EMPLOYMENT TRIBUNALS

Claimant: Mr A Devine

Respondent: Liverpool City Council

Heard at: Liverpool **On:** 22, 23 and 24 October 2024

Before: Employment Judge Benson
Mr R Cunningham
Ms L Heath

REPRESENTATION:

Claimant: In person
Respondent: Mr D Tinkler

JUDGMENT having been sent to the parties on 29 October 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant was employed by the respondent as a Leisure Attendant between 1 November 1991 and 30 January 2023.

2. He had a poor attendance record in recent years, and following the application of the respondent's attendance management process he was dismissed having previously received warnings for his attendance. During these periods, most of the claimant's absences were because of stress, which he says was caused by the respondent's behaviour towards him. He says that the absence management process was flawed as he had not triggered the final stage.

3. The claimant further alleges that having made a complaint that his then line manager had misused public funds, he contends that he was subjected to bullying and harassment by the Lifestyle's General Manager, Mr M Lancaster, and a later line manager, Mr B Noonan. Further, that he was moved to a different location without notice and his shifts were changed, again without notice. The claimant relies upon

these as detriments and brings claims of automatic unfair dismissal and detriment by reason of public interest disclosure, and of "ordinary" unfair dismissal.

4. The respondent defends all claims. It refers to the claimant's poor attendance record which it says resulted in formal warnings under its absence management policy, eventually resulting in dismissal. Further, it denies that the claimant has made protected disclosures and denies that any actions of Mr Lancaster, Mr Noonan or in relation to the dismissal were because of any disclosures.

5. It was unfortunate that the respondent's preparation for this hearing had been lacking. Witness statements were exchanged very late in the day, and no List of Issues had been agreed between the parties. Further, the respondent had not followed up on the claimant's failure to particularise his claim. As such Mr Tinkler together with claimant spent some time while the Tribunal was reading preparing a List of Issues which was agreed.

6. Having clarified with the claimant that he did not require any further time to consider the witness statements which had only recently been exchanged, and that he wished to proceed with the hearing, the hearing commenced.

7. The List of Issues agreed between the parties is set out below. Page references are to the hearing bundle.

Preliminary issues

8. The claimant made an application for one document to not be admitted into these proceedings as he contended it was "without prejudice". The respondent had produced a version of the letter which had partial redaction in which it said it would ensure there was nothing contained within it which was privileged. Having heard representations from both parties and having considered the document (redacted version) we concluded that the document was not protected by way of it being "without prejudice", and as such should be admitted in its redacted form. During the course of the hearing, the claimant wished to refer to the unredacted version. Having explained to him the issue of waiver of privilege, he confirmed that he wanted the Tribunal to have the unredacted version. That was arranged.

9. Agreed Issues to be decided (liability only):

Unfair dismissal

Main claim

1.1 Was the reason or principal reason for dismissal that the claimant made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed.

In the alternative: *Capability dismissal*

1.2 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.2.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;

1.2.2 The respondent adequately consulted the claimant;

1.2.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

1.2.4 The respondent could reasonably be expected to wait longer before dismissing the claimant;

1.2.5 Dismissal was within the range of reasonable responses.

2. **Protected disclosures**

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

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

PD1 10 May 2021 email to Lyn Cain (p74)

PD2 15 [12] May 2021 email to Mark Lancaster (p75)

PD3 25 May 2021 email to Lyn Cain and others (p78)

PD4 26 May 2021 email to Tony Reeves (p79)

PD5 16 June 2021 email to Lyn Cain and others (p82)

PD6 17 June 2021 email to WB Internal Audit and others (p84)

PD7 29 June 2021 email to WB Internal Audit and others (p88)

2.1.2 Did he disclose information?

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

2.1.4 Was that belief reasonable?

2.1.5 Did s/he believe it tended to show that:

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

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

2.1.6 Was that belief reasonable?

2.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

3. **Detriment (Employment Rights Act 1996 section 48)**

3.1 What are the facts in relation to the following alleged acts or deliberate failures to act by the respondent?

D1 12 October 2021 email sent to the Claimant from Mark Lancaster whilst the Claimant was off sick regarding upcoming training on 15 October 2021 and advising the Claimant that if he does not apply for refresher training, alternative arrangements will be looked at for his location/ employment (p121 refers).

D2 15 November 2021 email sent to the Claimant from Mark Lancaster whilst the Claimant was off sick regarding the requirement to attend Austin Rawlinson on 19 November 2021 and the relocation of the Claimant to Walton Soccer Centre due to the Claimant not having the required NPLQ qualification to work on a wet pool (p121 refers).

D3 24 November 2021 email sent to the Claimant from Mark Lancaster regarding the relocation of the Claimant to the tennis centre at Wavertree Sports Complex and the hours he would be required to work (p103 refers)

D4 The request in February 2022 that the Claimant return to the aquatic centre at Wavertree Sports Complex following the completion of the NPLQ qualification (p135 refers)**.**

D5 The notification to the Claimant by Brian Noonan in November 2022 without two weeks' notice that he was required to work on shift 12 which was a compressed week with the Claimant being required to complete his 35 hour over 4 days.

3.2 Did the claimant reasonably see that act or deliberate failure to act as subjecting him/her to a detriment?

3.3 If so, was it done on the ground that [s/he made a protected disclosure / other prohibited reason]?

Evidence and Submissions

10. We were provided with a bundle of documents for use at the hearing. The claimant had produced his own version as the respondent had not provided its version in hard copy in sufficient time, but the claimant agreed that all relevant documents were in the respondent's version which was used by the Tribunal in these proceedings.

11. We heard evidence from the claimant and his witness, Ms Woods.

12. On behalf of the respondent we heard from Mr M Lancaster, the Lifestyle's General Manager; Mr Brian Noonan, the Centre Area Manager; Mr Thomas Douglas, the Divisional Manager in the Neighbourhoods and Housing Directorate of the respondent who chaired the panel which dismissed the claimant; and Mr Andrew Buck, the Director of Finance Business Partnering who chaired the appeal panel. Mr Douglas gave evidence by way of video, which was consented to by the claimant.

13. Submissions were provided by both parties, for which we were grateful.

Findings of Fact

14. The facts in this case were largely agreed.

15. The claimant had worked for the respondent since 1 November 1991. During the time the events relevant to this claim occurred, he was employed as a Leisure/Recreation Attendant. He had a qualification which allowed him to work at swimming pools in the recreation centres. His contract was for 35 hours per week working shifts which included evening and weekends. It also provided that he could be moved between sites across the city according to operational needs as required. Over his time with the respondent, he had moved between 15 and 20 times.

16. Following a complaint made by another member of staff in 2020, the claimant was absent with stress and was moved to the Austin Rawlinson (AR) site in Speke upon his return. The claimant stated that this was the beginning of his issues with management and Mark Lancaster particularly.

17. The claimant started at AR site in early 2021. The manager was Lynn Cain. There was gossip that shifts were not being given out appropriately by Ms Cain, including that she was favouring friends and family members. The claimant was concerned about this.

18. The claimant initially wrote to Ms Cain on 10 May 2021 to discuss this with her as he stated he didn't understand why this was being done.

19. The email included the following paragraph:

"I don't understand why this is being done and would like to have a meeting to find out what is going on" and "this is not the best use of Liverpool City Council resources. I would like to arrange a meeting".

20. Ms Cain referred the matter to Mr Lancaster who in turn, referred it to the internal audit department as a whistleblowing complaint. On 12 May 2021, the claimant having spoken to Mr Lancaster wrote again, and this time alleged that Ms Cain's actions amounted to fraud. He had undertaken no further investigation during that period. His email of 12 May was in response to Mr Lancaster explaining that he

couldn't have that discussion with Ms Cain direct as the matter had now been referred. The claimant was very unhappy about this. The email of 12 May included the following:

"Can you clarify what you are saying? Is it that I am the only person in Liverpool City Council that cannot have a face-to-face meeting with their line manager" …."can you give me a time and place for a meeting about this as I feel this is bullying and would like to talk about this as I find it shocking" ……"I have submitted a grievance and would like to talk about what I feel is fraud by putting a supervisor on the pool in order to keep a part-time staff member of the pool and then put them on the pool and pay them as a supervisor. This has been going on for years and is very dodgy and needs to stop".

21. The claimant declined Mr Lancaster's offer to meet to discuss the allegation.

22. Over those emails and others between 10 May 2021 and 29 June 2021 (PD1-PD7) the claimant raised complaints that the manager of the AR site, Lynn Cain was using supervisors to cover shifts at the pool when there were pool attendants at a lower rate of pay available and she was giving friends and family who were employed on other contracts shifts at the pool, when pool attendants (including the claimant himself) were available for those shifts. He alleged that this was a misuse of public money.

23. These allegations were investigated and were not upheld. It was found that there were acceptable reasons for the allocation of the shifts. The claimant was notified of the outcome on 2 August 2021. The claimant continued in his position at the AR site.

24. From 11 October to 15 November 2021, the claimant was absent from work with stress. A decision had been made by the senior management team that the claimant would be managed by Mr Lancaster rather than Ms Cain, as she had requested that she have no direct contact through email with him as it was causing her undue stress and anxiety and she felt threatened by the claimant's approach.

25. During that period of absence on 12 October 2021 **(D1)** Mark Lancaster emailed the claimant as his Lifeguard National Pool Lifeguard Qualification (NPLQ) had expired. This offered the claimant the opportunity to attend a refresher course on 15 October and said that if the claimant did attend the refresher and no longer had the qualification, "we will have to look at alternative temporary arrangements for your location/employment as obviously you cannot continue to work the pool without the relevant qualification for a period of time". The claimant did not attend the training and on 15 November 2021 Mr Lancaster wrote to him to confirm that when he returned to work, he would be temporarily moved to a dry site (which had no pool) until he could attend a requalification course. There was initially a suggestion that he would be relocated to Walton Soccer Centre **(D2)** but that was not progressed and it was confirmed on 24 November that he work be located at Wavertree Sports Complex (Liverpool Tennis Centre) **(D3).**

26. Following a telephone consultation with the Occupational Health Unit (OHU), the claimant returned to work on 15 November 2021 on a phased return. The claimant was unhappy with the shift patten and found the hours did not suit him and

he did not want to be based in Wavertree. He said both impacted upon his caring responsibilities for his parents.

27. He asked Mr Lancaster for a form to make a request for a shift change under the family friendly framework. The claimant considered that Mr Lancaster was bullying him by locating him at Wavertree and by the shifts he was allocated and wrote to him saying that he was supposed to help and not bully him. By email, Mr Lancaster provided the claimant with the link for an application for shift changes and said that allegations of bullying were serious and invited the claimant to discuss his allegations or raise them with an independent officer. He said that he was open to a discussion about the claimant's hours.

28. On 25 November 2021 the claimant submitted a request for flexible working and lodged a grievance alleging bullying by Mr Lancaster. This related to the move to Wavertree and the working hours. The claimant would not attend meetings arranged by the respondent to discuss his request and it was not progressed.

29. The respondent has an Attendance Management Policy to support and manage attendance in the workplace. There are three stages. Trigger points at which the employee will move to the next stage of the process are detailed in the policy and in written confirmation issued after each meeting. The final stage is a Stage 3 Attendance Hearing at which all relevant issues are discussed, including support and adjustments given to the employee and consideration is given to whether there is a reasonable likelihood of the employee achieving the desired level of attendance within a reasonable time. A decision to dismiss an employee can be made at this stage. There is an appeal process.

30. On 26 November 2021 the claimant was invited to a Stage 1 review meeting to take place on 7 December 2021 as his absences had reached the Council's trigger points under its Attendance Policy (10 working day absence in rolling 12 month period). He had been absent for 36 calendar days.

31. The claimant was placed on an improvement and support plan for 6 months. He was advised that he would be invited to a Stage 2 meeting if his absence and/ or ill health was a cause for concern in the next 6 months. The relevant trigger points and the respondent's expectations were set out in a confirmation letter.

32. The claimant's grievance was investigated by Louise Harford. Her report is short and goes into little detail. The claimant's primary complaints related to feeling bullied by Mr Lancaster by him contacting the claimant twice by email while he was absent. Those emails were those to advise him about the training course and secondly where he was to report upon his return to work. Further that the move to a different site should have been done with two weeks' notice and that the shifts given were a further attempt to bully him and force him out of his job. Ms Harford accepted that the emails sent to claimant by Mr Lancaster when the claimant was on sick leave would have had a negative impact upon him and refers to them causing him annoyance and harassment, but she does not find that the claimant was being forced out of his job by these matters as he alleged. She also accepted that the claimant should have been given more notice of the changes to his location.

33. In February 2022, the claimant completed his NPLQ requalification and was able to work at leisure centres with a pool. The claimant was advised by Mr

Lancaster that he was to stay on the same site at Wavertree but move across to the Aquatic Centre. **(D4)** This was close to the claimant's home which it was understood would be favourable to him. The role at AR site which the claimant had occupied prior to his absence in October 2021 had been backfilled at the time the claimant's NPLQ qualification had lapsed. This was normal practice.

34. The claimant was signed off as absent from work by reason of stress from 5 March 2022. He was absent for 152 calendar days and returned on 10 August 2022.

35. On 16 March 2022, the claimant lodged a further grievance against Mr Lancaster in relation to his relocation to Wavertree Aquatic Centre. He was concerned that the hours were unsociable, and that Mr Lancaster had done it to bully him.

36. The claimant's line manager at the Aquatic centre was Brain Noonan. He took over responsibility for the management of the claimant's absence. Mr Noonan kept a summary of contact by email and telephone with the claimant during his absence. This showed regular and supportive contact, with welfare meetings. The claimant made enquiries about a transfer back to the AR site. Mr Noonan investigated this possibility but explained that there was no full time vacancy there at present and any move would be subject to a vacancy becoming available. The claimant was asked to explain why the Liverpool Aquatic centre was not suitable, to allow Mr Noonan to consider any flexible working options for him.

37. On 10 April 2022 the claimant was invited to welfare support meeting to be held on 19 April, following which he was referred to Occupational Health. A report was provided dated 10 May 2022. It reported that the main cause of the claimant's stress was the bullying which he said Mr Lancaster was subjecting him to and the location for work. It said that if these issues were removed, then symptoms generally resolve.

38. The claimant's grievance was investigated. His grievances were not upheld. Recommendations were made including that the claimant to be encouraged to have informal communication with his managers and that he be assisted in progressing his request for flexible working.

39. The claimant and Mr Noonan continued in their email correspondence about the claimant's preferences to move to the AR site or an alternative site where the hours and location suited him better. As there were no full-time positions at anywhere other than the Liverpool Aquatic Centre, the claimant was told that it was not possible to move location at this time, but that his request would be kept under review. He was asked to think about progressing his flexible working request relating to his hours.

40. Over the months of May and June, an impasse appeared to have been reached where the claimant would not return to the Aquatics centre as the hours and location did not suit his needs and the respondent did not have an alternative position available and the claimant would not provide details of the hours which he could work at the Aquatics centre which would suit him. He continued to be signed off because of the stress this was causing him.

41. On 17 June 2022 the claimant was invited to a Stage 2 review meeting as he had hit the trigger point under the Attendance management policy. He had been absent since 5 March 2021. On 30 June he met with Mr Noonan and was placed on a Stage 2 Improvement and Support Plan for 6 months. That claimant was told that if his absence was a cause for concern over next 6 months, he would be invited to attend an Attendance hearing which was the final stage of the respondent's attendance process. It was agreed that he would return on a phased return basis once a return date was confirmed. Trigger points were detailed in the letter, including a further 5 days working days absence in the next 6 months.

42. In June, the claimant met with HR to progress his flexible working request. As there were no full-time positions other than at the Aquatic centre, he provided the hours he would be willing to work. These were the same hours which he had worked at AR site. The respondent confirmed that it would advise the claimant if a full-time position at another centre did become available. In July 2022 the claimant was advised that the hours and days he requested could not be accommodated at the Aquatic centre as the hours he sought did not fit with the operational needs of the centre or customer demand and they could not adjust the rota to accommodate them.

43. The claimant appealed and at the request of another manager, Mr Noonan was asked to have a further look at the claimant's request. Mr Noonan proposed a set shifts which although not ideal for the centre or its operational needs he considered assisted the claimant with his caring responsibilities. This had been achieved by other staff at the centre agreeing to change their shift to accommodate the claimant's request.

44. It was agreed that the claimant would return to work on a phased basis on 4 August but take holidays so that his first day in work would be 9 September. The claimant returned to work and had an induction session and return to work interview on 13 September with the duty manager and Mr Noonan where his hours were discussed.

45. Following that meeting, on 16 September the claimant was offered two alternative working patterns in line with his request to work a 7-hour shift between the hours of 9.00am and 9.00pm. He was asked to respond by 20 September. He did not respond but raised a further grievance including that the suggested shift patten would result in his losing his shift allowance.

46. On 21 September commenced a further period of absence. He was absent for 41 calendar days citing stress. He returned on 1 November 2022.

47. Mr Noonan considered that it was not appropriate to move straight to Stage 3 of the process. The claimant was therefore invited to attend another Stage 2 attendance review meeting. On 6 October the claimant emailed to say he would not be attending as it was causing a lot of stress.

48. On 7 October the claimant was invited to a reconvened Stage 2 meeting to take place on 14 October 2022. The claimant did not respond and did not attend. Mr Noonan had offered various adjustments to assist him in attending, including asking if his union representative wanted to attend on his behalf. The meeting went ahead

in his absence and he was advised that a decision had been made to extend the Stage 2 Improvement and Support Plan for 12 months. This email confirmed that:

a. "If your absence and/or ill-health causes further concern in the 12-month improvement and support, then you will be invited to an Attendance hearing which is the final stage of the attendance process. Examples of further concern may be:

- two further occurrences of absence
- a total of five working days absence
- 15 weeks continuous absence (accumulative for employees who are currently absent from work)
- cause for concern over your levels or patterns of absence
- Cause for concern over your ability to maintain satisfactory attendance and/or performance due to absences or ill-health"

49. The claimant was referred to occupational health and he attended an appointment on 1 November. A report advised that the claimant was medically fit to return to work and carry out normal duties upon completion of a phased return. It noted that the claimant intended to return to work the following day.

50. The claimant returned to work on 2 November. He was to return to his contractual full time hours but initially on a phased return. The shift pattern was over 13 weeks, which was based upon operational requirements and number of staff. He worked the hours agreed.

51. On 6 November the claimant submitted a further grievance, alleging bullying by Mr Noonan. This was in relation to his location to the Aquatic centre.

52. The claimant was absent from work on 19 and 20 November. This was reflected in the respondent's absence records.

53. On 20 November, all staff were notified that it had been necessary to move from the scheduled 13 week to a 12 week shift pattern following staffing issues. The claimant says he was informed of this on 20 November, but he cannot remember who told him. **(D5)** This caused the claimant some concerns as the shift patten would move from week 12 to week 1 when his hours would be 35 hours over 4 days.

54. He returned to work on 27 November. On 1 December, the claimant provided a fit note from his GP. The note said that claimant was not fit to work from 21 November to 25 November. This hit a trigger point under the respondent's policy as he was absent for more than 5 days. The respondent recorded this as 9 calendar days. It was 7 working days.

55. On 12 December, the claimant's grievance which he raised in September 2022 was heard. This related to the flexible working patten which he had been offered.

56. The claimant was invited to attend an Attendance hearing chaired by Tom Douglas to take place on 16 December. He attended that meeting with his trade union representative.

57. A copy of an attendance report (p219-221) prepared by Mr Noonan was attached to the invitation letter. Mr Noonan also attended to put forward the management case.

58. The report attached the occupational health reports that had been obtained and detailed the support that had been given to the claimant and that offered through the EAP programme which the claimant had not taken up. It explained the impact that his absences were having upon the delivery of the service and the additional cost that had resulted because staff had to be paid at premium rate to cover his absences. It referred to the flexible hours offers that had been made.

59. The report set out the claimant's absence record as:

a. 11/10/21 to 15/11/21 work related stress 36 days

b. 5/3/22 to 3/8/2022 work related stress 152 days

c. 21/9/2022 to 31/10/2022 work related stress 41 days

d. 19/11/2022 to 27/11/2022 work related stress 9 days.

60. During the course of the hearing, it became apparent that each of the numerical days set out in that report were calendar days, and not working days, but that the dates of absence were correct. This made no difference to the trigger points. We accept Mr Douglas' evidence that even with the adjusted working days figure, it would not have resulted in a different decision.

61. We also accept Mr Noonan's evidence that the claimant was absent on 19 and 20 November, in addition to 21 to 25 November. That was seven working days. The claimant nor his representative challenged this at the Attendance hearing.

62. Having heard from the claimant and Mr Noonan, Mr Douglas decided to adjourn the hearing to review the evidence that had been provided and to await the outcome of the claimant's grievance in respect of the flexible working request. At no stage during the attendance hearing (nor in his subsequent appeal) did the claimant suggest that the reason for any actions of Mr Noonan or Mr Lancaster were because he had raised the issue in 2021 about misuse of public money.

63. The claimant's grievance was not upheld.

64. The Attendance hearing was reconvened on 19 January 2022. Mr Douglas concluded that the claimant should be dismissed. He noted that the claimant had not disputed that he had hit the final trigger points under stage 2; that he had persistence absence during the period 11 October 2021 and 27 November 2022 because of work related stress; given the recent dismissal of his grievance, the reasons he gave for his poor attendance still remained – he still had issues with work pattern and management; that the impact of his absences was that it was detrimental to the service provision and his colleagues; and that despite warnings, his attendance had

continued at an unsustainable level. He considered the support that had been offered through OH and the EAP.

65. The claimant was dismissed with a payment in lieu of his notice period. Mr Douglas' reasons were confirmed in writing.

66. On 3 March 2023 the claimant appealed against his dismissal. The appeal was heard by a panel chaired by Andrew Buck on 28 February. The claimant attended with his trade union representative. Mr Douglas attended. Having heard representations from the claimant and considered all relevant factors the panel upheld the decision to dismiss.

67. He confirmed the panel's decision in writing on 31 March 2022. The panel took into account the concerns that the claimant had, and still had about the adjustments he felt should have been made to recognise his carer responsibilities but that his grievances in that regard had not been upheld. The panel considered the various types of support that had been offered to the claimant. It considered the detrimental impact that his absences had upon the service and his colleagues and that there had been attempts to find workable solutions to his concerns about working arrangements but that those proposals were not acceptable.

The Law

Unfair Dismissal – Public Interest Disclosure

68. Section 103A of the Act deals with protected disclosures and reads as follows:-

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

69. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"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."**

70. In **Beatt** the Court of Appeal described the reason for dismissal as

> **"the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what 'motivates' them to do so…"**

Unfair Dismissal

71. Section 98 reads as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub-section if it … relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do …**
>
> **(3) In subsection (2)(a) – "capability" , in relation to an employee means his capability assessed by reference to skill, aptitude, health, or other physical or mental quality……**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

72. There is no burden on either party to prove fairness or unfairness respectively.

73. The essential framework for considering whether dismissal on account of ill-health absence falls within the band of reasonable responses open to an employer was set out by the EAT in **Monmouthshire County Council v Harris EAT 0332/14.** There, Her Honour Judge Eady observed:

> **'Given that this was an absence-related capability case, the employment tribunal's reasoning needed to demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice'.**

74. In addition, where the employer operates a detailed attendance policy, it will be expected to adhere to its provisions to ensure procedural fairness, although inconsequential departures from the policy will not necessarily be fatal — see **Sakharkar v Northern Foods Grocery Group Ltd (t/a Fox's Biscuits) EAT 0442/10.**

75. In **Kelly v Royal Mail Group Ltd EAT 0262/18** Mr Justice Choudhury (President of the EAT) made the important point that attendance policies usually apply to all absences (save for those that may be discounted for disability-related conditions), and that ill-health absence does not imply fault on the part of the employee. Indeed, it is likely that most absences dealt with under absence procedure will entail little or no fault, since employees do not choose to get ill or to

have accidents. Nevertheless, an employer is entitled to look at an employee's overall attendance in order to consider whether there is a likelihood of satisfactory attendance in the future. So far as general fairness is concerned, the question is not whether other employers in similar circumstances might have allowed additional time to see whether the employee's attendance improved before dismissing but whether what the employer did fell within the band of reasonable responses.

76. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

77. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

Protected Disclosures

78. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

> **"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B which is made by a worker in accordance with any of Sections 43C to 43H.**
>
> **s43B(1): in this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:**
>
> **a) that a criminal offence has been committed, is being committed or is likely to be committed,**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…**
>
> **(c) …**
>
> **(d) …**

79. The Employment Appeal Tribunal ("EAT") (HHJ Eady QC) summarised the case law on section 43B(1) as follows in **Parsons v Airplus International Ltd UKEAT/0111/17,** a decision of 13 October 2017:

> **"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:**
>
> **23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.**
>
> **23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**

> **23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."**

80. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong or formed for the wrong reasons.

81. In **Chesterton** Underhill LJ addressed the question of the motivation for the disclosure in paragraph 30, saying that:

> "… **while the 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: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."**

82. In **Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA,** the EAT rejected the suggestion that a tribunal should consider for itself whether a disclosure was in the public interest and stressed that the test of reasonable belief remains that set down by the Court of Appeal in **Babula v Waltham Forest College 2007 ICR 1026, CA.** After reviewing Lord Justice Wall's judgment in that case, the EAT concluded that the public interest test in S.43B(1) can be satisfied even where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made, provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable. On appeal, the Court of Appeal agreed that the test as expounded in **Babula** remains relevant. It made the point that tribunals should be careful not to substitute their own view of whether the disclosure was in the public interest for that of the worker.

83. Sections 43C – 43G address the identity of the person to whom the disclosure was made. In this case it was accepted that the alleged disclosures were made to the employer (section 43C).

Detriment in Employment

84. If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"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."**

85. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337:** the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

86. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

87. In **International Petroleum Ltd and ors v Osipov and ors UKEAT/0058/17/DA the EAT** (Simler P) summarised the causation test as follows:

> **"...I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:**
>
> **(a) 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 a protected disclosure he or she made.**
>
> **(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight [[2003] IRLR 140]at paragraph 20.**
>
> **(c) 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."**

88. The case came before the Court of Appeal in October 2018 (**Timis and Sage v Osipov and Protect [2018] EWCA Civ 2321).** The main point in the appeal was that of vicarious liability, and the approach of the EAT to causation was not disturbed.

Discussion and Conclusions

89. In this case the facts were mostly agreed. There were a couple of issues where there was a disagreement upon the evidence, and we have dealt with these in our conclusions.

90. The claimant brings claims of automatic unfair dismissal, where he says that the reason for his dismissal was him having made public interest disclosures in May and June 2021 in respect of concerns that Lynn Cain, his manager at AR site was misusing public funds; that thereafter Mark Lancaster sent bullying and harassing emails to him, his shifts were changed, and he was moved to different locations. During the course of the hearing, he explained that he believed that Mr Noonan continued this and that he and Mr Lancaster were trying force him out because he had raised these issues. He says this led to his absences and ultimately his dismissal and further that these amounted to detriments. In the alternative that the dismissal was unfair because there was insufficient investigation, particularly in

respect of the number of days he was absent at the last trigger point and that it was the respondent's actions which caused him to be absent again at that point.

91. The respondent denies all the claims.

Public Interest disclosure

92. The respondent accepts that there was a disclosure of information in the series of emails which the claimant relies upon. These each made or referenced the same issues, that being the wrongdoing of Ms Cain and the misuse of public money. We have taken these as a whole.

93. Did the claimant believe the disclosure of information was made in the public interest? This is a subjective test, but we must consider whether in holding that belief it was a reasonable for him to do so. We accept that at the time that the claimant sent those emails, he reasonably believed that that he was doing so in the public interest. The claimant believed that public money was being wasted as staff were being offered shifts at higher rates of pay when there were suitably qualified staff available. If that was happening, as the claimant believed, it involved the respondent's money being spent on unnecessary staff costs. That is a matter which potentially affected the residents of Liverpool (who part fund the council) as such it was in the public interest to raise it.

94. Mr Tinkler in his submissions did not seek to persuade us otherwise, but rather focussed upon whether the claimant had a reasonable belief that the information he was disclosing tended to show that a criminal offence had or was being committed or that there was or had been a failure to comply with a legal obligation. He said it did not. We agree with him.

95. We do not consider that when making his disclosures in May and June 2021, he believed that the information tended to show that a criminal offence had or was being committed or that there was or had been a failure to comply with a legal obligation. His initial email on 10 May did not say that and he said so himself in his evidence before us. It was just a suspicion that something wasn't right. He did what he thought was the correct thing in that situation and asked to discuss it with his manager. Unfortunately, the issue was then escalated and investigated externally, and that conversation did not take place. The claimant could provide no explanation why two days later in his email to Mr Lancaster he alleged that fraud had been committed, when he had carried out no further investigation or had any additional information. It seems to us that his position had become entrenched after Mr Lancaster became involved and the claimant was unhappy that he couldn't discuss it directly with Ms Cain. Although subsequent emails refer to fraud, we do not consider that was what the claimant believed and there was no evidence to support his view.

96. He accepted this is his evidence under cross examination. He explained that he had a "feeling of wrongdoing" and that "it was not the best use of public money". His views were based upon observations of a site where he had worked for a few months and gossip from supervisors who were losing out on shifts. He suspected something might not be right but had no real basis for his views. They were speculation. Throughout his evidence to the tribunal, he was also not clear whether he was alleging that Lynn Cain herself was responsible for any misuse of public

money or whether it was someone else, perhaps supervisors and suggested she might had condoned it by turning a blind eye.

97. We conclude that the claimant did not believe that the information tended to show that a criminal offence had or was being committed or that there was or had been a failure to comply with a legal obligation. In any event there we find that there were no reasonable grounds for him to have had any such belief.

98. Following his disclosures the matters were investigated by the respondent and it found that there were explanations for each of the examples of misuse of public funds which the claimant relied upon.

99. We conclude that the claimant did not make a protected disclosure by way of the emails he relies upon. As such his claims of automatic unfair dismissal and detriment fail and are dismissed.

Detriments

100. Although not necessary for our decision, we find that the respondent had good explanations for each of the actions about which the claimant complains as detriments, which were not in any way related to the disclosures he relies upon. The claimant essentially says that Mr Lancaster and in one respect Mr Noonan, had a campaign to make his life difficult because he had made the complaint about Lynn Cain. He suggests that they did this through a series of actions including moving him to different sites, sending emails which were harassing in nature and by making the shifts difficult for him to fulfil. Our findings are as follows:

101. **D1:** This was 5 months after the initial email in May 2021. The lapse of his lifeguard qualification and the training course two days after it had lapsed was an appropriate and justifiable reason to contact the claimant, even if he was absent, in view of the impact it would have upon his ability to return to work. Although an investigation concluded that Mr Lancaster's action was annoying and harassment towards the claimant because it also referred to him needing to be moved to alternative role upon his return, we consider the wording of the email was not threatening as alleged by the claimant, but rather factual and we do not find that it had anything to do with the disclosures about Lynn Cain.

102. **D2**. Similarly in respect of his return to work on 19 November 2021 and the initial proposal that he return to Walton Soccer centre, that was an appropriate reason to email the claimant at that stage. It had nothing to do with the claimant's disclosures in May and June 2021.

103. **D3** Again there was a good reason why the claimant was told to return to the Wavertree Sports complex. His lifeguard qualification had lapsed, and he could not work at the poolside. Wavertree was a larger centre with Tennis and Athletics. There was more to be done. AR was smaller and operationally did not need an extra person there. Although the hours he was given initially were difficult for him, he was advised by Mr Lancaster to put in a flexible working request, which the claimant did and he was offered a meeting with Mr Lancaster to discuss the hours, which he did not take up. Although he put in a grievance, he made no suggestion that the reason for his treatment was because he had made disclosures. We do not find that it had anything to do with the disclosures about Lynn Cain.

104. **D4:** In February 2022 the claimant had returned to work and had regained his lifeguard qualification. The respondent moved him to the Aquatic centre at Wavertree on the same site as he had been working. The claimant's original role at AR site had been filled shortly after he had lost his qualification. The respondent regularly moved staff across the sites dependent on operational need. Indeed, the claimant had been moved 15-20 times before. We accepted that Mr Lancaster had the operational need at that time and there was no reason why the role of another employee should be altered because the claimant wanted to return to AR, a site he had only been at for less than a year himself. Having lodged a grievance about this, the grievance officer agreed that his hours would be reviewed to assist him with his caring responsibilities. There was a good reason for the actions of the respondent which was not connected with any disclosures the claimant had made.

105. **D5:** We find on balance that the evidence of Mr Noonan is to be preferred in that the claimant was absence through sickness on 19 and 20 November 2022 and not in work. The respondent's records confirm this to be the case and we accept Mr Noonan's evidence that he checked the position on the retained system. We do however accept that the claimant's shift was altered for the week of 21 November 2022 and he was told this was the case. This was because the F13 shift patten was altered to an F12 pattern because of staffing and operation needs. This caused the claimant some concerns as he had caring responsibilities. The claimant wasn't however sure who told him his shift was to change or who was behind it. In cross examination he mentioned a colleague Terry then Mr Noonan. His evidence in respect of this shift change cannot be relied upon as his recollections are unclear. The shift change impacted all people on the shift, not just the claimant. There was no evidence that any decisions were because the claimant had made any disclosures.

106. We do not find that Mr Lancaster and Mr Noonan were harassing and bullying the claimant by their actions or that they were putting pressure upon him because he had made the disclosure in May 2021.

Automatic unfair dismissal

107. Again, although not necessary in view of our conclusion that there was no protected disclosure, we would not have found that the reason for the claimant's dismissal was because of the emails he wrote some two years before. The claimant did not raise this alleged connection in his Attendance hearing or in the appeal before Mr Douglas and Mr Burke or their panels.

108. It is not necessary for us to deal with the time issue.

Unfair Dismissal

109. The remaining claim is one of unfair dismissal. The respondent contends that the reason for the dismissal was capability, being the claimant's persistent poor attendance.

110. The respondent has shown that this was the reason for the claimant's dismissal. He had considerable absences from work, by reason of stress.

111. The claimant bases his claim upon the respondent's failure to properly investigate during the final attendance review and appeal, particularly in respect of

the number of days he was absent at the last trigger point and that it was the respondent's actions which caused him to be absent at that point. He alleges that he had not hit the trigger for the Stage 3 attendance review as he had only had 4 days absence and not the 9 days contended by the dismissing officer.

112. As a Tribunal we must consider whether the respondent act reasonably in all the circumstances in treating the claimant's persistence absence as a sufficient reason to dismiss the claimant? We have considered whether Mr Douglas and Mr Burke (and their panels) genuinely believed the claimant was no longer capable of performing his duties, the consultation which took place with the claimant; whether the respondent carried out a reasonable investigation, including finding out about the up-to-date medical position; whether it could reasonably be expected to wait longer before dismissing the claimant; and whether dismissal was within the range of reasonable responses.

113. The claimant had been absence for over 170 working days in a 13-month period. It became clear during the hearing that the number of days of absence considered by the dismissing officer and appeal officer were calendar days not working days. This information had come from Mr Noonan who advised that this was the method he had been told to use generally to record absences. This was unfortunate and something which the respondent will no doubt wish to review if it is a systemic issue.

114. In any event the triggers used by the respondent at the various stages in the Attendance Management process were unaffected as the claimant had at stages 1 and 2 exceeded them in any event. This miscalculation of working days of absence generally was not something that was brought up by the claimant or his Trade Union representative at the Attendance hearing or the appeal. At the stage 3 Attendance hearing the claimant did not question the validity of the 9 days absence trigger. At the appeal the only reference was in the letter of appeal in which the claimant said the absence was 7 days not 9.

115. We find that the claimant was absent for more that 5 working days in the final trigger period. That was the conclusion reached by Mr Douglas. He had provided a GP note which covered a period of 5 days inclusive. He did not seek to argue any differently at the disciplinary or appeal hearing.

116. There was ample evidence that the respondent had obtained occupational health reports and sought to accommodate the claimant's hours to assist him with his caring responsibilities and had held attendance meetings with the claimant who was aware that he was at risk of triggering a final attendance meeting which could result in his dismissal. Mr Noonan had extended his stage 2 warning to give him a further opportunity to show he could give sustained service.

117. His absences were by reason of stress. The occupational health reports each refer to the claimant's difficulties with management as being a reason for his stress. The claimant had raised a number of grievances about his treatment by management and other than his grievance conducted by Louise Harwood, none had been upheld. There were no grievances outstanding at the date of the claimant's dismissal. Both Mr Douglas and Mr Buck concluded that there was little prospect of the claimant being able to provide sustained attendance in the future and that the impact upon the service was something that could not continue.

118. The decision by the respondent to dismiss an employee who has been absent for more than 170 days over a period of 13 months, in circumstances where it is providing a public service and where there is little prospect of him providing sustained service and attendance in the future cannot be said to be outside the band of reasonableness. Although the calculations were undertaken on a calendar day rather than working days basis, that does not take the decision outside that band. Nor does the suggestion that the claimant's last absence was caused because of a change of shifts. At the time he was notified the claimant was already absent again and the claimant's whole attendance record is relevant and not just the final trigger points.

119. This claim fails and is dismissed.

120. The Tribunal apologises for the delay in producing these written reasons which due to the Judge's judicial and other commitments.

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Employment Judge Benson

Date: 28 January 2025

JUDGMENT AND REASONS SENT TO THE PARTIES ON
Date: 7 February 2025

FOR THE TRIBUNAL OFFICE

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