EMPLOYMENT TRIBUNALS

Claimant: Mr Ashley South

Respondent: World of Books Group Limited

RESERVED JUDGMENT ON AN APPLICATION FOR INTERIM RELIEF

Heard at: Midlands West **On:** 15 July 2025
Deliberations: 18 July 2025

Before: Employment Judge J Connolly (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr C Ludlow (Counsel)

JUDGMENT

The Claimant's application for interim relief is refused.

REASONS

INRODUCTION

1. The claimant was employed by the respondent as a Health Safety and Facilities Manager at its Coventry warehouse from the 17th of March 2025. On the 13th of June 2025 the claimant resigned with notice. It is agreed his employment ended on 13th of July 2025. By a claim form presented on the 15th of June 2025, the claimant brought a claim for constructive unfair dismissal including a claim that he was unfairly dismissed by the respondent because he made protected disclosures.

2. Within the body of his claim form, the claimant made an application for interim relief. That application was listed for determination.

3. On the 12th of July 2025, one clear working day before the hearing, the claimant made an application to amend both his claim and application for interim relief to include a complaint that he was unfairly dismissed because he carried out activities in connection with preventing or reducing risks to health and safety at work (section 100(1)(a) Employment Rights Act 1996 'ERA') and to amend his application for interim relief to include an application on that basis. A further application to amend was made at the hearing, firstly, orally and then, in writing.

4. I heard and refused the application to amend the application for interim relief. I provided my reasons orally and they are not repeated here. I did not finally determine the claimant's application to amend his claim, as is set out in more detail in the accompanying Case Management Order. Because of the time involved in determining the amendment application and, in light of the volume of material put before me (as set out below), I did not have time to reach and deliver a Judgment on the interim relief application. I therefore reserved my Judgment.

THE BROAD ISSUES

5. The two overarching issues for determination were discussed at the outset of the hearing and agreed as follows:

    5.1 Is it likely that at final hearing the claimant will establish that he was dismissed

    5.2 Is it likely that at final hearing the Tribunal would be satisfied that a protected disclosure/s were the sole or principal reason for the claimant's dismissal?

6. For the purpose of the interim relief hearing only, the respondent did not challenge that the claimant was likely to establish that he had made a protected disclosure or disclosures.

EVIDENCE / DOCUMENTS

7. I was provided with the following

    7.1 From the claimant:

        7.1.1 A file of documents (128 pages)
        7.1.2 The claim form and Particulars of Claim
        7.1.3 A copy of a second claim form and Particulars of Claim which had been rejected by the tribunal
        7.1.4 A witness statement by the claimant dated 13th July 2025 (3 pages)
        7.1.5 A second witness statement from the claimant erroneously dated 12th of June 2025 rather than 12 of July 2025 which consisted of a rebuttal of one of the respondents witness statements (8 pages)
        7.1.6 A skeleton argument by the claimant (7 pages)
        7.1.7 A supplemental submission by the claimant (18 pages)
        7.1.8 A rebuttal of the respondent's submission by the claimant (13 pages)
        7.1.9 A clarificatory note from the claimant (2 pages)
        7.1.10 A procedural note from the claimant (2 pages)

    7.2 From the respondent:

        7.2.1 A file of documents (270 pages)
        7.2.2 6 witness statements, from Messrs Archer, Bell, Bernath, Fisher, Perkins and Talbot (24 pages)
        7.2.3 Written submissions (26 pages).

8. Given the volume of documents, the difficulty of working with two separate files (which was unsatisfactory even for an urgent hearing) and the time taken up with the amendment application, I made it clear that I had read the Claim Form and Particulars of Claim, all the witness statements (but not the documents referred to in the witness statements), the claimant's and respondent's Skeleton / Written Submission / Submission rebuttal documents, but not the documents referred to in them. I emphasised to the parties that I would expect them to draw attention to any relevant documents during their submissions and I would consider them when I deliberated.

9. I heard oral submissions from both parties.

10. I have considered all the documents to which I was referred. Any page references below prefixed with 'C' refer to the claimant's file and those with 'R' to the respondent's file.

RELEVANT LAW – INTERIM RELIEF

11. Relevant to this case, **s.129(1) ERA** provides that an application for interim relief will be granted where
"it appears to the tribunal that It is likely that on determining the complaint to which the application relates the tribunal will find –
(a) That the reason (or if more than one the principal reason) for the dismissal is one of those specified in…section 103A.."

12. It is for the claimant, as the applicant, to establish that this is 'likely. 'Likely' in this section means "*a pretty good chance of success*" (**Taplin v Shippam Ltd (1978) ICR 1068 EAT**; reaffirmed in **Dandpat v The University of Bath and Ors UKEAT/0408/09**). This phrase, in turn, has been interpreted as meaning "*a significantly higher degree of likelihood than just more likely than not"* (**Ministry of Justice v Sarfraz [2011] IRLR 52 EAT**).

13. The standard of proof required is therefore greater than the balance of probability test to be applied at the main hearing. The higher burden of proof is necessary as the granting of such relief will prejudice a respondent who will be obliged to treat the contract as continuing until the conclusion of the proceedings. Payments made under a continuation of contract order are not recoverable in the event the employee's unfair dismissal claim is dismissed at final hearing. Such a consequence should therefore not be imposed lightly (**Dandpat above**).

14. The "likely to succeed" test has to be applied to all of the matters that the claimant has to prove (**Simply Smile Manor House Ltd and ors v Ter-Berg [2020] ICR 570; Steer v Stormsure Ltd [2021] ICR 807**).

15. I am required to make a summary assessment of the likelihood of success at this early stage in the proceedings on the material before me. I am not required to make a summary determination of the claim and it would be wrong to do so. It is a broadbrush and impressionistic task (**Dandpat, above; reaffirmed in Hall v Paragon Finance plc [2024] EAT 181**). That is the approach I have sought to take.

RELEVANT LAW – CONSTRUCTIVE DISMISSAL

16. **Section 95 ERA** materially provides:

"(1) For the purpose of this Part an employee is dismissed by his employer if…

(a) …

(b) …

(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct…"

17. The above is often referred to as 'constructive dismissal'. The principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

18. In order to succeed in a claim of constructive dismissal, the employee must therefore establish that:

18.1 as a matter of fact, the conduct about which he complains occurred

18.2 as a matter of objective judgement, it amounted to a fundamental breach of contract on the part of the employer

18.3 he resigned in response to any proven breaches in the sense that they were a cause of his decision to resign

18.4 he did not affirm the contract before resigning.

19. It is a fundamental breach of contract for an employer, without reasonable and proper cause, to conduct itself in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the parties (**Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) [1997] ICR 606, HL; Morrow v Safeway Stores [2002] IRLR 9**).

20. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

21. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. Simply acting in an unreasonable manner is not enough to breach this term. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. These qualifying words emphasise the demanding nature of the test.

22. A breach of the implied term of trust and confidence may consist of a series of actions on the part of the employer that cumulatively amount to a repudiation of the contract. The 'last straw' in the series does not, of itself, have to amount to a

breach of contract, still less be a fundamental breach in its own right (**Omilaju v Waltham Forest London Borough Council [2005] IRLR 35, CA)**.

23. **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, [2018] IRLR 833** contains an important discussion of the last straw concept in [14] – [21] and the '5 stage' test to be applied in such cases [55].

RELEVANT LAW – DISMISSAL BY REASON OF A PROTECTED DISCLOSURE

24. I will not deal with the law on the definition of a protected disclosure because, as set out above, for the purpose of the interim relief hearing only, the Respondent did not challenge that the claimant was likely to establish that he had made a protected disclosure.

25. **Section 103A ERA** provides that
"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

26. In a constructive dismissal, the reason for the dismissal is the reason for the conduct which is said to amount to a fundamental breach of contract and which caused the employee to resign. The Tribunal must enquire into what operated on the mind of those who conducted themselves in breach of the implied term in order to establish the reason or principal reason for their conduct (conscious or subconscious).

27. Once the reason or reasons are identified, it is for the Tribunal to evaluate whether they were separate from the protected disclosure or were so closely connected with it that a distinction could not fairly and sensibly be drawn (sometimes described as the "separability principle") (see **Hall above,** affirming the guidance provided by the Court of Appeal in **Kong v Gulf International Bank (UK) Ltd [2022] ICR 1513**).

28. The operation of the burden of proof at final hearing was in dispute between the parties in relation to employees with less than 2 years continuous service with the employer. The clamant maintained it was for him to show facts from which the Tribunal could conclude that the principal reason for the dismissal was the disclosure and then the burden shifted to the respondent. He sought to rely on **Kuzel v Roche Products [2008] EWCA 380** in this regard. The respondent maintained that, in respect of employees with less than 2 years' service, the burden of proof is on the employee to establish that the making of the protected disclosure was the sole or principal reason for dismissal (**Maund v Penwith DC [1984] ICR 143, CA; Ross v Eddie Stobart Limited EAT 0068/13)**. I accept that the respondent's analysis is correct. The fact that the burden of proof is on an employee with less than 2 years' service is, indeed, addressed and reaffirmed in 2024 in **Hall above** – at paragraph 69 by Eady P.

DETAILED ISSUES

29. In light of the law as set out above, the detailed issues which I have to determine are whether the claimant has satisfied me that it is likely in the sense that he has

a pretty good chance / it is significantly more likely than not that at final hearing the Tribunal will find that:

29.1 The respondent conducted itself in the manner complained of by the claimant

29.2 The conduct amounted to a fundamental breach of contract because it breached the implied term of trust and confidence (to use the shorthand for the term set out in **Malik** and above)

29.3 The sole or principal reason for the respondent's conduct and the dismissal was that the claimant made a protected disclosure/s.

30. For the purpose of the interim relief hearing only, the respondent did not raise any dispute in relation to the conduct being at least a cause of the claimant's resignation nor as to whether he had affirmed the contract.

THE PROTECTED DISCLOSURES ON WHICH THE CLAIMANT RELIES

31. The specific disclosures upon which the claimant relied were not clear from the Particulars of Claim. I took the view it was necessary to clarify the alleged disclosures in order to properly consider the likelihood the claimant would establish they were the reason for his dismissal.

32. Through discussion and with reference to the claimant's contemporaneous documents and the summaries he had typed onto the documents, I established that he relied on the following 11 alleged protected disclosures:

32.1 On 3 April 2025 in conversation with Messrs Archer, Henry and Fisher and by email to Mr Bell, taken together or individually, he disclosed that

32.1.1 the level of dust in the workplace was excessive and was a potential and likely breach of the Control of Substances Hazardous to Health Regulations ('COSH')

32.1.2 posed a risk of explosion and high risk of fire in breach of the Regulatory Reform (Fire Safety) Order 2005 ('RRFSO 2005')

32.1.3 by the email, set out the legal requirements with which the respondent was not currently complying. ('PD1')

32.2 On 4 April 2025 by email to Mr Tibbs and in discussion with Mr Henry, taken together or individually, he disclosed that

32.2.1 Special personal data which listed reasons why people were off work unwell etc appeared to be accessible to multiple people

32.2.2 It needed to be kept confidential and access given only to those who needed it for legitimate business purposes

32.2.3 This was in order to be compliant with GDPR ('PD2')

32.3 On 22 May 2025 by email to Messrs Burke and Bernath he disclosed that

32.3.1 the respondent's proposal that employees work at height to remove excess waste that had accumulated in a storage area would put them in breach of the Working at Height Regulations 2005 ('WHR'), HSWA 1974, and MHSR 1999

32.3.2 the proposal that a fork lift truck be used to compress the waste, although safer than working at height, would likely breach PUWER 1998

32.3.3 waste should be collected more frequently (‘PD3’)

32.4 On 28 May 2025 to Messrs Bell, Bernath and Talbot in writing he disclosed that a number of identified changes to the fire evacuation procedure were advisable because the current process was ineffective (‘PD4’)

32.4.1 Although not specified, he believed this information tended to show a breach of RRFSO 2005, HSWA 1974 s.2, MHSWR 1999 reg 9

32.5 On 11 June 2025 at 12.44 in writing to Messrs Archer, Bernath and Ms Butcher he disclosed that the risk and method statement (‘RAMS’) produced by a contractor for a project to install racking called Project Nova was inadequate in the numerous respects listed in the email (‘PD5’)

32.5.1 Although not specified, he believed this information tended to show variously a breach of LOLER 2022, HSWA 1974, MHSWR 1999, PUWER 1998.

32.6 On 11 June 2025 at 23.19 in writing to Messrs Archer, Bernath and Ms Butcher in writing he disclosed that

32.6.1 The respondent and the contractor had non-delegable legal duties for site safety and liability in respect of Project Nova

32.6.2 The RAMS in their current form were unacceptable and would place both the respondent and claimant in breach of their legal duties

32.6.3 He would not be able to confirm the work was safe to commence unless issues in the RAMS were addressed (‘PD6’)

Although not specified, he believed this information tended to show a breach of the WHR 2005 and MHSWR 1999.

32.7 On 11 June 2025 at 6.42pm in writing to Messrs Archer, Bell, Bernath and Perkins and Ms Butcher that

32.7.1 The RAMS provided by the contractor were inadequate

32.7.2 They did not address working at height

32.7.3 They could not be signed off as safe without breaching the respondent’s legal duties. (‘PD7’)

Although not specified, he believed this information tended to show a breach of the Construction and Design Management Regulations 2015 (‘CDMR 2015’) and MHSWR 1999.

32.8 On 11 June 2025 at 8.16pm in writing to Messrs Archer, Bell, Bernath and Perkins and Ms Butcher that

32.8.1 The contractor may be wrongly assuming they can discharge statutory duties via contractual clauses which is not legally possible

32.8.2 Many of the required controls are being misunderstood or misapplied

32.8.3 The contractor’s team appear not to understand how to work safely at height or manage other key hazards (‘PD8’)

Although not specified, he believed this information tended to show a breach of CDMR 2015 and HSWA 1974.

32.9 On 12 June 2025 at 9.18am in writing to Messrs Archer, Bell, Bernath and Perkins and Ms Butcher that

32.9.1 He has serious concern about the contractor's inability to document how they will carry out the works safely and in compliance with legal duties

32.9.2 unless the contractor understands and documents each step of the work there is a high chance of an accident occurring, particularly if they are unaware of their own legal obligations. ('PD9')

Although not specified, he believed this information tended to show a breach of CDMR 2015 and MHSWR 1999

32.10 On 12 June 2025 at 7.12pm in writing to Messrs Archer, Bell, Bernath and Perkins and Ms Butcher that

32.10.1 The revised RAMS remain insufficient and it would be negligent to approve them in their current form

32.10.2 The onus remains on the contractor to demonstrate legal and technical competence, which they had failed to do, even after being provided with specific guidance on the hazards and risks requiring control

32.10.3 Without evidence of compliance the claimant cannot lawfully authorise commencement of the work ('PD10')

Although not specified, he believed this information tended to show a breach of CDMR 2015, MHSWR 1999 and HSWA 1974

32.11 On 12 June at 7.28pm in writing to Messrs Archer, Bell, Bernath and Perkins and Ms Butcher that

32.11.1 Version three of the RAMS still failed to account for key statutory risks including the use of gas bottles and unaddressed fire hazards

32.11.2 The claimant rejects the contractors claim that their equipment was bespoke and therefore exempt because LOLER was clear on what was and was not exempt and their equipment had to be subject to a thorough inspection or written scheme of control from a competent person

32.11.3 Insurance would not cover any injury or loss if the statutory breaches were not addressed

32.11.4 The contractor and the respondent would be exposed to vicarious liability ('PD11').

Although not specified, and in addition to LOLER, he believed this information tended to show a breach of an employer's duty to have insurance in respect of personal injury.

33. The claimant accepted that PD3, 4 and 5 were not referred to in the Particulars of Claim, even in general terms. The respondent reserved its position as to whether it would contend that the claimant required permission to amend his claim to rely on these but did not object to me having regard to these for the purpose of the interim relief application.

THE BREACHES OF CONTRACT AMOUNTING TO A REPUDIATORY BREACH ON WHICH THE CLAIMANT RELIES

34. The breaches of contract on which the claimant relied as amounting to a repudiatory breach were not fully particularised in the Particulars of Claim and required some clarification. Again, I thought it appropriate to clarify them before

considering his prospects of establishing that they happened or the reason for the conduct.

35. The claimant relied on the following 7 matters, individually or collectively, as conduct which amounted to a breach of the implied term of trust and confidence:

    35.1 On 3 April 2025 in response to the verbal discussion set out in PD1, Mr Fisher stated that the claimant was 'going over the top' ('breach 1')

    35.2 On 9 or 10 June 2025 Mr Fisher referred to the delay in the repair of a broken door as having been 'Ashley'd' ('breach 2')

    35.3 On 9 or 10 June 2025 Mr Fisher shouted sarcastically to the claimant, in front of other colleagues or workers, 'is it fixed yet?' in respect of the broken door ('breach 3').

    35.4 On 5 June 2025 Mr Fisher reversed a safety control implemented by the claimant, namely a live spreadsheet to monitor defective equipment, without discussion or consultation with the claimant (C46-52) ('breach 4')

    35.5 On 12 June 2025 Mr Archer rejected the claimant's objection to the contractor's lifting equipment based on LOLER and sought a second opinion from a third party who also carried out racking installation but was uninvolved in Project Nova without knowing who their safety representative was (C64) ('breach 5')

    35.6 On 8 June 2025 Mr Bernath and/or a Ms Ergun encouraged employees to submit high volumes of near miss reports for reward which was deliberately disruptive and in direct contradiction of a concern the claimant had expressed over respondent's employees reporting the wrong things (C54-9) ('breach 6').

    35.7 On 12 June 2025, Mr Bell who was the lead in respect of Project Nova, failed to act on PD7 (which was made on 11 June 6.42pm C37) ('breach 7').

36. The claimant confirmed that the above, gleaned from his Particulars of Claim, was an exhaustive list of the conduct which he relied upon at this stage and which he said caused or contributed to his decision to resign (although other matters were referred to in the documents he produced).

RELEVANT EVIDENCE AND CONCLUSIONS

37. Given that the purpose of this hearing was to assess the likelihood of the relevant matters being established and not to make findings of fact and, having regard to rule 94 of the Employment Tribunal Procedure Rules 2024, I did not hear any oral evidence. Whilst I read the statements referred to above, I did so in order to understand the case each party intends to put forward at final hearing. I have been careful to avoid any findings of fact in setting out my decision below, except to the extent that the matters I refer to are wholly uncontroversial.

38. I have considered all the material in [7] above; in respect of the claimant's and respondent's files/bundles I have considered the particular documents to which I was referred. Below I record the essential documents and the essential gist of my reasoning.

39. The respondent is a very large online retailer of second-hand books, CDs and DVDs. The claimant was employed by the respondent as a Health Safety and Facilities Manager at its Coventry warehouse from the 17th of March 2025. On the 13th of June 2025 the claimant resigned with notice i.e. within 3 months of starting employment.

40. The various individuals referred to in the protected disclosures and breaches of contract were employed in the following roles:

    40.1 Mr Archer – Operations Change Manager
    40.2 Mr Bernath – Interim Warehouse manager and the claimant's acting line manager in respect of day to day tasks
    40.3 Mr Fisher – Operations Excellence and Continuous Improvement Manager
    40.4 Mr Bell – UK Operations Director; claimant's acting line manager for administrative purposes; Mr Fisher's line manager and the Project Nova sponsor
    40.5 Ms Butcher – Head of Programming and Mr Archer's line manager
    40.6 Mr Perkins – Chief Operating Offic er based in Chicago
    40.7 Mr Talbot – Senior HR Business Partner
    40.8 Mr Tibbs – the former Health Safety and Facilities Manager

Prospects of Establishing that the Conduct Complained of as a Breach of Contract Occurred

Mr Fisher's conduct – comments made (breaches 1 – 3)

41. In relation to the 3 alleged comments by Mr Fisher,
    41.1 the claimant relied on his witness statement and Particulars of Claim where he asserted these comments occurred and
    41.2 his letter of resignation dated 13 June 2025 (R99) where the comments are referred to. The latter 2 comments were said to be one of the most recent and decisive incidents in the claimant's decision to resign.

42. The respondent relied on Mr Fisher's evidence to the effect that the making of these comments was disputed:
    42.1 He had no recollection of saying to the claimant that he was going over the top or to anyone that anything had 'been Ashley'd'.
    42.2 He had asked the claimant to fix a particular door which was required to get trucks in and out and was frustrated by the claimant's failure to arrange this repair in a timely manner
    42.3 He had asked him why the door was not fixed on a number of occasions in a tone that may have betrayed his frustration
    42.4 He may have said the repair was 'with Ashley'
    42.5 He was always professional in his dealing with the claimant.

43. The respondent also relied on:

43.1 the absence of evidence of any contemporaneous grievance or verbal escalation by the claimant of these matters

43.2 the inconsistency between the claimant's statement in his resignation letter that 2 of the comments were the most decisive incidents in his decision to resign and the claimant's annotation on C64 to the effect that it was Mr Archer's conduct in seeking a second opinion (breach 5) that was the key repudiatory breach.

43.3 The claimant's misinterpretation or misunderstanding of Mr Fisher's conduct relied upon as breach 4 (which I deal with in the section below).

44. The claimant accepted in submissions that this part of his case was essentially 'one person's word against another'.

45. I do not find at this stage the claimant has a pretty good chance / it is significantly more likely than not that these factual disputes will be resolved in his favour at final hearing. They may be but, in circumstances where the comments and the way they were delivered are denied and there is no independent, contemporaneous corroborative evidence, it is not appropriate, in my view, to find that the claimant has a pretty good chance this factual dispute will be resolved in his favour.

46. I draw further support for this conclusion from my analysis below of the final part of the claimant's case against Mr Fisher.

Mr Fisher's conduct – unilateral reversal of the claimant's safety control (breach 4)

47. In essence, it appears at this stage that the claimant suggested a system for dealing with repairs to equipment identified as defective and known as 'red tagged'. Specifically, the document at C46 appears to show that he suggested that, in addition to the equipment being tagged, it be logged on a spreadsheet he could share with a repairer.

48. The claimant contended Mr Fisher reversed this system without consultation or discussion.

49. The respondent contended Mr Fisher suggested that a system of recording the repairs on a whiteboard in the area where the equipment was stored be continued and/or refined, that he intended both systems be used, that this was ventilated in written messages with the claimant and that the claimant readily agreed to this suggestion.

50. There is therefore a dispute of fact about what Mr Fisher suggested and whether it was a suggestion or a reversal of the claimant's method without discussion or consultation.

51. This issue is contained within the Particulars of Claim but is not covered in any detail in the claimant's witness statement. The respondent relied on the witness statement from Mr Fisher and the documents at C46-52 which contained the relevant messages exchanged about this issue at the time.

52. I do not propose to set out each of the messages. I find that, on review of these contemporaneous documents, they could be said to provide some support of the claimant's case that Mr Fisher suggested or decided to implement a whiteboard system. Equally, they could be said to evidence an exchange of ideas between the claimant and Mr Fisher, be ambiguous as to whether Mr Fisher was suggesting the whiteboard system in addition to or in preference to the claimant's system, and to evidence that the claimant was content with Mr Fisher's suggested approach.

53. There is clearly an issue between the parties as to the reliability of the perceptions and interpretation of the claimant and Mr Fisher in relation to their interactions with each other. I do not find at this stage, in the absence of unambiguous contemporaneous evidence in support, that the claimant has a pretty good chance or it is significantly more likely than not that he will establish Mr Fisher acted in the manner he alleges.

Mr Archer's conduct in seeking a second opinion (breach 5)

54. For the purpose of this hearing, it was not in dispute that
    - 54.1 On 11 June 2025 at 12.44 the claimant stated the following (C34)
      "The LOLER inspection records appear to be from 2024, if they are related to harnesses etc. they will need to be within the past 6 months unless brand new harnesses are to be purchased with the conformity certificate etc. attached or available…."
    - 54.2 On 12 June 2025 at 11.41 am Mr Archer stated the following (C64)
      "…one concern his having and raised to me is that his lifting attachment is bespoke and doesn't have LOLER inspection / certificate and all racking installers use this.
      So I have reached out to Intexion (Simon) who is kindly looking into this, as he believes it could be 'best practice' for a yearly inspection but not LOLER. He is taking this to his H&S rep to. Find out. I think a second opinion from Intexion is worth it and I value Simon's feedback, given they also do the same job"
    - 54.3 At 11.48 the claimant replied (C64)
      "Thanks - that's good to know - just for clarity LOLER states that every employer shall ensure that lifting equipment which is exposed to conditions causing deterioration which is liable to result in dangerous situations (which theirs is) is: Thoroughly examined (in the case of lifting equipment for lifting persons or an accessory for lifting - which slings etc are - at least every six months) In the case of other lifting equipment, at least every 12 months or in either case in accordance with an examination scheme. Inspections etc must be by a competent person who is a trained LOLER inspector or a structural engineer etc"

55. The respondent relied on the witness statement of Mr Archer [19] which states that the context in which he made this request to Intexion was that the claimant and he had an earlier conversation on 12 June 2025 in which the claimant indicated he was uncertain whether a certificate was required or whether it was best practice. The claimant denies that there was any such conversation. He invited me to note no mention is made of such a conversation in the exchange between him and Mr Archer. He asserted that the fact he replied to Mr Archer's message so quickly to identify the source and extent of the legal requirement for an inspection is

inconsistent with Mr Archer's evidence that he had expressed uncertainty about this earlier that day.

56. I accept on the material before me, that there is an apparent inconsistency between the contemporaneous documents and Mr Archer's written statement. In the circumstances, in the absence of oral evidence, I find that the claimant has a pretty good chance that his evidence will be preferred in this regard and that Tribunal will find that Mr Archer sought a second opinion from Intexion as to the need for the Project Nova contractor to have LOLER certificates / inspection in relation to its equipment without the claimant having indicated any uncertainty about his view of the legal requirements.

57. A Tribunal at final hearing may, of course, find differently, given that it will hear oral evidence tested in cross examination both on this issue and a number of other issues which may assist on reliability (or credibility) generally.

Mr Bernath / Ms Ergun's disruptive conduct in organising a near miss reporting competition (breach 6)

58. The claimant's Particulars of Claim put the breach as follows in paragraph 4 (iv): 'The volume of spurious or incorrect safety reports deliberately increasing after the claimant raised concerns about mis categorisation, interpreted as coordinated undermining'

59. In his Skeleton [2.2.5], the claimant stated ' a team submitted over 70 reports in a weekend to deliberately overload the claimant's review duties…"

60. It is not disputed by the respondent that Ms Ergun organised a near miss reporting competition. The respondent denies that Mr Bernath instructed Ms Ergun to undertake the challenge. The respondent denies that this was deliberately disruptive.

61. Both parties referred me to C54-9, which I find appear to show the claimant's idea for a root cause analysis competition on 6 June 2025 (C54-7); Mr Bernath's support for the initiative (C58) and that Ms Ergun had organised a challenge over 3 days whereby employees were to record near misses to increase awareness of health and safety starting on/about 6 June 2025 (C59).

62. The respondent relied on the witness evidence of Mr Bernath [23] – [25] which set out that he and the warehouse staff were supportive of the claimant and the ideas he had, that he was unaware of the competition before Ms Ergun organised it, she often came up with competitions for the quieter shifts and he, effectively, refuted that he or Ms Ergun were deliberately undermining and seeking to be disruptive of the claimant and his work. The respondent also relied on the evidence of Mr Bernath as to his positive relationship with the claimant with specific examples of the support he gave him generally and in respect of his views.

63. In the absence of any clear or strong evidence from the claimant as to why he thought this was deliberately disruptive or undermining conduct by either Mr Bernath or Ms Ergun and in light of Mr Bernath's apparent support of the claimant's suggested initiative set out in the contemporaneous documents and his witness

statement, I do not accept, at this stage, that the claimant is likely to establish that either Mr Bernath or Ms Ergun acted in a manner which was deliberately disruptive or undermining.

Mr Bell's conduct in failing to act on the claimant's disclosure 7 (breach 7)

64. The claimant alleges that Mr Bell, the Project Nova sponsor, failed to respond to the claimant's 7th disclosure (C37) about a number of inadequacies in the contractor's RAMS which would need to be addressed before the racking works could commence.

65. This disclosure was made on 11 June at 6.42pm and the works were scheduled to commence on 16 June 2025.

66. It was the claimant's case that, Mr Bell, as project sponsor failed to respond, in particular, to Mr Acher's message on 12 June at 11.41 (C63). Mr Archer's message, materially stated as follows:
'Hi All,
Please see Qubestor's updated RAMS and comments below.
@Ashley South if we can prioritise reviewing them before 10am tomorrow as per Mat's request
Then @Richard Bell, as project sponsor we will need to make a formal decision to delay or compromise without risking any H&S
....

67. The claimant relied on the above.

68. The respondent relied on all the statements and those of Mr Archer and Mr Bell in particular. It referred me to the exchanges of messages set out in Submissions at [16] – [45]. The heart of the respondent's submission on this issue is that the current evidence shows the following:
    - 68.1 The claimant continued reviewing versions of the contractor's RAMS over the course of 12 June (R234, R233)
    - 68.2 By 3.49pm Mr Archer proposed that if the final submitted RAMS at the ned of play that day did not meet a reasonable and practical standard, then a call would be required (R200)
    - 68.3 At 6.38pm the claimant said he would review the latest version (R201)
    - 68.4 At 7.12pm the claimant said the RAMS was not sufficient albeit improved. He proposed sitting down with the contractor and accepting the RAMS subject to that and a caveat that anything needing inspection under LOLER had such an inspection and there were certificates he could check (R201) and at 7.21 he added clarification of his requirements
    - 68.5 At 7.25pm Mr Bell stated
      "Thanks Ashley direct appraisal of situation needed in these circumstances" and asked for some clarification R202
    - 68.6 At 7.28pm C set out various concerns and asserted tht insurance would not cover the works if his concerns were not accounted for R202
    - 68.7 Mr Bell stated 'Yep agree' at 7.36pm (R202)
    - 68.8 Mr Archer replied, amongst other things, to propose that the relevant people 'huddle in the morning' before an external call with the contractor (R203)
    - 68.9 The claimant was invited to that morning meeting on 13 June

68.10 Mr Bell would then make a decision ‘go or no go’ (Mr Bell [11]).

69. The respondent contended that this demonstrated the claimant, respondent and the contractor were seeking to constructively work their way through the claimant’s concerns, Mr Bell did reply to the claimant on a number of occasions on 12 June and the material decision whether to proceed or not trailed in Mr Perkins’ message was to be taken after the meetings on 13 June 2025.

70. I accept that, on the face of it, that is the tenor of the evidence I have seen. In the circumstances, I do not accept that the claimant is likely to establish that Mr Bell relevantly failed to respond to his disclosure or concern.

PROSPECTS OF ESTABLISHING THE PROTECTED DISCLOSURES WERE THE REASON FOR THE CONDUCT

71. Having found it is likely that the claimant will prove that the respondent conducted itself in 1 of the 7 ways alleged, I have gone on to consider whether it is likely a Tribunal will find that the reason for this conduct is that the claimant made the protected disclosures.

72. The conduct is that of Mr Archer is seeking a second opinion from another racking contractor as to whether bespoke equipment used in their work required LOLER certification / inspection.

73. In submissions the claimant stated that Mr Archer questioned whether the claimant’s interpretation of the law was correct and that this “stemmed from” his protected disclosure or “came from it”. This is consistent with his witness statement in rebuttal of Mr Archer’s evidence where he references his view that Mr Archer did not trust his competence or advice (I (c)).

74. If the claimant’s evidence on this issue is accepted at final hearing, I do not accept he is likely to establish this means his disclosure or disclosures were the reason for the conduct complained of. The claimant is only, in my view, likely to establish that, but for the disclosure the conduct would not have occurred. In other words, it is the context in which the conduct occurred. This is not likely to satisfy the requirement that it be the principal reason for the conduct complained of. Any doubt as to whether the claimant’s interpretation of the law in his disclosure was accurate, his experience or competence is likely to be considered a separate feature.

75. In the alternative and, insofar as it is necessary, I also

75.1 note the claimant’s perception of why Mr Archer did what he did is largely consistent with Mr Archer’s evidence [19] and Mr Bell’s evidence [23] i.e. to obtain an opinion from an expert / someone who did this day in and day out to assist in resolving the apparent dispute between the contractor and the claimant as to what was required.

75.2 attach weight to the apparently positive comments from Mr Archer in relation to the claimant’s interventions or disclosures about the need for the contractor’s RAMS to be revised and certain measures to be in place before the works could commence. These tend to indicate that Mr Archer was not

inclined to treat the claimant adversely because he made protected disclosures.

76. Those comments are set out below:

76.1 On 12 June 8.56 am, Mr Archer “good work on the RAMS…if you need any support let me know…let’s catch up later on it” R256

76.2 On 12 June 2025 9.00am, the claimant stated
“…Things like LOLER can't go unmissed or we would all end up in court if something went wrong and someone would be seriously injured”
to which Mr Archer responded
“100% agree” R256

76.3 On 12 June 3.49pm, Mr Archer stated
“… I don't feel anything Ashley has flagged is unreasonable to be on there (*sic)* RAMS and somewhat shocked that things that would be common practice are missing to be honest. Let's see what the RAMS come back like and take a review from there tomorrow” R200

76.4 12 June 10.22pm, Mr Archer
“… Firstly, Ashley, great work last couple days making sure as a business we cover ourselves and contractor safety on site. As much as it's frustrating we aren't there yet with the RAMS, it's the right actions we are taking...”

77. In the circumstances, the above constitute an additional and alternative basis as to why I am not satisfied that the claimant is likely to establish that the principal reason Mr Archer sought an additional opinion to that of the claimant on this issue was because the claimant had made a protected disclosure or disclosures.

Approved By: **Employment Judge Connolly**

On: 21 July 2025