Claimant does so, and both of them faced the same allegation of collusion. The grievance appeal outcome letter of Mr Skinner provides a plausible explanation of the inclusion of this allegation and we find that was the reason why – the protected disclosure was not a material influence.

407. As regards the addition of the reference to loss of trust and confidence, this could have been expressed more clearly in the invitation letter that it was the consequence of one or both of the other two allegations rather than a freestanding allegation. This was clarified by Mr Donovan in advance of the disciplinary. We do not find that the addition of the allegation itself was a detriment to the Claimant as it was simply a description of the consequences of the other two allegations. Even if we are wrong on that we find that the reason this was done was simply to record that the result of either of the first two allegations (if proven) could lead to a loss of trust and confidence. We do not find that the Claimant's protected disclosure(s) were a material influence in the decision to add this reference in the invitation letter.

408. We found that the manner in which the allegation was expressed was a detriment to the Claimant as he would have been confused for a few days as it what it meant before it was clarified. The Claimant is clearly a highly intelligent professional but he is not a human resources specialist nor an employment lawyer (both of whom would likely have easily understood the allegation) and he was unfamiliar with this type of expression. It is unsurprising that the Claimant sought to challenge why it had been added and what it meant as it would have been initially confusing to him. We have looked at the reason why this was done. It was quite clear to the Tribunal that this was simply a case of sloppy drafting and it was something which Mr Donovan clarified and corrected swiftly, and he displayed no intention to confuse or victimise the Claimant in this regard. The way in which the allegation was referenced was not materially influenced at all by the Claimant's protected disclosure(s) it was simply a lapse in drafting.

409. We dismiss this allegation.

410. As regards **Detriment 5D**, we find that the allegation about leaving the site unattended was abundantly clear and the Claimant understood this to be the case and the potential consequences as he asked whether it was P45 time. There was no detriment to the Claimant, and even if we are wrong on that the words used in the allegation were not materially influenced by the Claimant's protected disclosures. The reason for the allegation (including the wording of the allegation) was simply due to there being a case to answer when Mr Bacon and Mr Neal arrived on site and found both Mr Yohane and the Claimant absent which neither have denied.

411. We dismiss the allegation.

412. As regards those matters within **Detriment 6** we record that by this time Mr Donovan would have been aware of the Claimant's protected disclosures of 25 June, 3 and 7 July 2023 (Disclosure 8) and Mr Donovan would also have been aware of the Disclosure 10 when it was made at the disciplinary hearing of 30 August 2023 as he was in attendance at that meeting. As we have indicated, the Respondent has a small HR team and all three members worked on this matter and would have been aware of the Claimant's grievance and appeal, the disciplinary, and the numerous pieces of correspondence from the Claimant.

413. With respect to **Detriment 6A**, it is the role of HR advisors to advise and for decision makers to decide. In this case we find that Mr Donovan adhered to the limits of his role and where he intervened it was to seek or to provide clarity for the benefit of both the Claimant and management. It is entirely normal for an HR Business Partner to have involvement in various stages of grievance and disciplinary processes. Mr Donovan's involvement did not subject the Claimant to any detriment, and even if we are wrong on that we find that his involvement and the steps he took were not materially influenced by any of the Claimant's protected disclosures and we dismiss the allegation.

414. As regards **Detriment 6B**, we do not find that Mr Donovan acted as an interrogator and we repeat our earlier findings about the involvement of Mr Donovan in this process, there was no detriment to the Claimant and we dismiss the allegation.

415. As regards **Detriment 6C**, the factual premise of this allegation has not been made out. There is no evidence that Mr Donovan failed to advise Mr Oliver to take account of the Claimant's evidence. We repeat our earlier findings as to the role of HR advisors and Mr Donovan's input in this matter, and we dismiss the allegation.

416. As regards **Detriment 6D**, the factual premise of this allegation has not been made out. There were no false interpretations of the Specification by Mr Donovan and there was no detriment to the Claimant as the factual premise of the allegation has not been made out. We repeat our earlier findings about the involvement of Mr Donovan and we dismiss the allegation.

417. As regards **Detriment 6E**, Mr Oliver did not agree to include the Claimant's notes of the meetings because they were not an accurate reflection of the meeting. As we have indicated, the Claimant has a tendency to write after the event and to provide significant amounts of further detail, and Mr Oliver and Mr Donovan were entitled to reject additional material if it had not been discussed in the meetings. There was no detriment to the Claimant by rejecting minutes which had not been discussed in the meeting, and even if we are wrong on that, the Claimant's protected disclosures were not a material influence the decision, and we dismiss the allegation.

418. As regards **Detriment 7**, the invite was sent on at midday on 25 August 2023 for a meeting on 30 August 2023 at 10:30am. This was five calendar day's notice which was sufficient time for the Claimant to prepare, and the Claimant confirmed that he was fine to proceed. We find that responsibility for the scheduling of the hearing was a matter which fell to HR who would be aware of the Respondent's policies. There was no detriment to the Claimant as he had sufficient time to prepare.

419. Even if we are wrong on that and this amounted to a detriment, and whereas the Respondent's HR team were aware of the Claimant's protected disclosure of 25 June, 3 and 7 July 2023 (Disclosure 8), we find the protected disclosure was not a material influence the amount of notice given to the Claimant. We dismiss the allegation.

420. As regards **Detriment 8**, the Respondent had entirely legitimate reasons for refusing Mr Yohane and alternatively the Claimant's father to attend as his companion for the disciplinary hearing. There would have been a clear conflict of interest had Mr Yohane been allowed to attend. This was entirely fair and reasonable and consistent with the Respondent's own policies and it was not a breach of the ACAS Code.

421. We noted the Respondent offered the Claimant the opportunity to choose someone else or to allow his father to attend to provide moral support by being in the building and giving the Claimant the opportunity to adjourn the hearing to seek his father's support. This was in excess of the Claimant's entitlement under the policy, and he suffered no detriment as he was treated more favourably than would otherwise have been the case. We remind ourselves that the Claimant did not bring a claim for disability discrimination and such we have no jurisdiction to consider his assertions about denial of reasonable adjustments.

422. Even if we are wrong on the issue of there being no detriment to the Claimant, the Claimant's protected disclosure of 25 June 2023 did not have a material influence on this decision to comply with the Respondent's policy. We dismiss the allegation.

423. As regards **Detriment 9**, the "alteration" between the two statements was entirely innocuous, there was no detriment to the Claimant in doing so. Whereas it was not immediately clear who did it, we found that it was Mr Neal who had done so and has since forgotten about it. The date of the amendment has not been established before us although we find that it likely occurred before the Claimant was told that there was a disciplinary case to answer (on or around 20 and 21 June 2023). Accordingly, the amendment could not in any event have been influenced by a protected disclosure which had yet to take place on 25 June 2023.

424. Even if we are wrong on that we do not find that the amendment was materially influenced by the Claimant's protected disclosure. We dismiss the allegation.

425. As regards **Detriment 10**, we do not find that the decision to charge the Claimant with gross misconduct was erroneous. It was clear to us that there was a case to answer after Mr Neal and Mr Bacon attended site and found the Claimant and Mr Yohane absent. There was a potential breach of the Specification which could have led to serious consequences had there been an accident or had the HSE attended. We do not find that there was a detriment to the Claimant in inviting him to the disciplinary where he could answer that charge and state his case.

426. However, if we are wrong on that and it did amount to a detriment, notwithstanding that we do not find that the charge was erroneous, we have examined the issue of causation.

427. We have found that the decision was based solely on the fact that Mr Bacon and Mr Neal arrived on site on 16 June 2023 and found both Site Managers absent, and after speaking to Mr Yohane on 16 June, and

engaging with Mr Ross on 18 June 2023, and taking HR advice on 19 June 2023, the decision was then made to commence the disciplinary which was communicated on 20 June orally and followed up in writing thereafter. This pre-dates the Claimant's first protected disclosure on 25 June 2023 by a number of days, it could not therefore as a matter of logic have been materially influenced by something which had not yet happened.

428. We dismiss the allegation.

429. As regards **Detriment 11**, we do not find that there was a failure to deal with the grievance impartially. We found that there had been a full investigation, it had been fair and thorough, and it reached conclusions which Ms Streeter was fully entitled to make. As we have set out in considerable detail in this judgment, Ms Streeter dealt with each of the allegations raised by the Claimant and whereas she did not uphold all of them, or did not make the findings the Claimant would have wished, this does not mean the investigation was not impartial. We further find that the steps Ms Tame and Ms Streeter took to try and re-integrate the Claimant back to work and the proposals of mediation, were not indicative of people intent on punishing or victimising the Claimant for having made a protected disclosure.

430. There was no detriment to the Claimant. Even if we are wrong on the issue of detriment, we do not find that the Claimant's protected disclosure (Disclosure 8) had any material influence on Ms Streeter's conduct of the Claimant's grievance nor the outcome she reached. We dismiss the allegation.

431. As regards **Detriment 12**, the reference to loss of trust and confidence could have been better explained in the invitation letter as we have already found, it was clarified by Mr Donovan in advance of the disciplinary where he said it was a consequence of the other two allegations.

432. This was not erroneous as it is a matter of common sense that a Site Manager leaving a site unattended could lead to a loss of trust and confidence in that Site Manager, moreover the terms of the Respondent's Specification were clear as regards planned and unplanned absence. There was no detriment to the Claimant in circumstances where both Site Managers had gone off site leaving the site unattended.

433. Even if we are wrong on that, it was not materially influenced by the Claimant's protected disclosures. The reason for the allegation being brought was because the Claimant was found to be off site on 16 June 2023 and thus the high risk site was left unattended whilst operational.

434. We dismiss the allegation.

435. As regards **Detriment 13**, the factual premise of this allegation has not been made out as the Claimant was asked about the allegation of collusion during the disciplinary hearing, and the allegation was dismissed. It had already been explained to the Claimant that loss of trust and confidence was a consequence of the allegations not a freestanding allegation itself. The Claimant had the opportunity to defend himself during

the disciplinary hearing and did so thoroughly. There was no detriment to the Claimant, and even if we are wrong on that the Claimant's protected disclosure (Disclosure 8) was not a material influence.

436. We dismiss the allegation.

437. As regards **Detriment 14**, we do not find that there was a false allegation of gross misconduct. The Claimant together with Mr Yohane, left the site unattended in breach of the Specification, and in doing so the Claimant was in breach of the Respondent's disciplinary policy and his contract of employment. This was a clear case of alleged gross misconduct. Accordingly, the factual premise of the allegation has not been made out.

438. Had there been a false allegation then this could have amounted to a detriment, however in this case the allegation was not false, there was a case to answer and it is not a detriment where there are reasonable grounds to believe that the person has committed the act alleged. In any event the allegation was due to the Claimant leaving the site with Mr Yohane on 16 June 2023 and the decision to bring the charge against the Claimant was not materially influenced by the Claimant's protected disclosure (Disclosure 8).

439. We dismiss the allegation.

Ordinary unfair dismissal

440. It is for the Respondent to show the reason for dismissal and that it was one falling within s.98 of the Employment Rights Act 1996 ("ERA"). The Respondent relies upon conduct and we accept that that was the reason for the dismissal of the Claimant. The Respondent's approach to health and safety is clearly set out in the individual contract of employment, the disciplinary policy, and also the Specification containing terms which are abundantly clear and which sets out the Respondent's expectations for the supervision of sites. There is a clear procedure to follow for both planned and unplanned absences. It is not in dispute that the Claimant left the site with Mr Yohane on 16 June 2023, both have said that they were in KFC and both Mr Neal and Mr Bacon attended the site and found it unattended. There was a *prima facie* allegation of misconduct which the Respondent consistently pursued during the disciplinary process and we find that was the reason for dismissal.

441. We therefore find that the reason for dismissal operating in the Respondent's mind at the time was conduct. This is a potentially fair reason under s. 98(2)(b) ERA 1996.

442. We have considered the issue of whether there was a need for a distinct disciplinary investigation. A disciplinary investigation would serve to establish whether there was a case to answer or not. The disciplinary hearing is the opportunity for the employee to provide their version of events to the charge against them. In this case it was already established that there was a case to answer. The terms of the Specification were clear, and when Mr Neal and Mr Bacon arrived unannounced on 16 June 2023, neither Mr Yohane nor the Claimant (as the Site Managers) were on site when

building work was being undertaken on a high risk site. According to them they were in KFC.

443. Mr Bacon contacted Mr Ross to establish what he knew, and his response was that both were undertaking client care work. This was sufficient in these specific circumstances. The Claimant had the opportunity to provide his version of events at the disciplinary hearing. There was no breach of the ACAS Code as the Respondent carried out as much investigation as was reasonable in these circumstances given that both Mr Neal and Mr Bacon were witnesses to the event.

444. As to whether the Respondent had a reasonable belief that the Claimant was guilty of the misconduct at the time of the dismissal, the answer to that question is also yes. The Claimant has provided many explanations for his conduct, some new ones were introduced in this hearing, but our focus for the unfair dismissal claim is what was relied upon at the time. The Claimant's explanations were two-fold. The first at the grievance stage and the dismissal appeal was that the site was not unattended as Mr Ross was present. Within the disciplinary hearing itself the explanation was that the Claimant was closer to the site from KFC than he would have been from plot 87. Given the abundantly clear terms of the Specification, and given that it was not denied that both the Claimant and Mr Yohane were off site at the time in question, we find that Mr Oliver had a reasonable belief that the Claimant was guilty of the misconduct alleged.

445. We have taken into consideration that the Respondent chose not to suspend the Claimant after the incident. The Respondent's policy allows for suspension in order to conduct an investigation, here a separate investigation was not needed as we have already addressed. The mere fact that the Claimant was not suspended does not in our view impact Mr Oliver's reasonable belief that the Claimant had committed the misconduct he was accused of.

446. The facts were established by the Respondent, namely that there were two Site Managers and both of them left the site without a Site Manager present. Mr Ross was not a suitable person to be left in charge of the site, however it was established by Mr Bacon that Mr Ross did not even know that they were off site, his understanding was that they were doing client care. Mr Oliver reasonably sought clarification on the terms of the Specification before forming his view that the Claimant was guilty of the misconduct alleged.

447. For the reasons we have already given, Mr Oliver had reasonable grounds to sustain that belief in the Claimant's misconduct.

448. We have found that a fair procedure was adopted in this case. We have already addressed the issue of an investigation and that is not repeated here. We have examined the decision to appoint Mr Bacon as the disciplinary chair and note that this was changed to Mr Oliver. We note the time between the disciplinary invite and the hearing, and whilst it was only one working day it was five calendar days, and we find that was sufficient. We have noted the expansion of the allegations against the Claimant, and whereas the allegation of collusion could have been better explained, the

Claimant knew what this related to as it was in the grievance outcome and in any event he successfully defended himself against that allegation.

449. We noted the reference to loss of trust and confidence, and whilst the drafting was sloppy, it was explained by Mr Donovan that it was not a free-standing allegation it was a consequence of the allegations. We note that Mr Bacon's statement was not provided to the Claimant, and whilst this was a failing it made no difference at all as his account was consistent with that of Mr Neal and the facts were well known to the Claimant that the Build Managers arrived on site at which time both Site Managers were offsite in KFC. The decision to disallow Mr Yohane as companion was entirely reasonable as both were accused of the same misconduct. The decision to disallow Mr P Glass was again entirely reasonable as he was not an existing employee. There was no unfairness to the Claimant. We find that the process adopted was within the range of reasonable responses of a reasonable employer.

450. We find that the process adopted was compliant with the ACAS Code. The Claimant was made aware of the allegations against him, he had an opportunity to respond to those allegations at a disciplinary hearing, and he was given the opportunity to appeal the decision.

451. We have examined the issue of consistency. We find that the decision to treat the Claimant's actions as misconduct and the decision to dismiss was consistent with other cases to which we were referred. It was clear to us that should a Site Manager leave an active site unattended there was every likelihood that they would be subjected to a disciplinary process and ultimately dismissed. Whereas Mr Neal was also in breach of the Specification, that related to completion of the risk assessment form. We were not satisfied that Mr Neal did in fact cause another site to be left unattended as alleged, and even if he did, that site was less active and less of a risk than that which the Claimant and Mr Yohane left unattended. The situation of Mr Neal is not comparable that of the Claimant who left the site he was jointly in charge of in order to go to lunch across the road. We therefore found no material inconsistency in the treatment. The treatment of the Claimant was consistent with Mr Yohane.

452. As regards the decision to dismiss the Claimant, as a reminder we must not approach our decision from the point of view of whether we would have dismissed the Claimant. We must avoid the substitution mindset. The question is whether dismissal was within the range of reasonable responses of a reasonable employer. We recognise that the Claimant feels that the sanction applied was harsh as he was going to lunch with a colleague, however context is relevant. The Claimant was a Site Manager, he left with Mr Yohane, leaving the site unattended and in breach of the Respondent's Specification, and as such we find that the dismissal was within the range of reasonable responses of a reasonable employer. The decision to dismiss the Claimant was substantively fair and the Respondent applied a reasonably fair procedure.

453. The complaint of unfair dismissal fails and is dismissed.

454. We further add that if we are wrong on our findings that the dismissal was procedurally (or substantively) fair, we would in any event have considered a reduction to the Claimant's compensatory award of up to 100% on grounds of *Polkey* on the basis that he would have been dismissed had a fair process been adopted. We would also have considered a 100% reduction in basic award due the Claimant's conduct prior to dismissal, and also a 100% reduction to the compensatory award on the basis of his contributory fault, due to the Claimant leaving the site unattended on 16 June 2023.

Automatically unfair dismissal – s. 103A ERA

455. It is not disputed that the Claimant was dismissed. We have gone on to look at the reason why. We have asked the question whether the protected disclosures were the reason or the principal reason for the dismissal. We have reminded ourselves that this is a different test to that for a detriment which involves consideration of whether the protected disclosure(s) were a material (more than trivial) factor. Automatic unfair dismissal involves a different approach. We have therefore looked to see what was the reason for the dismissal, and if there was more than one reason, what was the principal reason.

456. We find that the reason for the Claimant's dismissal was solely due to his conduct on 16 June 2023 by leaving the site unattended. The Claimant's protected disclosures were not the reason nor the principal reason for his dismissal. It was clear to the Tribunal that the decision to dismiss had nothing whatsoever in any way, to do with the disclosures we find that he made. We have taken into consideration that both Site Managers left the site unattended on the date in question, one claims to have made protected disclosures, the other does not, and both of them were dismissed.

457. The decision to dismiss was solely due to the Claimant's conduct and for no other reason. We found the Respondent's evidence to be compelling in this regard and we dismiss this complaint.

Breach of contract / wrongful dismissal

458. We find that on 16 June 2023 the Claimant left the site unattended, that is without a Site Manager present at the time construction work was being undertaken on a high risk site. The Claimant had not engaged with his line manager as regards a planned or an unplanned absence. In doing so the Claimant acted in breach of the Respondent's Specification.

459. We have rejected the Claimant's arguments that he had the permission of Mr Yohane, or from Mr Neal given over the telephone to Mr Yohane. Mr Yohane could not give permission and he did not attempt to do so anyway, similarly Mr Neal did not give permission.

460. We also reject the Claimant's arguments that the site was not left unattended by virtue of Mr Ross being there given that he was not a suitable person to be left in charge. Whereas the Claimant suggests that he was,

he is wrong. The Specification is clear as to who can be left in charge. Moreover Mr Ross did not even know the Claimant was absent.

461. We further reject the argument that the site was not left unattended as Mr Neal and Mr Bacon unknown to the Claimant had arrived on or around 4:05pm. It was the act of the Claimant choosing to leave the site with Mr Yohane without complying with the Specification which is the critical element in this case.

462. In leaving the site unattended, and in breaching the Specification, we find that the Claimant was in breach of his contract of employment. The Claimant had breached the terms which respect to health and safety, he had committed an act of gross misconduct under the Respondent's policy, and in doing so he had breached the implied duty of mutual trust and confidence at common law, and as such it was a repudiatory breach of contract. The Claimant's conduct could have caused the Respondent's site to be shut down or other penalties had the HSE or another authority visited with all of the damage that could have caused.

463. We have already rejected the Claimant's argument in his closing submission that he should not have been blamed as he said that Mr Yohane chose to follow him on 16 June 2023. The evidence of both the Claimant and of Mr Yohane was clear that both of them agreed to leave site together to go to lunch at KFC.

464. Accordingly, the Respondent was entitled to treat the contract as discharged and to dismiss the Claimant without notice.

465. The complaint of wrongful dismissal fails and is dismissed.

Time

466. As the complaints have not succeeded it is unnecessary for us to deal with the issue of time to any degree.

467. We repeat our thanks to Mr P Glass and to Mr Cordrey for their assistance throughout the hearing, and for providing closing oral and written submissions of such a high quality.

Approved by:

Employment Judge Graham

Date 8 January 2025

REASONS SENT TO THE PARTIES ON

15/1/2025

N Gotecha

FOR THE TRIBUNAL OFFICE