



EMPLOYMENT TRIBUNALS

Claimant: Mr Blake- White

Respondent: Govia Thameslink Railway Limited

Heard at: London South (in public by video) **On: 23, 24,25,26,27, 30 June, 1 and 2 July 2025**

Before: Employment Judge N Wilson
C Lloyd- Jennings (non legal member)
K Murphy (non legal member)

Appearances

For the claimant: Mr O Isaacs (counsel)
For the respondent: Mr M Sellwood (counsel)

JUDGMENT

1. The complaint of being subjected to detriments for making protected disclosures is well-founded and succeeds.

WRITTEN REASONS

2. These written reasons are provided following a request from the claimant at the end of the 8-day final hearing. The Judge was on leave for most of July 2025. This period of leave and other judicial commitments have therefore resulted in a slight delay in providing these written reasons for which I apologise. I did inform the parties when the request was made of my upcoming period of leave and the likely resultant delay.
3. This Judgment with reasons was delivered orally at the end of an 8-day hearing.

Background

4. The claimant has been employed with the respondent since March 2017 as a train driver under their Southern Railway brand. The respondent is the single largest rail operator in the UK. The claimant remains in the employ of the respondent.
5. The claimant has brought 4 separate claims which have been consolidated and are being heard together during this final hearing.
6. We had before us a 1755 hearing bundle. Within the bundle there is an agreed list of issues at page 248.
7. Some of the claimant's original claims have been withdrawn or struck out resulting in the claims we are to determine being confined to 2 detriments set out at page 248. The claimant relies on 12 protected disclosures which were causative of the alleged detrimental treatment.
8. Those 12 disclosures have been agreed by the respondent as being qualifying protected disclosures therefore the issue for the Tribunal is mainly one of causation.
9. The claimant relies on 2 detriments specifically:
 - a. The claimant's suspension from his substantive role as train driver from 14 April 2021 to 25 November 2021
 - b. The plot to terminate the claimant's contract of employment based on capability, ahead of an Occupational Health review, where the outcome of this review was pre-determined via an email of 18 May 2021

10. The 12 protected disclosures are set out at page 248 as:

- a. Telephone call to CIRRAS on 11 June 2020.
- b. Email from claimant to Angela Toase dated 21 February 2021 at 14.31
- c. Email from claimant to Angela Toase dated 23 February at 11.02.
- d. Email from claimant to Angela Toase dated 18 March 2021 at 20.18.
- e. Teams video call between the claimant, Angela Toase, Simon Bott, Dominic Morrow and Jeff Cheeseman on 14 April 2021 at 14.30.
- f. Email sent following a Teams video call on 14 April 2021, which forwarded disclosure (d);
- g. Email from claimant to Angela Toase dated 4 May 2021 at 17.29.
- h. Email from claimant to Angela Toase, Gayle Campbell and Jeff Cheeseman dated 6 May 2021 at 11.34.
- i. Email from claimant to Angela Toase and Jeff Cheeseman dated 7 May 2021 at 11.53.
- j. Email from claimant to Angela Toase dated 31 July 2021 at 12.37.
- k. Email from claimant to Dominic Morrow, Angela Toase, Mark Robey, Gayle Campbell, Simon Bott and Jeff Cheeseman dated 06 August 2021 at 12.07; and
- l. Email from Claimant to Angela Toase, Gayle Campbell, Simon Bott, Jeff Cheeseman, Graham Morris, Mick Whelan, Jean Cockerill, Patrick Verwer, Elliott Laurie, Imogen Dean and Rebecca Jorgenson dated 15 August 2021 at 21.45

11. The respondent's grounds of resistance state it is denied that the respondent suspended the claimant from his train driving duties because of any protected disclosures that he made as alleged or at all. They assert the decision to remove the claimant from his driving duties in April 2021 was based on the claimant's refusal to drive particular train units in the respondent's 377 fleet of trains. The respondent states in April 2021 the claimant informed his line manager that he did not want to drive those particular trains. He was referred to Occupational Health ('OH') on 7 April 2021. The resulting report deemed the claimant to be "F2" i.e. fit to drive with some recommendations. The report stated that the claimant should not drive the 377 series 6 and 7 trains as he reported stress, headaches and issues with concentration.

12. The respondent further denies there was any pre calculated plot by several parties to agree an outcome for a not yet taken place OH review. The respondent states the decision made by the OH department are entirely independent and based on the medical evidence available rather than any request made by a referring manager (*see grounds of resistance*). It is also denied that 'this plot' to terminate his contract of employment was because of his protected disclosures. The respondent states that at the time of the email dated 18 May 2021 the claimant had notified the respondent he was not prepared to drive two series of trains (the 377 series 6 and 7 trains) from the respondent's fleet and it is the respondent's position as set out in their grounds of resistance that he could not as result drive any of the trains in the 377 series as the respondent could not guarantee that the claimant would not have to drive the 377- 6 and 7 trains in the event of a last minute stock change.

13. We had witness statements from:

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|---------------------------|--|
| a. Mr Blake White | (Claimant) |
| b. Mr J Cheeseman | (Driver Trade Union Health & Safety Rep) |
| c. Mr Gregory Blake White | (Claimant's husband) |
| d. Mr Simon Bott | (Area Operations Manager) |
| e. Mr Whitby | (did not hear oral evidence from him) |
| f. Mr Dominic Morrow | Health and Safety Specialist |
| g. Mr Donnolly | (did not hear oral evidence from him) |
| h. Mr Peter Cooper | (Fleet engineer) |
| i. Mr Stephen Barkby | (Head of Safety Performance) |
| j. Ms Angela Toase | (Driver Manager) |

14. Without witnesses giving oral evidence and in the absence of their evidence therefore being able to be tested there is limited weight that we can place on the witness statements of those witnesses who did not give oral testimony.

Legal Framework

15. It is agreed between the parties that the 12 protected disclosures relied on by the claimant are qualifying protected disclosures. Employees and workers who make protected disclosures have the right not to suffer a detriment as a result.

16. Section 47 B of the Employment Rights Act 1996 ('ERA') provides that a worker has the right not to be subjected to any detriment by his or her employer, a colleague acting in the course of employment or an agent acting within the employer's authority on the ground that the worker made a protected disclosure.

17. The protection against detriment under s.47B ERA also has a number of parallels with the protection against victimisation under the Equality Act 2010. Indeed, the concept of 'detriment' originally derives from discrimination legislation. Discrimination cases have accordingly influenced Tribunals considering s.47B, particularly when it comes to the correct approach to causation.

18. It is important to stress that s.47B provides protection from any detriment; there is no test of seriousness or severity and the provision could well be breached by detrimental action that seems very minor to an objective observer (although the severity of the detriment will be relevant to the question of compensation).

19. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** 2003 **ICR 337 HL** their Lordships emphasised that it is not necessary for there to be physical or economic consequences to the employer's act or inaction for it to amount to a detriment. What matters is that, compared with other workers (hypothetical or real), the complainant is shown to have suffered a disadvantage of some kind.
20. The question of whether an employer's acts or omissions amount to a detriment is distinct from the question of what was the reason for those acts or omissions. It will therefore be an error of law for an employment tribunal to bring issues of causation into the factual question of whether a claimant has been subjected to a detriment.
21. Is it agreed by the respondent that the first detriment ie the suspension from driving duties was a detriment within the meaning of statute.
22. The second detriment is denied.

Burden of proof

23. In any detriment claim under s.47B ERA, it is for the employer to show the ground on which any act, or deliberate failure to act, was done - S.48(2).
24. Section 48(2) is easily misunderstood. It does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent (whether employer, worker or agent) must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.
25. It may be appropriate for a tribunal to draw inferences as to the real reason for the employer's (or worker's or agent's) action on the basis of its principal findings of fact.
26. The EAT summarised the proper approach to drawing inferences in a detriment claim in ***International Petroleum Ltd and ors v Osipov and ors*** **EAT 0058/17**:
- the burden of proof lies on the claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she was subjected was a protected disclosure that he or she made
 - by virtue of S.48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does not do so, inferences may be drawn against the employer (or worker or

agent) — **see *London Borough of Harrow v Knight* 2003 IRLR 140, EAT**

- as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.
- Whilst there was an appeal to the Court of Appeal in the ***Osipov*** case — ***Timis and anor v Osipov (Protect intervening)* 2019 ICR 655, CA** — the EAT's direction on the drawing of inferences was not challenged.)

Proving causal link between disclosure and detriment

27. The majority of cases under S.47B turn on the question of whether the worker was subjected to a detriment *on the ground that* he or she had made a protected disclosure. S.48(2) ERA means that the employer (or fellow worker or agent) will bear the burden of proving, on the balance of probabilities, the ground on which it acted or failed to act.
28. In ***Aspinall v MSI Mech Forge Ltd* EAT 891/01** the EAT held that the words 'on the ground that' in S.47B require a causal nexus between the fact of making a protected disclosure and the decision of the employer to subject the worker to the detriment. This mirrored the approach adopted in the context of race discrimination victimisation by the ***House of Lords in Chief Constable of West Yorkshire Police v Khan* 2001 ICR 1065, HL**.
29. The EAT in ***Aspinall*** borrowed the words of Lord Scott in the ***Khan*** case when concluding that, 'for there to be detriment under S.47B "on the ground that the worker has made a protected disclosure" the protected disclosure has to be causative in the sense of being "the real reason, the core reason, the causa causans, the motive for the treatment complained of"'.
30. The correct approach to the words 'on the ground that' in S.47B was considered by the Court of Appeal in ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening)* 2012 ICR 372, CA**. The EAT held that S.47B(1) requires an employer to show, if it is to avoid liability, that the detrimental treatment was 'in no sense whatsoever' on the ground of the protected disclosure: the standard that applied in discrimination law as set out by the Court of Appeal in ***Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* 2005 ICR 931, CA**.
31. The case progressed to the Court of Appeal, which accepted the employer's argument that, even if the EAT were right that it had to show that the making of the protected disclosure played 'no part whatsoever' in its acts and omissions, the tribunal's decision demonstrated that this stringent standard of proof had in fact been met. It had therefore been unnecessary for the EAT to remit the case on this point. it was not strictly necessary for the Court of Appeal to consider whether the ***Igen*** test proposed by the EAT was the correct one in this context,

but Lord Justice Elias went on to address the point for the sake of completeness. In his view, S.47B will be infringed if the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower. He stated that if Parliament had wanted the standard of proof in S.47B to be the same as for unfair dismissal, it could have used the same language, but it did not.

Decision makers knowledge of the protected disclosures

32. Bearing in mind that the question of causation under S.47B involves an examination of the thought processes of the alleged wrongdoer, one can intuit that a person cannot act 'on the ground' of a protected disclosure if he or she does not know about the disclosure.
33. Under S.47B ERA, the employee's liability does not flow automatically from the employer's liability: subsection (1) provides for the employer's liability for whistleblowing detriment, and subsection (1A) separately provides for an individual employee's liability. Therefore either an employer can be liable for an unlawful detriment under s.47B(1) or an individual employee can be liable under S.47B(1A), or both. Furthermore, under S.47B(1B), an employer can be held vicariously liable for any unlawful detriments for which an employee is individually liable under S.47B(1A)
34. it is important to note this case is brought against the claimant's employer and is therefore concerned with direct liability of the employer under section 47B(1) of the ERA 96. And there is a distinction between that provision and the provision for individual liability under section 47B(1A)
35. Support for adopting different approaches to detriment claims brought under s.47B(1) and S 47b(1A) can be found in ***First Greater Western Ltd v Moussa 2024 IRLR 697, EAT*** where Kerr J distinguished ***Malik*** (EAT in ***Malik v Cenkos Securities plc EAT 0100/17***) on the basis that the present facts did not risk injustice to the innocent decision maker. A claim was brought against the innocent influenced person in that case, but he was not held to be personally liable. Instead, the case was concerned with direct liability of the employer under S.47B(1), as to which Kerr J stated: 'It therefore appears to me that, unlike in age discrimination, a cause of action under S.47B(1) can in principle exist without an identified individual being motivated by a relevant protected disclosure.'

Findings of Fact

36. The relevant facts are as follows. Where we have had to resolve any conflict of evidence, I indicate how we have done so at the material point. References to page numbers are to the bundle and/or the witness statements.
37. We had a 1755-page main hearing bundle plus witness statements. We also had an agreed cast list and chronology.
38. We heard sworn evidence from:
- a. Claimant
 - b. Mr Cheeseman
 - c. Mr Gregory Blake White
 - d. Mr Simon Bott
 - e. Mr Morrow
 - f. Mr Cooper
 - g. Mr Barkby
 - h. Ms Toase
39. We have considered all the oral evidence heard and the documents referred to in the bundles insofar as they are relevant to the issues. I only refer to as much of the evidence as is necessary to explain our decision.
40. The 12 disclosures relied on by the claimant are agreed by the respondent to be qualifying protected disclosures. These are found at page 248.
41. Of the two detriments relied on, the first is not disputed by the respondent to amount to a detriment but causation is not accepted.
42. The second detriment is denied, and the respondent denies any plot to terminate the claimant's contract of employment based on capability ahead of the OH report where the outcome of this review was predetermined via the email of 18 May 2021.
43. The claimant made a telephone call to CIRRAS on 11 June 2020 which is a reporting line for rail safety and this disclosure related to failure to report safety notices to drivers. This is his first protected disclosure.
44. All of the other protected disclosures were made to Angela Toase the claimant's line manager at the material time, and a number of those disclosures also included other employees from the respondent's organisation or were disclosed to those other employees by Ms Toase, in particular Simon Bott, Dominic Morrow, Gayle Campbell and Mark Robey.
45. The claimant's second protected disclosure is an email to Angela Toase dated 21 February 2021. The claimant complains of sound levels and the frequency response made by the 'HVAC' (heating ventilation and cooling) system being

unacceptable. He asks if the company had measured the sound levels in the cabs and deemed them acceptable. Notably he refers to the sound being of great annoyance and causing occasional headaches. He then goes on to mention that he is undertaking research of noise levels and exposure and the impact of long-term exposure on hearing loss. He mentions younger people can be more receptive and sensitive to high frequency sounds. He states that *'It is my assertion that these fans produce an unacceptable amount of noise and contribute to an uncomfortable and possibly dangerous environment over extended periods'*.

46. Importantly he states *'In addition it would seem the company are aware of the issues within the cab as they have undertaken a program of "blocking off" the Cab fan MCB to prevent us from using this to turn the system off'*
47. He goes on to say *'Going forward, I will be measuring the sound levels on the Class 377 stock. If I come into contact with a unit which has an unacceptable noise level, I will log a record of this, inform fleet control and inform the health and safety rep at our depot. I will also take the train out of service as I believe these noise levels are not conducive with Train Driving'*.
48. He attached a sound clip to the email taken when the train was stationary. He points out that the sound clip demonstrates the noise from the driver seat to provide a true reflection of the issue.
49. The claimant finishes by saying he has raised the issue with Norwood LDS and Jeff Cheeseman the Health and Safety representative ('H&S rep') for the depot. The claimant specifically states these issues have been raised before with little to no change.
50. The third protected disclosure is made by email to Angela Toase on 23 February 2021 regarding the noise from the AWS alarms and detonators.
51. Angela Toase emails Peter Cooper forwarding the claimant's protected disclosures and asks Mr Cooper if he was aware of any other complaints.
52. On 10 March 2021 Simon Bott asks for the identity of the whistle-blower in relation to the failure to display or inform of safety critical notices (which was the first protected disclosure made on 11 June 2020) and Mr Cheeseman discloses the claimant's name as the whistleblower.
53. On 11 March 2021 Peter Cooper (fleet engineer) emails Angela Toase copying in Dominic Morrow (Health & Safety Specialist) regarding noise level testing and Ms Toase also forwards this on to Simon Bott (Area Operations Manager) and Gayle Campbell (in HR).
54. The way in which the claimant and his complaints are referred to is very telling and important in this case. It does bely the mindset of those involved, in particular Angela Toase, Mark Roby and Gayle Chapman.

55. The respondent seeks to persuade us that the only reason the claimant was suspended from driving and taken off track was because they were concerned about this ability to concentrate and therefore drive safely because of the noise levels and this was a safety issue driven by the OH restriction placed on him in respect of driving the series 6 and 7 trains, and the reason they could not accommodate him driving the other trains was due primarily to do with the stock change risk. However, the initial response to the claimant's disclosures and how the claimants' line manager (Angela Toase) and HR dealt with them is significant in this case and highly relevant to the material influence test.
56. The email from Ms Toase to Mr Cooper on 8 March 2021 refers to the driver 'complaining' and tellingly 'I know this driver will keep on about this'; this clearly discloses the mindset of Ms Toase at this time was certainly not one of concern for the claimant's ability to concentrate or concern about matters of safety, but rather that he was someone who is complaining and will keep on about it. It clearly shows Ms Toase was not at this point certainly concerned about the claimant not being able to concentrate and carry out his role safely despite knowing he was clearly raising the noise was unacceptable.
57. It is clear from the initial responses that Ms Toase appears to immediately be attempting to disprove that the claimant has a valid complaint by seeking to establish there was no issue from the respondent end and importantly that no other complaints had been made.
58. Peter Cooper sends an email on 11 March 2021 copying in Dominic Morrow with some information about the Control of Noise at Work Regulations and Ms Toase forwards those onto Simon Bott and Gayle Campbell.
59. No reasonable explanation has been provided for the involvement of HR at this stage, as according to Ms Toase's evidence no action she took following the disclosures was due to the claimant making protected disclosures. It is therefore not entirely clear why HR would be involved at this stage. We found her evidence to be evasive in large parts. She failed to directly answer questions put to her, instead bringing in other matters of evidence unrelated to the questions being asked. She demonstrated a reluctance to make appropriate concessions and often reverted to not being able to recall events when asked about matters which did not support the respondent's position in this case.
60. She mentioned often throughout her oral testimony that these were events from 4 years ago but then remained adamant about having a clear recollection about other matters put to her. We found her an unreliable witness. Further the documentary evidence in the bundle cast doubt on her oral evidence. For example, in her oral evidence she maintains she was attempting to help and support the claimant and was only concerned about his ability to drive safely because he had raised not being able to concentrate due to the noise of the

HVAC system. Yet her contemporaneous emails to others in the business at the material time notably disclose no such care or concern. To the contrary they bely a mindset of someone who was immediately looking to disprove that there could be a genuine problem with the noise, and they disclose a level of annoyance and frustration at the claimant which we find is because of the numerous disclosures he makes.

61. The concurrent YAMMER (the respondent's internal messaging platform) messages between Mark Robey and Gayle Campbell present real difficulty for the respondent. Mark Robey was a HR Manager at the material time and Gayle Campbell was an employee relations advisor who Ms Toase was clearly communicating with regarding the claimant's disclosures. Whilst Ms Toase was not involved in the particular YAMMER messages set out from page 1005 these are senior people who are guiding Ms Toase in relation to options available for the claimant.
62. Their YAMMER messages again disclose their attitude to the claimant's disclosures. We find these exchanges amongst senior members of the HR team at the respondent organisation indicates an organisation which is certainly far removed from viewing the disclosures the claimant raised positively. What is evident from much of the email communication in the bundle is the lack of any real consideration by anyone seemingly that the noise issues raised by the claimant could have merit and therefore there could be health and safety repercussions for the respondent's drivers. This is particularly troubling against a background of clear knowledge on the part of the respondent of the metal plates they had inserted in front of the circuit breakers being bent back so that drivers could still turn off the HVAC system. Arguably this alone would have alerted a reasonable employer of a more widespread issue with the HVAC system for drivers. Certainly, once the claimant raises this with the respondent when making his disclosures, they ought to have taken seriously the connection between this action of drivers and a possible noise problem with the HVAC system.
63. It is clear that the respondent's Peter Cooper and Dominic Morrow were certainly made aware by Mr Cheeseman in his email of 23 March 2021 that the noise from the cab fan is a factor raised in the driving instructors forum as having an impact on effective verbal communication in the cab with trainees and the potential safety considerations of this.
64. It is inconceivable that where the instructors have raised issues with effective verbal communication between a driving instructor and a trainee in such a small space as the drivers cab due to being hampered by the noise of the fan, that in the same space the same fan noise would not have similarly caused an issue for drivers and that the respondent would not have therefore known about this as a potential issue. In this regard we found the claimant's witness evidence throughout to be more credible than the respondent's witnesses. We accepted

his cogent evidence as to the ways in which the noise was impacting him and other drivers. We also found he has been consistent throughout when asserting he was not suffering from stress or a lack of concentration because of the noise issues he was raising. There is a clear distinction between someone saying they are suffering from 'stress' and the noise in the cab being at a level where it could be annoying and could affect drivers' concentration and the claimant saying he himself was unable to concentrate and drive safely. We do not find his email disclosures showed that he was informing the respondent he was suffering with stress and unable to concentrate because of the noise. He was saying the levels were uncomfortable and unacceptable and he was clearly concerned there was a breach of noise regulations which he wanted the respondent to investigate.

65. We also do not find the respondent believed the disclosures identified a safety risk with the claimant in driving the trains, certainly not before the OH report is received. Tellingly there is no mention of any such concerns until the claimant himself asks for an OH referral and the OH report is received.
66. It was clear from Mr Morrow's evidence that he was concerned that any reported noise **issue was not due to failure of the** whole fleet of trains as he was clear in evidence that this would have crippled the SE of England if for any reason those trains could not run. Mr Morrow discloses in his evidence a clear mindset of someone who was concerned about the operational and commercial impact on the business if there was any merit to the noise issue versus a genuine consideration of whether there could be merit in the noise complaint and looking to properly address it. Mr Morrow accepted any engineering change to the HVAC on 282 electric fleet trains would cost a phenomenal amount of money. Again, this shows the disclosures would potentially cause significant operational and financial implications for the respondent and this we find fed into the respondent's reluctance to acknowledge that there may be a real issue with HVAC systems.
67. It is clear from the photographs in the bundle and the evidence of Mr Morrow that the respondent has at some stage in 2020 inserted metal plates in front of the cab fan circuit breaker to prevent it from being switched off manually. We find metal plates were being bent back by drivers who were trying to access the circuit breaker in order to turn the HVAC system off. The respondent adduced no evidence of why those metal plates were inserted if it was not to prevent drivers switching of the HVAC system. What is more troubling is that they also do not address, and certainly we heard no evidence of this, the underlying cause and potential distraction which must have been causing the drivers to go to the lengths of bending back the metal plates. To the contrary the respondent's evidence was woefully lacking in relation to this crucial issue because the metal plates being bent back goes a considerable way to demonstrate that:

- a. there was an issue with noise in the cabs which drivers were effectively finding a work around for before the claimant's protected disclosures were made about the noise from the HVAC system
- b. The respondent had no appetite to address the underlying cause of why the drivers were doing this; to the contrary they issue a safety notice (page 164) stipulating that the metal plate should not be bent out of position. Given the respondent in this safety notice refers to the fan providing fresh air which is required for driver alertness and the system would no doubt be required to ensure a comfortable temperature in the drives cab (be that heat or cool air) the fact drivers were going to the lengths of bending back metal plates must have alerted the respondent to there being an issue with the HVAC system. We find the respondent has failed to show they considered why this was happening at all. They simply appear to have inserted thicker metal plates to prevent access to the circuit breaker.
- c. There is no evidence at all advanced by the respondent that there was any other reason why the drivers might have been bending back the metal plate nor that they took any steps to understand the cause of the distraction such that it is reasonable to draw an inference that this related to the noise in the cab from the HVAC system which in turn supports the claimant's disclosures and that there was a wider issue which importantly could be resulting in a distracting cab environment for drivers. Yet the respondent discloses no evidence to persuade us that this concerned them insofar as other drivers' safety to drive these trains is concerned. It is troubling that where passenger safety is relied on heavily by the respondent's witnesses in justifying their decisions to take the claimant off track once he makes his disclosures the respondent take no similar action or steps against other drivers. Notably we heard no evidence that when others raised complaints about the noise in the cab 377 stock the respondent took any steps to address any potential safety concerns arising from those drivers raising noise issues. Furthermore, no attempts were made by the respondent to address the underlying cause of why drivers were bending back metal plates. The fact they simply took steps to prevent them from doing so clearly also belies an attitude of an employer who has not considered potential underlying safety issues which may arise if there were distractions for the drivers from the noise levels. This lack of addressing the issue of metal plates and earlier noise complaints goes a considerable way in demonstrating the respondent's attitude to the noise issues was to ignore them. They simply showed no real appetite for addressing the noise and the problem this was causing drivers which directly undermines their position that they took the claimant's disclosures seriously and further that the disclosures did not materially contribute to the decision they made to take the claimant off track and suspend him from driving duties.

68. The 23 February 2021 email to Angela Toase raised the noise with the AWS alarm system and the detonators (protected disclosure number 3). A special notice was issued by the respondent on 11 November 2020 which again clearly demonstrated the respondent was aware that drivers were covering the AWS

alarm speaker. The notice states it is unacceptable to do so and if they felt the alarm was too loud drivers should report it using the appropriate report form. It is of course necessary for an AWS alarm speaker to be loud but a safety notice having to be issued about this practice must have again alerted the respondent to an issue with noise being a potential issue from the AWS system for drivers prior to the claimant's disclosures.

69. We did have serious concerns with Mr Morrow's witness evidence and his credibility generally. He was evasive and failed to make appropriate concessions even where it was plain he ought to. For example, he stated he did not know what the reference to 'rolling noise' was in the RSSB (rail safety and standard board report (page 1261) which would obviously relate to when the train was moving. His answer to the question asked about whether there would be different noise outcomes depending on whether the train was moving or static was not credible. In fact, he only made the concession that more noise would be generated when a train was moving versus when it was static when he was asked directly about this by myself following what was an evasive response. He also was clearly concerned about how his responses would be perceived by other employees of the respondent who were observing this public hearing. He repeatedly stated when being cross examined he did not wish to offend any of the drivers. He also contradicted himself in evidence at one point saying he would not have been aware of legislation in relation to noise levels and the duties on an employer but later in his evidence saying he was aware of the legislation as a train driver, when asked a question about the overall obligation on an employer to reduce noise levels to the lowest level possible.
70. Mr Morrow is the respondent's Health and Safety Specialist. He was informed of the claimant's complaint he says in April 2021. He also attended a video call with the claimant on 14 April 2021. This video call was attended by Angela Toase, Simon Bott (Area Operations Manager) and Jeff Cheeseman (Union Safety Representative).
71. We did not understand Mr Morrow's evidence that the complaint from the claimant was nuanced because it related to the class 377 series 6 and 7 trains only. The emails from the claimant to Angela Toase are clear as to the claimant's complaints. Furthermore, from the contemporaneous records of that meeting it is clear that the claimant refers to his report dated 18 March 2021 and that report sets out multiple failings he was alleging in relation to noise in the driving cabs. The claimant did reference the Control of Noise at Work Regulations, and we find based on this and the claimant's emails Mr Morrow's evidence that he was not aware the claimant was alleging the noise levels were unlawful to be incredible. The email makes several clear assertions to the noise regulations. It is clear there is an allegation that the regulations may not be being complied with.
72. Mr Morrow in his evidence could not recall whether he read the claimant's report ahead of the meeting he had with the claimant and Angela Toase on 14 April 2021. We accept the claimant's contemporaneous notes of that meeting and find that Mr Morrow had not read that email report of 18 March 2021. We heard

no cogent evidence from the respondent's witnesses to persuade us the claimant's contemporaneous notes were not accurate and we find they accurately record what was stated in that meeting.

73. It is troubling Mr Morrow had failed to consider the 18 March 2021 email from the claimant ahead of a meeting arranged to discuss the claimant's disclosures given the role Mr Morrow held within the respondent's organisation, and the failings the claimant had raised regarding the Noise at Work Regulations and cab noise which logically on the face of it could potentially impact safety if the noise was a distraction to drivers to the extent they were bending back metal plates to access the circuit breaker to manually switch them off.
74. Much of Mr Morrow's oral evidence was him saying he could not recall specific statements being made to him by the claimant and/or Mr Cheeseman in that meeting. We found Mr Morrow to be evasive when giving evidence. He did not have any recollection of key conversations or key matters put to him. Mr Morrow's oral evidence was that he was unclear about why the claimant was not able to turn off the air conditioning units. He seemingly still, even after having prepared witness evidence for the case expects us to accept, he still has no grasp about what the claimant was complaining of when he made his disclosures. We find this wholly unlikely. The email of 18 March 2021 clearly sets out at considerable length and in detail what the claimant was raising specifically in relation to noise in the cab environment; the fact that the cab noise could become so intolerable that drivers including himself were switching off the fans. In the same e-mail he refers to the company (ie the respondent) blocking of the access to the MCB with metal plates. The claimant forwards the email dated 18 March 2021 to Mr Morrow and others on 14 April 2021 after the meeting they have. Against the background of what is contained in those emails from the claimant and the record of the meeting which we accept is accurate from the claimant, it is inconceivable that Mr Morrow would not have a good understanding of precisely what noise related issues the claimant was raising.
75. It is also pertinent the claimant within these emails does not refer to himself not being able to concentrate or drive safely or suffering from stress.
76. This goes some way to corroborate his assertion throughout that he has never said to the respondent including their OH department that the noise impacts his concentration or that he is suffering with stress or anxiety because of the noise which in turn could impact his ability to drive safely.
77. Mr Morrow in his email of 15 April 2021 states that Peter Cooper, the fleet engineer, had already intended to undertake a review of cab fans and the associated noise levels and we find it more likely than not that this was because there was a wider known issue with the noise levels.

78. Whilst Mr Morrow repeatedly referred to him believing the specific complaint from the claimant related to when the heat was set at 28 degrees we do not find this credible against the backdrop of the multiple emails the claimant has sent making his disclosures which set out his specific complaints relating the noise. These do not make mention of the problem relating solely to this heat setting.
79. It is clear Mr Morrow does not reply to some of the claimant's emails. His evidence is that he cannot recall this. He also gave evidence that he did not know why Ms Toase copied him into emails asking for assistance. He states he did not know why she did that. We find it is not credible in his role that he;
- a) would not have been able to provide some assistance to Ms Toase and
 - b) given the nature of the disclosures being made he would not have a clear understanding of what was being asked of him
80. Ms Toase in her email dated 24 May 2021 states she needs assistance from fleet and safety to ensure the questions being raised by the claimant in his disclosures have been addressed. Mr Morrow is in safety. No credible evidence is advanced by Mr Morrow as to why he did not respond to those emails. We find it highly unlikely he would not have understood his assistance was being sought. We find it more likely than not he did discuss matters outside of the emails with Ms Toase, Mark Robey and Gayle Campbell. Notably when asked about any such conversations taking place about the whistleblowing, he stated he could not recall any such conversation. We find this is not credible and it is more likely than not that conversations were had. Ms Toase in her evidence indeed refers to a number of conversations she had with different people when she says she was looking at accommodating the claimant's restriction and it is not realistic that no conversations about the claimant's disclosures were had between these key employees other than what appears in the emails in the bundle.
81. Mr Morrow's oral evidence contradicted his clear statements in emails that 'we' which we take to mean himself and the safety specialist operations team had not received any previous feedback to indicate the noise levels were impacting adversely (page 660). In cross examination he tried to change this to mean he was certain the claimant was the only person who could not switch off the cab fans. We found his answers to the line of questioning about what he meant in his email of 24 May 2021 disingenuous at best. The statement he makes in that email is not subject to any qualification about the issue being the claimant was the only one who could not switch off the cab fan and that was affecting him. When he realised his oral evidence did not stand up to what he had clearly recorded in the email he then stated he had not come across another driver before the claimant tell him the 377 cabs noise was impacting them. This oral evidence mirrors his witness statement in relation to there being no prior complaints about noise in the driver cabs on the 377 trains.

82. However, we find this is directly contradicted by the email at page 1037 from Mr Morrow dated 25 January 2021 prior to the claimant's second protected disclosure about the driving instructors feedback in relation to noise and excessive heat. This comment appears directly under 'brief notes below' 16 January 2021 notes from cab HVAC review 377/387 Traction.
83. Notably the actions from this meeting were for Mr Morrow to pull together a driver's questionnaire to help understand the exact nature of the concerns. For example, is it noise or the time it takes for the fan to no longer operate.
84. It is clear no driver questionnaire was sent out notwithstanding a clear issue having been raised about the HVAC system with clear feedback from driving instructors in relation to noise.
85. Mr Morrow's oral evidence was this related to driver instructor complaints and sought to distinguish between noise the driving instructor would experience on the non driving side of the cab and the driving side. His oral evidence in this regard again is simply not credible. The driver's cab is a small space. The pictures in the bundle clearly demonstrate this. It is not credible that if noise affected a driving instructor on the non driving side to the extent that it was raised by them as an issue, that the same noise would not be impacting the driver.
86. Further Mr Morrow clearly had actions he was meant to take arising from the noise issue reported by driving instructors before the claimant's disclosures and yet he takes no actions in this regard. A reasonable inference can be drawn based on this background and his attitude to the claimant's disclosures that Mr Morrow is reluctant to potentially identify a real noise issue which requires action on the part of the respondent which could have a significant operational and financial impact.
87. The fact that he seeks to distinguish between the non driving side of the cab and the driving side of the cab as it pertains to noise is again telling of his mindset and attitude in relation to the noise issue. His evidence again is not credible about there being a difference between noise raised by the driving instructor because it was a safety critical discussion between the driving instructor and the driver, yet he maintained a position in oral evidence that there was a distinction between that being a safety concern for the driving instructor but not the driver. We found Mr Morrow's evidence not credible, and we find him to be an unreliable witness. We find his failure to disclose the relevant previous noise complaints to Ms Toase was materially motivated by the disclosures the claimant made because he knew admitting to them would potentially have serious operational and commercial implications for the respondent's business.

88. In August 2023 the claimant made a request for minutes of a meeting from the driving instructor forum where concerns were raised about the cab fans on the 377 6 and 7 series. We can see that feedback from page 1024 of the bundle. This discloses feedback from a number of people in September 2020 which supports what the claimant states in relation to the noise from the fans being an issue, the MCB's being vandalised and the metal plates which the respondent had installed. It is clear the feedback includes references to it being a distraction having to keep switching off the fan, to it being too noisy and that being a distraction. Notably one of the emails is dated 9 September 2020 and is sent to 114 recipients at the respondent organisation including Mr Morrow which clearly states that some of the 377 cab fans noise is a constant distraction and unless you are totally desperate for heat or cooling you can't wait to turn it off.
89. It is clear to us Mr Morrow and a not insignificant number of people at the respondent organisation had been made aware of the noise issues with the fans and importantly that they were a distraction some time before the claimant's second to twelfth disclosures.
90. The fact that Mr Morrow maintained his position about no one else having raised any issues is just not credible in light of all this evidence on this point.
91. It is clear that he was misrepresenting the position to Ms Toase when he therefore gave her information in his email responses about no one having complained about the noise in the driver cabs on the 377 trains in response to the claimant's protected disclosures.
92. Mr Morrow arranged to drive the trains on 26 and 27 May 2021 taking out 7 trains in the fleet over 2 days for dynamic testing. Mr Morrow's witness statement is not plausible in relation to him saying he had the cab fan in air fan mode because the days he was driving were hot days. This is against the backdrop of him saying his understanding of the issue was about the full heat mode not the AC mode. We do not accept his explanation as being credible here because the temperature for the days in question is disclosed in the bundle as being 16 and 18 degrees and although Mr Morrow's evidence was that he found this too hot and the temperature had to be right for him, the cab van contemporaneous pictures of his driving for this testing show him in a jumper and his cab mate in a jacket. Again, his evidence does not stack up against the documents in the bundle. Further what is troubling is that on his own evidence he carried out testing in the AC mode rather than heat mode when he himself understood the issue to only be one of when the system was in full heat mode. His evidence is simply again not credible. We find it is more likely than not he knew full well there was a significant difference in noise between the AC mode and the full heat mode. This coupled with his failure to admit to any prior noise complaints despite having known of them leads us to conclude that he was deliberately misrepresenting matters. Both Dominic Morrow and Peter Cooper

knew that issues with the noise in the 377 train cabs had been previously raised. The respondent has provided no explanation about why these prior complaints were not disclosed earlier than they were.

93. We find from the outset Ms Toase and others at the respondent's organisation were keen to make the noise complaints a claimant issue rather than accept that there could have been an issue with the noise levels from the HVAC system that could have a negative impact on drivers whilst driving. This is despite clear evidence showing the respondent was made aware of noise issues prior to the claimant's disclosures.
94. The troubling thing throughout is the respondent witnesses were clearly attempting to draw a distinction between driver instructor noise complaints and the claimant's complaint. We heard no cogent evidence to persuade us of any valid distinction in this regard.
95. Ms Toase in her oral evidence stated neither Mr Cooper nor Mr Morrow told her of any prior noise complaints. Even if this is credible (which we do not find it to be given the likelihood of offline conversations being had about the claimant's disclosures) she admitted in her evidence that she had heard whispers about the noise. She expanded that other drivers and Mr Cheeseman had talked about noise issues and that she had heard there were other people saying they were noisy, but she was at pains to distinguish between not having a written complaint and/or an official complaint and having been aware of a noise issue more informally. It is again of great concern that having accepted she knew others had raised noise as an issue she was content to ignore this because in her own words nothing was received by her in writing. This essentially enabled her and others in the respondent organisation to feed a narrative that the issue was a claimant issue whether that be due to his lack of resilience (which we do not find the respondent has established nor do we find the explanation Ms Toase gave for raising this with the claimant in a meeting to be genuine) or for his acute good hearing. None of this stacks up against the factual background. Ms Toase's mindset is crucial given she ultimately suspended the claimant from driving duties and takes him off track. We do find the decision followed group input from others.
96. Ms Toase seeks advice and input from others including Mr Morrow, Mr Bott, HR (namely Mr Robey and Ms Campbell) before she was able to respond to the claimant's disclosures and ultimately suspend him from driving duties. This is evidenced by the emails in the bundle.
97. It is also evident that Ms Toase's explanation for the reason for the first detriment (ie suspending him from driving and taking him off track) was solely because of safety concerns because the claimant was stressed, and /or was saying he was unable to concentrate. We do not accept her oral evidence that the claimant had informed her himself he was unable to concentrate. This is not

supported by the wording of the emails in which he raises his disclosures. We preferred the claimant's evidence on this issue. We do not find she held a genuine belief the claimant was a danger and that safety was a concern of hers when she made him off track. Notably there is no evidence that she raised concerns about his fitness to drive or any safety perspective prior to the OH report. This leaves the restriction of the OH report she relies on to justify the decision made.

98. Ms Toase's evidence is most troubling insofar as it relates to the reason the claimant was off track and suspended from driving duties. Her evidence is the decision was made by her because of an OH consultation with 'Ewa' which took place on 7 April 2021. Her oral evidence that she thought the claimant had agreed the contents of that OH report because an employee's OH report would only be released to a line manager if they agreed it, is clearly contradicted by the email the claimant sent to Ms Toase before the OH report was released to either of them. The claimant emails Ms Toase immediately after the OH discussion on 7 April 2021 and he specifically states he wanted to wait until he had the report before he spoke to her but that may not be until later in the day or the next day so he wanted to give Ms Toase advance notice of issues he had with the consultation and matters he did not agree with. It is plain even before the claimant and Ms Toase have seen the OH report that he has raised he has concerns about the consultation. He has maintained those concerns throughout.
99. The OH report suggest that the claimant does not drive the 377-stock series 6 and 7 trains. The OH consultation was a telephone consultation, and it was not with a doctor. It records the claimant reported stress, headaches and issues with concentration which he attributes to the noise made by the fans in these train cabs.
100. There follows an email exchange between Angela Toase and David McCaighy about Ms Toase being able to plan his (*the claimant's*) work but not being able to control stock changes and this being too great a risk to the business. She says it will be Simon's (Bott's) call. David McCaighy tellingly replies that he thinks the claimant represents a risk anyway anyway and Ms Toase does not question this response which we find is likely because she agrees with this. We find it is plain the respondent considers the claimant a risk to the business because of the numerous disclosures he has made.
101. Ms Toase and the respondent seeks to persuade us the only reason for the suspension from driving duties was because of the OH restriction on the 6 and 7 series and the inability of the respondent to accommodate this. They argue they could not control stock changes and there was too great a risk of stock changes. This is significantly undermined by:

- a. The claimant makes it immediately known to the respondent he does not agree with the OH report and disputes it accurately reflects what he stated about the noise issues.
- b. A meeting is held with Ms Toase on 15 April 2021. The respondent does not take any minutes of that meeting, and we accept the notes of the meeting appearing at page 499 made by the claimant are an accurate reflection of what was said. The respondent advances no cogent evidence to persuade us the meeting notes made by the claimant are inaccurate. The witness statements do not challenge the accuracy of the claimant's meeting notes. We therefore find that the claimant during this meeting did make it clear to Ms Toase that he did not agree that he had informed OH that he was suffering from loss of concentration or indeed stress and should be corrected. He said he had used an analogy of kids in the back of the car and the word 'stress' having been taken out of context. Ms Toase in her oral evidence did not notably answer directly about whether the claimant during this meeting told her he disagreed with the OH report, but rather her evidence was that the claimant told her verbally that he was not safe to drive because of the noise. If this was a genuine admission the claimant had made to her why does Ms Toase never refer to this in any emails to others in the business where she is talking about taking him offtrack. Logically that would surely be the most prevalent consideration and reason for taking him off track if that is what the claimant had informed her himself. We find it is not credible he would have mentioned this to her, and she would not have mentioned it in any email communications following his disclosures, certainly when she makes the decision to take him off track. It is more likely than not that given the claimant has already raised an issue with the OH report by email before the report had been released that he informed Ms Toase during this meeting about how the OH report was inaccurate.
- c. What is most troubling is Ms Toase's failure to refer him back for further assessment given he is clearly disputing what the OH report records in terms of stress and concentration issues.
- d. Ms Toase's evidence on this issue was of great concern. She stated that she had a conversation with the OH advisor who informed her that because nothing had changed there was nothing OH could do. We find this wholly incredible. The only reason OH would first of all respond that nothing has changed is if Ms Toase informed them nothing had changed. Yet the very thing that was in issue was that OH report was not agreed by the claimant. A reasonable employer would have surely simply referred an employee back to OH for further review where fundamental matters recorded in the report are being disputed as being recorded accurately by that employee. Especially when the report is being relied on to change an employee's duties. We do not find it likely OH would be

able to refuse to assess the claimant again in those circumstances. Ms Toase's explanation that the claimant was being fluid in his description of the effects on him is not supported by the documentary evidence. We found the claimant's evidence more credible as to the impact on him of the noise and we accept he never stated to OH or the respondent that he was not safe to drive because of the noise impacting his concentration. We find the claimant's evidence overall has been far more consistent and reliable than that of the respondent's witnesses.

- e. Ms Toase gave away her mindset in oral evidence when she also stated, she was sure 'we would end up where we are today in a claim'.
- f. We were not persuaded by the explanation advanced by the respondent that the reason the claimant had to be taken off track was because they could not guarantee a stock change. Ms Toase's evidence was not persuasive as to what steps she took to fully ascertain whether there was a real risk of this. It is notable she states it's too big a business risk without any real qualification of this assessment. The claimant's position that stock changes are rare was supported by Mr Cheeseman's clear evidence on the point and we find there was no clear and real business risk of stock change as purported. Mr Cheeseman stated stock changes are fairly rare. At the time of these events, he had been driving for 20 years and he stated he could count on 2 hands how many times a stock change had to be done. He states it happens maybe once or twice a year. We find this was information that either would have been known to Ms Toase or information she could easily have ascertained had she really been looking to simply follow the restriction in the OH report.
- g. We find Ms Toase supported by others including Mr Robey used the restriction in the OH report to suit the respondent removing the claimant from driving because he had made disclosures and the respondent i) did not want to have to address the underlying potentially valid noise complaint in light of the potential repercussions this would have on the business, ii) she was frustrated with the claimant, as clearly were others in the business, and felt the claimant was a risk to the business in some way because of those disclosures and iii) the stock change reason for not being able to accommodate the restriction does not stand up to scrutiny against the witness evidence of the claimant and Mr Cheeseman, and we do not accept the OH restriction coupled with the stock change issue was the genuine reason to suspend the claimant from driving duties.

102. Turning to causation in light of our factual findings it is plain that the decision to suspend the claimant from driving were materially influenced by the disclosures made by the claimant. It is already admitted by the respondent that

suspending the claimant from driving and taking him off track amounted to a detriment.

Detriments

103. It is already admitted by the respondent that suspending the claimant from driving and taking him off track amounted to a detriment.
104. Our findings of fact also directly feed into the second detriment (which is not admitted by the respondent)
105. Our findings about how the respondent addressed and responded to the claimant's disclosures and his subsequent suspension from driving is crucial in relation to the second detriment, namely 'the plot to terminate the claimant's contract of employment based on capability, ahead of an Occupational Health review, where the outcome of this review was pre-determined via the email of 18 May 2021'.
106. It is clear in our findings that the OH restriction and the stock change issue was not a genuine reason for the claimant's suspension.
107. It is clear that key staff of the respondent including those in senior positions in HR had a negative view of the claimant which we find was because of him making his disclosures.
108. Mr Bott is the Area Operations Manager for the respondent. His evidence was that he had asked Ms Toase to keep him in the loop about what was happening with the claimant following his disclosure about noise compliance with the HVAC units because he was genuinely interested as he has responsibility for the driving community. This evidence was contradicted by Ms Toase saying she forwarded Mr Bott emails for reporting purposes about those drivers who were off track.
109. Ms Toase admitted in her evidence that she had deliberately withheld using the claimant's name in emails to Mr Bott and others, when it was put to her, as she did not want those emails to be disclosed in later proceedings. Yet Mr Bott denied thinking there was anything unusual about this. We find on balance it is unlikely he did not know why the claimant's name was being omitted from email correspondence. This again undermines the respondent's position about any 'plot' because if management were having conversations about employees which were above board and had nothing to hide why would one deliberately attempt to avoid disclosure of emails by removing the names of employees in the emails.
110. Mr Bott was also evasive in his response to being asked about offline conversation between himself Ms Toase and Gayle Campbell. He had to accept everything is not minuted (it is clear from the respondent's disclosure it

is not). He also stated he 'did not know' rather than there were no offline conversations. We find it more likely than not that Angela Toase, Simon Bott and Gayle Campbell were having more than the documented emailed conversations about the claimant and importantly his disclosures. It simply is not credible that the only conversations had are those we see contained in emails within the bundle, particularly where a number of emails seek to deliberately omit the claimant's name to evade disclosure of them.

111. Mr Bott also accepted the notes the claimant made about the meeting which took place on 14 April 2021 could be accurate and we consider this also supports our earlier finding in relation to those notes.
112. Notably Mr Bott had no recollection of whether Mr Morrow during the meeting on 14 April 2021 mentioned that he had knowledge of prior noise complaints.
113. Mr Bott also in his oral evidence stated due to there being a number of distractions in the cab, whether the driver said the distraction was manageable would be material to the assessment of whether someone was able to safely drive. This was clearly disregarded by Ms Toase given her failure to refer the claimant back to OH when he was disagreeing that he had informed OH that he was unable to concentrate (and therefore unable to drive safely).
114. A complex case review takes place with OH on 16 April 2021 with Mr Bott, a Dr CC, Angela Toase and Gayle Campbell. There is a meeting record in the bundle. We can see in that meeting record, the narrative about the claimant's concentration and alertness being affected by noise is continuing to be pushed forward. It is incredibly troubling that despite Ms Toase at this time clearly having been informed by the claimant that he had informed the OH advisor that he was not able to concentrate (it is also troubling that there is also seemingly a new reference to alertness which is not mentioned in the original OH report) this is not mentioned by anyone at this complex case review. It refers to 'we can only go by what the driver tells us' but it is abundantly clear the driver is disputing having told them this about concentration or alertness.
115. What is clear is that the respondent is willing to accept an OH report which the claimant has repeatedly disputed as being accurate to inform them of the next steps they take including suspending him from driving. The failure to compete a re referral in the face of the claimant's objections to the accuracy of the report is significant in relation to the second detriment. It belies the mindset of the respondent's Ms Toase, Mr Bott, Mr Robey and Gayle Campbell in particular is to push a narrative that the claimant is not capable of performing his driving duties safely. The lack of being able to accommodate the restriction further enables the respondent to move forwards along a potential capability route. Whilst the respondent is at pains to point out there was no such plan

because the claimant remains employed by them this does not mean based on the findings that there was no such plan in progress at that time.

116. Ms Toase sends an email to Simon Bott and Gayle Campbell dated 18 May 2021 and states the situation with the claimant has become ridiculous and she feels it should be taken up much higher and she would also like help from Mark Roby. She refers to doing a referral back to OH but we know that there was never a re referral back to OH by Ms Toase.
117. Mr Bott in response to the same email states *Don't forget when you do the OH referral, this is based on the discussions we had with the doctor on the complex case review, where we needed to demonstrate that the noise levels were within legal parameters and this was not planned to change in the foreseeable. OH has then agreed post seeing LBW that they will say his anxiety is not going to change for the foreseeable and we would then look at medical capability to fully complete his role and contract with us.*
118. The respondent is in great difficulty with this response from Mr Bott because it records an agreement before OH have re assessed the claimant. Mr Bott accepted eventually this remark was made in anticipation of a further OH review. Whilst Mr Bott was at pains to explain that they could not just terminate someone's employment without following a capability process, it is clear this email is anticipating a certain outcome from OH which would allow the respondent to then move to medical capability to fully complete his role and contract. This is clear evidence of the direction the respondent wanted the outcome of the OH referral to go. We make no findings that OH were involved in any plot. We have no evidence that points to this at all. But what we do have is the respondent employees in particular Gayle Campbell, Simon Bott and Angela Toase allowing something which they knew the claimant was saying had been inaccurately recorded in the OH report to be used to support moving the claimant along to a capability process. Whilst much was made of the U1 classification, and we accept the classification was a temporary one in so far as the claimant's fitness to work is concerned, what is more significant is the failure to refer the claimant back to HR when he had clearly disputed the accuracy of the report. We find this substantially supports the second detriment insofar as the respondent seeking to take advantage of the OH report referring to the claimant's concentration issues to drive forward a capability route and to ultimately terminate his employment. We find it is more likely than not that the claimant's email referring to the company whistleblowing policy which Ms Toase sent to Mr Bott, Mr Morrow, Mark Robey on 24 May 2021 likely affected the plans that the respondent had in so far as the progression to a capability route to complete his role and contract with the respondent was concerned.
119. We find the second detriment is established. It is clearly detrimental treatment to try and drive a particular OH outcome which can ultimately be used to move one along to a capability route which could result in the end of one's

employment. Further we find that a hypothetical comparator would not have been treated in the same way had they disputed an OH report. The matters which materially influenced this treatment was the claimant's whistleblowing complaints.

In conclusion:

120. In conclusion it is for the employer to show the ground on which any act, or deliberate failure to act, was done. We have not been persuaded that the reasons advanced by the respondent for the detriment are established. To the contrary we find they were not genuine reasons, and we are satisfied in light of our findings that the claimant was subjected to both detriments on the grounds that he made protected disclosures. It is clear that the treatment of the claimant, notably the actions and importantly the failure to act including failures to disclose relevant information about previous complaints and a failure to re refer the claimant to OH once he disputed the accuracy of the report, the removal from driving duties and the respondents desire to move the claimant to a capability process based on what they knew the claimant was saying was disputed in the OH report, was materially influenced by his protected disclosures.

121. We find the claimant has discharged his evidential burden and we are not satisfied with the grounds advanced by the respondent as to why they did any act or failed to do any act insofar as those actions and/or failures relate to the relevant detriments was not because of the protected disclosures made. We find the complaints of whistleblowing detriment to be well founded, and the claimant's claim succeeds.

122. The matter will be listed for a one-day remedy hearing with separate directions to be ordered for that hearing.

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Employment Judge N Wilson
Dated: 15 August 2025

Sent to the parties on:
20 August 2025

For the Tribunal Office:

P Wing

