



EMPLOYMENT TRIBUNALS

Claimant: Mr William Calver

Respondent: University of Greenwich

Heard at: London South (by video) **On:** 17 to 20 June 2024

Before: Employment Judge C H O'Rourke
Mr S Corkerton
Mr C Tansley

Representation:

Claimant: In person

Respondent: Miss C Urquhart – Counsel

REASONS

(Having been requested subject to Rule 62(3) of the Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant was employed by the Respondent, latterly as a Widening Access Consultant, for sixteen years, until his resignation with immediate effect, on 27 June 2022.
2. He brought a claim on 8 August 2022 [6 (PDF numbering in the bundle)], alleging constructive unfair dismissal; automatic unfair dismissal and detriment on the grounds of protected disclosure and breach of contract in relation to notice pay.
3. In very broad terms, he asserted that the Respondent, who received public funds to '*improve equality of opportunity for underrepresented groups to access, succeed in and progress from higher education*' [2139] was not using at least part of such funds for the purpose for which they were intended and disguised such misuse through lack of financial transparency. He sought, by whistleblowing, to challenge such behaviour.
4. Over the period November 2021, to May 2022, he made six disclosures, subject to Part IVA of the Employment Rights Act 1996 ('ERA'), for which, as a consequence, he claims that he was subjected to detriment and automatically unfairly dismissed. He relies on the same detriments to found a claim of constructive unfair dismissal.

5. Issues. The issues were set out, in broad terms, in a case management order ('the CMO') of 8 March 2023 [78]. The Claimant was ordered to provide further and better particulars of the claimed detriments/fundamental breaches of contract he relied upon, and he did so, setting out twenty-three alleged detriments [81-90].
6. Clarification of the Issues before and during the Hearing. Ms Urquhart, in an 'opening note' [separate document], provided prior to the Hearing, confirmed the following admissions by the Respondent as to the List of Issues. We summarise those as follows:
 - a. The Claimant made the disclosures set out at paragraph 5.1.1 of the CMO.
 - b. Those disclosures met some of the requirements of Part IVA ERA, including the fact that the Claimant made them in the reasonable belief that they were in the public interest, but the following elements of this Part of the Act were not conceded, namely:
 - i. That they did not, '*in the reasonable belief*' of the Claimant '*tend to show ... that a person has failed ... to comply with any legal obligation to which he is subject.*' and that therefore they could not be 'qualifying disclosures' (s.43B(1)(b)).
 - ii. While it was accepted that if the Tribunal nonetheless considered that the disclosures were qualifying, that then the bulk of the disclosures made to the Respondent would be 'protected' (five of the six), but that the fifth would not be so protected, as it had been made to the Office for Students ('OfS'). The OfS are not (it was agreed) a 'prescribed person' under s.43FA, and therefore this disclosure (made on 24 March 2022) needed to meet the requirements of s.43G ('*Disclosure in other cases*') to be 'protected'. The Respondent considered that it was not so protected because it was not '*in all the circumstances of the case ... reasonable for him to make that disclosure*' (s.43G(1)(e)), because having previously made a substantially similar disclosure to his employer ((2)(c)(i)), he had failed to comply '*with any procedure whose use by him was authorised by the employer*' ((3)(f)), in this case, specifically, that he had failed to appeal against the outcome of previous disclosures.
 - c. The previous issue raised as to time limits was no longer pursued.
7. Claimant's withdrawal of certain allegations of detriment/fundamental breach of contract. At various stages during the Hearing the Claimant confirmed that from his list of protected disclosures/detriments/fundamental breaches of contract in respect of constructive unfair dismissal [81 to 90], he relied only on the following, the remainder being withdrawn. We summarise those as follows, in broad terms only, the detail being contained in the Claimant's further and better particulars:

- a. Allegation 4 – that in the summary document of their investigation report into his disclosures, of 18 March 2022, the Respondent had withheld from him evidence of their alleged non-compliance with regulatory requirements.
 - b. Allegation 8 – that the Respondent did nothing to respond to his grievance of 4 May 2022, against the Vice Chancellor, requiring clarification of the Respondent's compliance (or otherwise) with regulatory requirements.
 - c. Allegation 12 – that the Respondent stated, on 24 May 2022 that they would not investigate the above grievance.
 - d. Allegation 18 – essentially a failure to provide the evidence of regulatory compliance referred to in Allegation 8.
 - e. Allegations 22 and 23 – a failure by the Respondent to refer the Claimant for an Occupational Health (OH) report.
8. Otherwise, the issues are as set out in the CMO.

The Law

9. We were referred to Part IVA, s.47B and s.103A ERA, as to the meaning of 'protected disclosure' and the protection from detriment or dismissal in that respect. Section 48(2) states that, in respect of detriment, it for the employer to '*show the ground upon which any act ... was done*' and, in respect of automatic unfair dismissal, the burden is on the employer to show the reason for dismissal.
10. In respect of constructive unfair dismissal, the burden of proof for which is on the Claimant, we considered the following authorities:
- a. The case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 EWCA**, which sets out the test for constructive unfair dismissal and which has been itemised already in the list of issues.
 - b. The case of **Mahmud v BCCI International [1997] UKHL ICR 606**, which stated (as subsequently clarified) that:

"The employer should not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."
 - c. The case of **Nottinghamshire County Council v Meikle [2004] EWCA IRLR 703**, which indicated that any fundamental breach of contract needs to 'play a part in' or 'be one of the factors relied upon' in the decision to resign.
11. In respect of protected disclosure, we considered the following authorities of relevance:

- a. **Fecitt v NHS Manchester [2012] EWCA IRLR 64** held that the test for detriment is whether the protected disclosure '*materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.*'
- b. **Derbyshire v St Helens MBC [2007] UKHL IRLR 540** defined 'detriment' as existing '*if a reasonable worker would or might take the view that the treatment was in all the circumstances a detriment*' and '*an unjustified sense of grievance cannot amount to a detriment.*'
- c. **Panayiotou v Kernaghan UKEAT/0436/13/RN**, which indicated that the manner in which a claimant pursued his disclosures could be separated from the fact of his making them.
- d. We summarise the authorities in respect of the issue of 'reasonable belief in failure to comply with a legal obligation', as follows (quoting from the relevant IDS reference work). The EAT in **Korashi v Abertawe Bro Morgannwg University Local Health Board UKEAT/0424/09/JOJ** stated that the focus on 'belief' in s.43B establishes a low threshold. However, the reasonableness test clearly requires the belief to be based on some evidence — rumours, unfounded suspicions, uncorroborated allegations and the like will not be enough to establish a reasonable belief. The EAT's decision in **Wharton v Leeds City Council EAT 0409/14** is a good example of how finely balanced the question of reasonable belief can be. W was employed by the Council as an assistant community creator but was dismissed after only seven months in post. He claimed that the reason for his dismissal was that he had raised concerns about the way in which the Council was using the funds provided to it by Arts Council England (ACE). Among other things, he considered that the Council was neglecting to utilise available equality data to plan and coordinate its engagement work as stipulated in the strategic plan that underpinned its bid for ACE funding. The employment tribunal found that there was no qualifying disclosure — all that the 'disclosures' amounted to was W complaining that the Council was not complying with his own interpretation of its policy and strategy. In the tribunal's view, that did not tend to show breach of a legal obligation, such as the improper use of funds under a funding agreement, and W could have had no reasonable belief otherwise since he had never seen the ACE funding agreement and had not been given any information as to its terms. On appeal, the EAT held that the tribunal had erred. The fact that W had not seen the funding agreement would not necessarily prevent him having a reasonable belief that the Council was in breach of it. It was possible that W could have reached that belief if, rightly or wrongly, he believed that his job description, the funding bid or the Council's strategic policies were incorporated into, or reflected obligations contained within, the funding agreement. This issue would be remitted for the tribunal to reconsider.

The requirement that the worker's belief that information tends to show a relevant failure must be 'reasonable' indicates that there can be a qualifying disclosure of information even if the worker is wrong. This was stressed by the EAT in **Darnton v University of Surrey [2003] ICR 615, EAT**, when overturning an employment tribunal's finding that a university lecturer had not made a qualifying disclosure because allegations made to the university vice-chancellor to the effect that a criminal offence had been committed were not factually correct. The EAT held that the question of whether a worker had a reasonable belief must be decided on the facts as (reasonably) understood by the worker at the time the disclosure was made, not on the facts as subsequently found by the tribunal. This case was cited with approval by the Court of Appeal in **Babula v Waltham Forest College [2007] ICR 1026, CA**, when it made clear that a worker will still be able to avail him or herself of the statutory protection even if he or she was in fact mistaken as to the existence of any criminal offence or legal obligation on which the disclosure was based. Furthermore, even where the legal position is something of a grey area, a worker might reasonably take the view that there has been a breach. In *Fuller v Exsel Engineering Ltd ET Case No.3100143/14* the employment tribunal accepted that F reasonably believed that EE Ltd, a company that exported items for military use, was in breach of a legal obligation when it decided not to obtain licences for the export of universal gun mounts. EE Ltd had sought a view from the relevant government department as to whether licences were required and had not been given a definitive answer. It went ahead without the licences on the basis that the gun mounts were not 'dedicated', in that they could be used to mount other things, but acknowledged that it was taking a risk in doing so. In these circumstances, it could not be said that F's contrary view was unreasonably held.

The Facts

12. We heard evidence from the Claimant. On behalf of the Respondent we heard evidence from Mr Peter Garrod, the University Secretary, who arranged the investigation of the Claimant's disclosures; Ms Sara Ragab, the Claimant's line manager and who was involved in relation to a referral to OH; Mr Robert Morris, Head of Employee Relations and Change, who had oversight of the Claimant's sick leave and subsequent grievance; Mr Chris Shelley, who became the Claimant's line manager, on Ms Ragab being obliged to step aside, the Claimant having brought a grievance against her, his involvement being again principally in relation to the OH referral. Ms Claire Matthews, then the Associate Director, UK Student Recruitment and Mr Christopher McDermott, Assistant Director of Finance, had provided witness statements, but were not questioned by the Claimant and simply affirmed to their statements.
13. Chronology. We set out the following generally uncontentious chronology:

- a. March 2019 to March 2021 – the Claimant raises informal concerns about ‘*value for money*’ and the ‘*cost effectiveness*’ of the Respondent’s management of access and participation funding.
- b. 21 October 2021 – Claimant goes on sick leave and provides fit notes referring to anxiety and depression.
- c. 25 November 2021 – disclosure 1.
- d. 14 December 2021 – Mr Garrod asks a Ms Carrie (an external academic with expertise in this area) to investigate the disclosure.
- e. 24 December 2021 – disclosure 2.
- f. 1 February 2022 – disclosure 3.
- g. 15 March 2022 – the Claimant returns from sick leave, but having taken some annual leave, returns to work on 23 March 2022.
- h. 18 March 2022 – Mr Garrod provides the Claimant with a summary of Ms Carrie’s report, concluding that there was no evidence of wrongdoing by the Respondent and no further action would be taken in respect of the disclosures. The Claimant was advised of his right of appeal, which he did not exercise [1001].
- i. 21 March 2022 – disclosure 4.
- j. 24 March 2022 – disclosure 5 (to OfS).
- k. 5 April 2022 – Claimant has a return-to-work meeting with Ms Ragab, at which the possibility of an OH referral is discussed.
- l. 20 to 26 April 2022 – Ms Ragab arranges for the Claimant to complete a ‘stress risk assessment’, as a precursor to a referral to OH.
- m. 3 May 2022 – disclosure 6.
- n. 4 May 2022 – Claimant submits grievances against the Vice Chancellor and Ms Ragab, resulting in the latter’s removal as his line manager and being replaced by Mr Shelley.
- o. 10 to 17 June 2022 – Claimant on leave.
- p. 21 June 2022 – Claimant on sick leave and does not return to work.
- q. 27 June 2022 – Claimant resigns [1889].

14. Reasonable Belief as to Tending to Show Failure to Comply with a Legal Obligation. We considered the following evidence on this issue:

- a. The Claimant (in his third, fourth, fifth and sixth disclosures) placed reliance on an OfS document entitled 'Regulatory notice 1 – Access and participation plan guidance' [2137]. It, in turn, referred to the Higher Education and Research Act 2017 ('HERA') and The Higher Education (Access and Participation Plans) (England) Regulations 2018 ('the Regulations'). In particular, he referred to its use of the terms '*cost effectiveness*' and '*value for money*', in the context of the '*use of these funds for the purposes given*'. In his third disclosure, he refers to it, obviously incorrectly, as a '*statutory instrument*' [803-806].
- b. He was challenged that this document was merely guidance (hence its title) and did not impose a legal obligation on the Respondent, which he disputed, stating that it was based on the statutory requirements of HERA and therefore lawfully binding.
- c. He stated that he was very familiar with the document having used it '*extensively*' when preparing the Respondent's Access and Participation Plan (APP) (WS 10). Despite this, however, when questioned, he was unaware of the above-mentioned Regulations (which are, of course, a statutory instrument), referred to in the document and an extract of which was annexed to it.

15. Conclusion on Reasonable Belief as to Failure to Comply with a Legal Obligation Issue. We find on balance and considering the low bar for an employee to overcome in such cases that the Claimant's belief in this respect was reasonable. That, of course, is entirely different to any conclusion that the Respondent was, in fact, actually failing to comply with any legal obligation, which we neither find, nor, indeed, it is within our remit to do so. The reasons we find in the Claimant's favour in this respect are as follows:

- a. The Claimant is not a lawyer and is not expected to understand the difference, in this context, between legal obligations and guidance. The document is couched in somewhat legalistic terms – it refers to the OfS undertaking investigations or interventions if the guidance is not complied with and to wording such as that '*providers will be required ... and must adhere*' (and similar), not dissimilar to terms imposing legal obligations.
- b. It refers to being underpinned by HERA and the related Regulations and that it is a '*regulatory notice*', which terminology could convey to the layman that it had the force of law. (The Regulations make clear that the limit of the OfS 'power' in this respect was to either approve, or not approve a provider's APP, which presumably, therefore, would have implications for ongoing funding.)
- c. The Respondent themselves did not seek to correct the Claimant's belief in this respect, in response to his disclosures, indicating that they too (until perhaps seeking legal advice in respect of this claim) also considered the guidance a legal obligation.

16. First Two Disclosures not being Qualifying and Remainder being so. We are clear that the first two disclosures are not qualifying disclosures, because the Claimant makes no reference, whatsoever, to any alleged breach of a legal obligation. However, from the third disclosure onwards, the Claimant does make reference to such alleged breach and accordingly, having found that such belief on his part was reasonable, the third, fourth and sixth disclosures are qualifying.
17. Fifth Disclosure to the OfS. This issue hinges on the Claimant's admitted failure to follow the Respondent's appeal procedure. His disclosures were made and responded to subject to the Respondent's 'Public Interest Disclosure (Whistleblowing) Policy and Procedures' [252], which allowed for the right of appeal in the event of an outcome that the whistleblower did not agree with. It was clear that he did not exercise that right. When questioned as to why he had not, he said that it was '*not compulsory*' (which it wasn't, unless perhaps he sought to make disclosures to a third party). It cannot, we find, be the case that he did not bring an appeal because he no longer trusted the Respondent, as why, therefore, would he subsequently raise a grievance to the Respondent on effectively the same issue? He was also directly informed, at the time, when he stated his intention to approach the OfS that he should, instead, appeal internally, but chose not to. We do not, therefore, consider it to have been reasonable for him to make the disclosure to the OfS and therefore that accordingly, it is not a protected disclosure.
18. Conclusion on Protected Disclosures. Accordingly, therefore, only the third, fourth and sixth disclosures are protected. In any event, as at least the third disclosure pre-dates the alleged acts of detriment and the alleged automatic unfair dismissal, he continues to have the potential to bring his claims of detriment and automatic unfair dismissal.
19. Detriments. Miss Urquhart summarised the now remaining six alleged acts of detriment as falling into three categories: firstly, the Claimant's dissatisfaction with the outcome to his disclosures and his desire for further investigation; secondly, his bringing of a grievance against the Vice Chancellor, which was not dealt with by the Respondent and, thirdly the delay of or non-referral to OH. We concur with that categorization, and we approach those grievances in that format, as follows:
 - a. Detriment 4. As stated, this allegation was that in providing the Claimant with only a summary of Ms Carrie's report, it had failed to pass on evidence of non-compliance with regulatory requirements, in particular her conclusion, as stated in the report, but not in the summary that '*the group did not formally discuss whether activities constituted value for money*'. We considered the following evidence in this respect:
 - i. The Claimant was somewhat fixated on the terms '*value for money*' and '*cost effectiveness*' (as used in the guidance document) and considered that unless those specific terms were used by Ms Carrie in her report, or by Mr Garrod in his summary, the issue was not being considered. Mr Garrod, in

cross-examination, pointed out the OfS' definition of '*value for money*' in its 'Value for Money Strategy' document, which states that '*value for money in higher education is a complex and contested concept. It can be framed as anything from positive feedback from individual students, to effective consumer protection, or the return on investment for public spending*' [2194]. He also pointed out several references in both his summary and the report to related topics, such as '*evidence of a detailed financial model and monitoring process that has a clear audit trail. Financial information is gathered from across the university through an auditable process ... from the bottom up ... hours worked per year ... used to calculate expenditure.*' [1005]. He did not accept that the mere failure to use the '*value for money*' and '*cost effectiveness*' terms invalidated either his summary or the report itself. The report does in fact refer to '*cost effectiveness*' [904].

- ii. Ms Carrie's report [889 to 912], while it pointed out areas in which the Respondent could improve, did not, in general, agree with the Claimant's assertions. She concluded that there wasn't '*any evidence of a breach of regulatory requirements in relation to measuring impact and cost effectiveness.*' [904]. She stressed, as does the OfS guidance on value for money, that '*modelling the cost of the work undertaken to meet the needs of around half your students is always going to be complex and will involve some degree of estimation*'.
- iii. The Respondent's whistleblowing policy states, in respect of '*feedback*' to the whistleblower that '*where reasonable and possible, the University Secretary ... should inform the whistleblower in writing of what action, if any, is to be taken (but)... there may be certain situations where the discloser may not be informed of the outcome ...*'. [259].

b. Conclusion on Detriment 4. We reach the following conclusions:

- i. We had no reason to doubt the thoroughness and independence of Ms Carrie's report and it is indeed detailed and does not spare the Respondent's feelings in respect of areas for improvement, indicating the independence of her approach. We don't consider that Mr Garrod misrepresented the thrust of her report in any way. He summarised her main conclusions, which did not support the assertions in the Claimant's disclosure and the Claimant is, we find, attempting to 'cherry-pick' at his wording, due to its lack of specific reference to the terms '*value for money*' and '*cost effectiveness*' (which are of course themselves, as both the OfS and Ms Carrie concluded, somewhat nebulous terms in this context).

- ii. Essentially, the Claimant disagrees with Ms Carries' conclusions, and we accept the genuine nature of such disagreement, but simple disagreement with an employer's detailed and thorough conclusions cannot, of itself, constitute a 'detriment' to the affected employee. The Claimant is clearly passionate about this subject, referring to both his own personal background and his professional life, spent largely furthering access to education for disadvantaged groups and is entitled to disagree with his employer's approach on such issues, but, as stated, that failure to concur with his views cannot be a detriment to him (analogous to the situation in **Derbyshire v St Helen's MBC**).
 - iii. Even if the full report had been provided to him, we don't consider it would have made any difference to his views – he was 'right', and the University was 'wrong' and he would never be reconciled to any other view.
 - iv. Bearing in mind that the Claimant was in fact provided with a five-page quite detailed response, there was no contractual entitlement to any response to his disclosure - indeed the policy allows for the possibility of there being no feedback to the whistleblower of any outcome and therefore the Claimant can have no complaint of any breach of contract in this respect.
- c. Detriments 8, 12 and 18. These cover essentially the same ground, the alleged failure of the Respondent to progress his grievance against the Vice Chancellor and in doing so to oblige the Respondent to provide the Claimant with evidence (or the lack thereof) of compliance with legal obligations. We can deal with these allegations relatively briefly. By bringing these grievances the Claimant was essentially attempting to 're-litigate' his whistleblowing disclosures, by other means, and by putting the most senior person in the University 'in the frame'. This was clearly, in our view, an entirely inappropriate use of the Respondent's grievance procedure. As previously pointed out, the correct approach for the Claimant to take would have been to have appealed against the Respondent's responses to his disclosures. If that appeal were unsuccessful, then, having exhausted the Respondent's procedures, he would have been free to have approached external bodies, such as the OfS, or other interested parties, under the umbrella of protection of the Employment Rights Act. He was not therefore entitled to have his concerns dealt with within the grievance procedure and the Respondent was entirely correct to refuse to do so. Such refusal cannot therefore constitute a detriment.
- d. Detriments 22 and 23. We group these detriments together as they both essentially complain of the Respondent's delay or failure to

refer the Claimant to OH. We consider the following evidence in this respect:

- i. The Respondent witnesses and their counsel accepted that there had been delay, a referral not being made until the point of the Claimant's resignation in June.
- ii. There was no dispute that the Claimant was suffering from anxiety and depression, as stated in his fit notes.
- iii. Both the Claimant and Ms Ragab agreed that in their Teams meeting of 31 January 2022, the possibility of referring the Claimant to OH was discussed, but that he said that he wished to await the outcome of his disclosures before any such referral. When challenged on this point in cross-examination, he said, effectively that Ms Ragab should have overridden his stated wishes in this respect, regardless, due to what he said was the severity of his condition.
- iv. He received the disclosure outcome summary on 18 March 2022 and therefore, according to his previously stated wishes, the 'clock would begin running' on any referral to OH.
- v. Following some annual leave, he returned to work on 23 March and had a return-to-work meeting with Ms Ragab on 5 April 2022, at which an OH referral is discussed.
- vi. Between then and 4 May 2022, the evidence indicates that Ms Ragab engaged with HR, as to the appropriate procedure and who was going to progress it, as well as, at least in her view, the necessity of the Claimant completing a 'stress risk assessment', prior to any referral. However, no referral was made.
- vii. On 4 May 2022, the Claimant brought a grievance against Ms Ragab [1764], which largely focused on concerns about his job role and alleged exclusion from parts of it. It also referred to Mr Ragab's failure to '*follow up*' on the concerns raised in his disclosures. In the final paragraph he complained of the failure to refer him to OH. Ms Ragab was temporarily relieved of her line management responsibilities for the Claimant and thereafter had no further involvement in the matter.
- viii. On 9 May 2022, Mr Shelley having taken over line management responsibility, the Claimant and Mr Shelley met, and the Claimant requested an OH referral from him [1791]. Mr Shelley said in evidence that he thought that HR would progress that request, but that on speaking to Mr Morris of HR, on 23 June, to check with the progress of that referral, he was told that it was for him to action, not HR.

- e. Conclusions on Detriments 22 and 23. We consider that the failure to refer the Claimant to OH did constitute a detriment. It's clear from the evidence that at least from mid-March, when he received the disclosure outcome, he was actively requesting an OH referral, but that it did not happen. We don't consider it reasonable for him to assert that prior to that date, his stated wish not to have a referral should have somehow been overridden by Ms Ragab. That places far too great a burden on her to 'see behind' the fit notes provided by the Claimant (the only medical evidence provided to her) and to exercise her own non-medical opinion on this issue, contrary to the Claimant's stated wishes. In any event, no referral could have gone ahead without his stated signed agreement, which would also have been required for OH to access his medical records, which they no doubt would have wished to do. Therefore, the period of delay runs from mid-March to late-June, a period of approximately three months. While we have no idea whether, if such a referral had been made, it would have made any difference, bearing in mind the impasse between the Claimant and the Respondent as to the subject matter of his disclosures, nonetheless his medical concerns should have been explored by OH and reported on and a delay of three months in doing so is not reasonable.
- f. Detriment on the ground of having made Protected Disclosures. We don't, however, find that such detriment was on the ground of him having made protected disclosures and we do so for the following reasons:
- i. All the indications are that the delay was caused by inefficiency and lack of knowledge by his line managers of the correct procedures, exacerbated by vague advice from HR.
 - ii. It is clear from the evidence that while there may have been some dispute as to the need for the completion of a stress risk assessment, Ms Ragab was actively progressing the matter and was probably close to making a referral, when the Claimant, by bringing a grievance against her, removed her from his management chain, necessitating a change of manager. While he said that he didn't anticipate that outcome, it was both obvious that that would happen and good practice in such circumstances.
 - iii. This meant that Mr Shelley had to 'pick up the reins'. We accept from his evidence (and on this point we confirm that we found both the Claimant and the Respondent witnesses to be reliable and truthful) that he was confused as to the correct procedure for making an OH referral and genuinely thought that HR was progressing it.
 - iv. There was no advantage whatsoever to the Respondent (indeed, in view of our findings as to detriment to the

Claimant, an active disadvantage) in not progressing his referral.

- v. There was no evidence that either Ms Ragab's or Mr Shelley's thought processes in this respect were motivated by the Claimant's protected disclosures. While the Claimant, in closing submissions, belatedly sought to attempt to establish such a link for Mr Shelley, referring to discussions between them as to the Claimant's role and prospective changes to it, he put no such evidence to Mr Shelley in cross-examination. On the basis, therefore, that Mr Shelley denies any such link and that there is no evidence to the contrary, we conclude that the failure to refer the Claimant to OH was not on the grounds of, or materially influenced (**Fecitt v NHS Manchester**) by the Claimant's disclosures.

20. Overall Conclusion on Protected Disclosure Detriment Claim.

Accordingly, therefore, the Claimant's claim of detriment on the grounds of protected disclosure fails and is dismissed.

21. Constructive Unfair Dismissal. Having found that only two of the detriments relied upon by the Claimant as forming potential breaches of the implied term of trust and confidence (both relating to the OH issue) are well-founded, we focus on those. In this case, as that issue was a 'live' one, right until the point of the Claimant's resignation, we don't consider that any 'last straw' is really needed by him, but we will also, nonetheless, consider that issue. Our conclusions are as follows:

- a. By failing for three months to refer the Claimant to OH was the Respondent in breach of the implied term of trust and confidence? The test for this issue, as set out in **Malik v BCCI** is whether the Respondent has '*without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.*' and had '*had no reasonable or proper cause for doing so*'.
- b. As should be clear from our findings that the related detriment was not because of the protected disclosures, it cannot either be the case that the Respondent failed in this respect '*in a manner calculated*' to destroy the relationship between them and the Claimant. If anything, 'calculation' was the opposite of their somewhat confused and disorganized handling of the matter.
- c. Therefore, that leaves the issue as to whether it was '*likely*' to destroy or seriously damage the relationship and we don't consider that it was, for the following reasons:
 - i. As was clear from the Claimant's grievance against Ms Ragab and his resignation letter [1891], the issue formed either a very minor or no part of his reason for resigning. Indeed, the resignation letter makes no reference to it, a crucial absence,

we consider.

- ii. Instead, the vast bulk of his focus is on his disclosures and the perceived failures of the Respondent to properly address them, which is the real reason for his resignation.
 - iii. Our view is that, somewhat belatedly, realising that the Respondent had clearly failed to progress the OH referral, he has decided to over-emphasise this issue, in the hope that it bolsters his claim, but that at the time of resignation, it did not so feature in his consideration as to the breakdown in trust and confidence between he and the Respondent.
 - iv. We don't consider, therefore, that even to the level in **Meikle** that the OH failure can constitute, or form part of, on its own, a fundamental breach of contract, justifying the Claimant's resignation.
- d. Finally, even if it were needed and we don't consider that it is, the claimed 'last straw' of the Claimant that his whistle-blowing concerns were not to be discussed at a forthcoming Widening Participation Impact Strategy Group meeting does not meet the test in **Omilaju v Waltham Forest LBC [2005] ICR 481**, in that it must contribute, however slightly, to the breach of the implied term of trust and confidence. The only possible breach identified by us is, as stated, the Respondent's failure to progress the OH referral, to which this alleged last straw has no connection, or contribution. Indeed, the subject matter of the last straw strengthens our view as to the true reason for the Claimant's resignation - the refusal of the Respondent to deal further with his disclosures, not the delayed referral to OH. On its own, the last straw could not constitute a breach of the implied term of trust and confidence as it would be entirely unreasonable to expect the Respondent, having rejected, in detail, the Claimant's disclosures, to then allow their discussion in effectively open forum, at a meeting of potentially 25 attendees. This again was simply an attempt by the Claimant to re-introduce his disclosures by other, illegitimate, means and the Respondent's refusal to concede to such demand could not constitute a fundamental breach of contract, in those circumstances.
- e. Conclusion. Accordingly, therefore, the Claimant's claim of constructive unfair dismissal fails and is dismissed.

22. Automatic Unfair Dismissal. Having found that the Claimant was not dismissed, constructively or otherwise, he cannot succeed in a claim of automatic unfair dismissal, which is accordingly also dismissed.

23. Pay in Lieu of Notice. This claim, being dependent on the success of a claim of unfair dismissal, also fails and is dismissed.

Judgment

24. For these reasons, therefore, the Claimant's claims of automatic unfair dismissal and detriment on the grounds of protected disclosures, constructive unfair dismissal and breach of contract in respect of pay in lieu of notice fail and are dismissed.

Employment Judge O'Rourke

Date: 23 August 2024