



EMPLOYMENT TRIBUNALS

Claimants: 1. Mrs S Withe
2. Mr A Withe

Respondent: Royal Mail Group Limited

Heard at: Liverpool **On:** 3, 4 and 5 January 2018

Before: Employment Judge Wardle
Mr A G Barker
Mr B Bannon

Representation

Claimants: Mr B Henry - Counsel
Respondent: Mr S Peacock - Solicitor

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the first and second claimants' complaints of "ordinary" unfair constructive dismissal, automatically unfair constructive dismissal by reason of protected disclosures and detriment on the ground of protected disclosures and the first claimant's complaint of a failure to comply with a duty to make reasonable adjustments are not well-founded but that the second claimant's complaint of an unlawful deduction from his wages in respect of an hour's unpaid overtime in an agreed sum, having been conceded by the respondent, is well-founded.

REASONS

1. By their claim forms the first and second claimants have brought complaints of "ordinary" unfair constructive dismissal contrary to sections 94, 95(1)(c) and 98 of the Employment Rights Act 1996 ("ERA"), automatically unfair constructive dismissal by reason of protected disclosures contrary to sections

94, 95(1)(c) and 103A of ERA and of being subjected to detriment on the ground of their having made protected disclosures contrary to section 47B of ERA. Separately the first claimant's form also included complaints of discrimination arising from disability contrary to section 15 of the Equality Act 2010 ("EqA") and of breach of the duty to make reasonable adjustments contrary to sections 21 and 22 of EqA. However during the course of hearing it was clarified that only the reasonable adjustments complaint was being pursued, which was in relation to the first claimant allegedly being refused her request to attend a medical appointment on 18 October 2016 and her being required to return to her delivery role during a period of recommended restricted duties. In addition each of the claimants complained of a failure to pay them holiday pay contrary to section 13 of ERA and /or the Working Time Regulations 1998 and of unlawful deduction from wages contrary to section 13 of ERA but the holiday pay complaints were withdrawn at the hearing and the unlawful deductions complaint was clarified as relating solely to an unpaid hour of overtime worked by the second claimant, which the respondent conceded was owed to him in the sum of £10.65 subject to the deduction of any tax and National Insurance properly payable.

2. By its responses the respondent accepts that the first claimant is disabled by virtue of the condition known as Antiphospholipid Syndrome but denies that it has discriminated against her on the grounds of her disability as alleged or at all. It also denies in respect of each of the claimants that they have made qualifying disclosures as alleged or at all; that they were subjected to any unlawful detriment because of the alleged protected disclosures; that it breached any terms of the claimants' contracts of employment as alleged or at all or that if any breach was committed, which was not admitted, it did not amount to a fundamental breach entitling their resignations; that their dismissals were automatically unfair as alleged or at all and that they were owed any payments in respect of holiday pay or unpaid wages as alleged or at all.
3. The Tribunal heard evidence from the claimants and on behalf of the respondent from Mr Paul Wilshaw, Reserve Manager; Ms Karen Greenwood, Operational Postal Grade ("OPG"); Mr Nick Gledhill, Reserve Delivery Manager; Mr Patrick Higgins, Delivery Office Manager; Ms Kelly Pipe, Deployment Manager and Mr Tony Donal, OPG. Each of the witnesses gave their evidence by written statements, which were supplemented by oral responses to questions posed. We also had statements made on behalf of the claimants by Mr Neil Stokes, OPG and on behalf of the respondent by Mr Andrew Evans, OPG neither of whom attended to give evidence. The weight we attached to these statements was that which would be normally attached to a statement where the maker has not been subject to cross-examination. We also had before us documents in the form of a bundle, which we marked as "R1".
4. On the third and final day of hearing at the conclusion of the evidence and having received submissions we informed the parties that judgment would be reserved. We later sat in chambers that afternoon when we were able having regard to the evidence, the submissions and the applicable law to reach

conclusions on the matters requiring determination by us.

5. Having heard and considered the evidence we found the following facts.

Facts

6. The claimants, who are husband and wife, were employed by the respondent as postal workers at its sorting and delivery office in Tarporley, which is a small office where there are some 19 employees. The first claimant was employed from 8 February 1997 until 12 November 2016 when her employment was terminated by her upon her resignation. The second claimant's employment with the respondent which began on 19 August 1985 also terminated on 12 November 2016 upon his resignation.
7. The respondent is a very large employer providing a national postal delivery service.
8. The first claimant has suffered with Antiphospholipid Syndrome since 2001, which according to her grounds of complaint is a serious disorder of the immune system, which causes an increased risk of blood clots, cardiac arrest and strokes. The respondent does not dispute that she is a disabled person for the purposes of section 6 EqA.
9. The claimants' case is that between January 2014 and 12 November 2016 they raised approximately 50 grievances with Mr Patrick Higgins, their Delivery Office Manager at Tarporley or in his absence with Reserve Managers. They contend that these grievances amounted to protected disclosures under the whistleblowing legislation and that as a result of making them they were subjected to detrimental treatment, which the respondent failed to prevent thereby leading to an unpleasant working environment and causing them to resign.
10. At a Case Management Hearing held on 16 May 2017 the claimants were ordered to set out their alleged protected disclosures and in the event that there were more than ten of these to point to the ten disclosures which they believed were most likely to have been a reason for dismissal or detriment.
11. This order gave a chronology of alleged disclosures taking place between early 2015 and 25 October 2016 as set out in a Scott Schedule at pages 32-35 of the bundle.
12. In relation to disclosure number 1 which is said to have occurred in early 2015 the first claimant claims that she raised three grievances in conversation with Mr Higgins relating to (i) staff hours (ii) the purchasing and selling of postal rounds and (iii) staff using company property for personal use without proper insurances or as benefit in kind. These disclosures were claimed to show the 'relevant failures' of the commission of a criminal offence and/or that the health and safety of any individual had been endangered. In regard to these grievances, in respect of which Mr Higgins claimed to have no knowledge, the first claimant did not elaborate in her witness statement on what she was

complaining about at this time.

13. Taking them in turn in relation to the first grievance of staff hours the only elaboration given was in cross-examination when the first claimant was asked what this was about and referred to practices such as 'job and jack', which we understood to mean employees being able to leave on the completion of their deliveries ahead of their contractual finishing time. However it was unclear what her grievance was here as in the interview conducted with her by Ms Pipe at page 147 arising from a bullying and harassment complaint made against her and her husband by Ms Greig she comments that we all have it too good, we still have ghost overtime and job and jack, which suggested that these were practices from which she herself was benefitting.
14. In relation to the second grievance of the purchasing and selling of postal rounds this again was only elaborated on during cross-examination when the first claimant confirmed that this related to a fellow postal worker, Dave Jones, paying a couple of colleagues, Heidi Greig and Ed Lanning to complete part of his deliveries. In so far as Mr Higgins' awareness of this practice was concerned, whilst acknowledging that he knew that Mr Jones had asked Ms Greig and others to carry out part of his round his evidence was that he had at no time been told by the first claimant or anyone else that Mr Jones was paying them to do so adding that to do so was completely against process and that if it had been brought to his attention he would have taken immediate action to deal with it.
15. In relation to the third grievance of staff using company property for personal use without proper insurances or as benefit in kind the first claimant's witness statement identified the property in question as being postal vans but from here on in the particular mischief complained about became somewhat confusing in that the first claimant appeared to claim in her witness statement that this related to an undated occasion when Mr Jones was permitted by Mr Higgins to take a postal van home, which Mr Jones told her he was going to use to take items to/from his new home in Nantwich only then for the second claimant to state during the course of his evidence that the concern about van use was confined to the use by Ms Greig of a postal van to deliver on overtime that part of Mr Jones' delivery which she had been paid by him to carry out and for the first claimant in contrast in her evidence to refer to an instance where Mr Jones had wanted to take a van home to enable him to pick up mail from Crewe the next morning to bring to Tarporley on overtime, in which she had intervened by offering to collect it herself. For his part Mr Higgins again denied any knowledge whatsoever of the first claimant raising an issue in relation to the improper use of postal vehicles in early 2015 or at any other time adding that staff are required to record the mileage of their vehicles on a daily basis and that their fuel cards are monitored meaning that any private use would likely to be noticed.
16. The second disclosure contained in the Scott Schedule alleges that the second claimant witnessed Mr Jones pay Ms Greig for a postal round on many occasions so reported it to Mr Higgins orally on or around 10 January 2015, which allegation was claimed to show the commission of a criminal

offence seemingly from the point of view that the cash being received by Ms Greig was unlikely to have been reported to HMRC for taxation purposes. Such alleged disclosure, which is a reiteration of the second grievance said to have been raised by the first claimant above and was not expanded upon by the second claimant in his witness statement was also denied by Mr Higgins as having been made to him by the second claimant, although he did accept that Ms Greig did on occasions cover part of Mr Jones' duty and that this was done on overtime which was initially not done strictly in line with the normal manner for allocating overtime in the sense that Mr Jones was organising the covering of part of his duty by himself and not through a manager, which was corrected. In relation to this particular alleged disclosure it is the case that Mr Jones in his interview on 31 October 2016 with Ms Pipe as part of her investigation into Ms Grieg's bullying and harassment complaint against the claimants at page 196 when asked if he had ever paid anyone cash to cover part of his delivery responded affirmatively and mentioned Mr Lanning and Ms Greig dependent on who was working on the Saturday if he wanted to get away handy adding that the managers are aware and that he let Patrick (Mr Higgins) know what he was doing and that if he didn't pay it needed to go onto overtime which he preferred not to do and on average this was every other Saturday. For his part Mr Higgins also denied that Mr Jones had made him aware that he was paying anyone cash for this purpose.

17. The third alleged disclosure again related to the buying and selling of rounds said to have been reported by the second claimant during 2015 in conversations with relief managers if Mr Higgins was not in the office. The individuals named by him in this connection were Ms Greenwood, Mr Wilshaw and Mr Gledhill all of whom were clear in their recollection that at no time had either of the claimants raised the issue with them and denied any knowledge of the practice.
18. The fourth alleged disclosure related to the first claimant informing Mr Higgins in conversation in or around May 2015 that a member of staff, identified as Mr Jones, appeared to be intoxicated and that she was concerned he would be driving and be a risk to the general public. This disclosure was claimed to have engaged the criminal and health and safety categories of the relevant failures. In her witness statement she claimed that having expressed this concern to Mr Higgins he responded that he had not noticed and that he would not be able to tell if he was over the drink drive limit or not which led her to comment that if there was any doubt he should not be driving as his round was near a school but that her comments were ignored and Mr Jones still went out in his van. Again Mr Higgins denied having any recollection whatsoever of the first claimant making any such disclosure to him and stated that had it have been made it would have been acted upon and not ignored.
19. The fifth alleged disclosure related to the first claimant informing Mr Anthony Baxter, Delivery Director, on 18 July 2015 by email of her complaints relating to (i) the buying and selling of rounds and (ii) the use of company property for personal use without proper insurance and receipt of benefit in kind, which was claimed to have again engaged the criminal and health and safety categories of the relevant failures. The email in question is at page 120. It has

the first claimant stating merely that there are issues within the office at Tarporley, which she has previously complained about to her manager and the union. The difficulty for the first claimant in placing reliance on this email communication as a disclosure is that it does not actually disclose any information, which was recognised by Mr Henry in closing submissions when he indicated that we did not need to consider this disclosure nor indeed for that matter the sixth alleged disclosure by the first claimant relating to an email that she claimed to have sent to HMRC on 19 July 2015 relating to the buying and selling of rounds. There was no copy of the email produced in the bundle only an acknowledgment from HMRC, which meant that we were unable to determine what facts, if any, had been conveyed to them and there was no suggestion that the respondent was aware of the communication as would be necessary for the purposes of connecting this disclosure with any subsequent detrimental treatment.

20. The seventh alleged disclosure related to each of the claimants informing Mr Andrew Evans in conversation on 19 July 2015 as to (i) the personal use of company vehicles without requisite insurance and (ii) colleagues receiving cash in hand for rounds. Neither claimant expanded on the matter in their witness statements. Mr Evans was unable to attend the hearing because of a family medical problem but from his written statement it was noted that as an Operational Postal Grade he had no managerial authority, which suggested that had any malpractice been reported to him he would have had to have referred it up to Mr Higgins and it was his evidence that he had not at any stage been informed by any covering manager, or anyone else, about any disclosures having been made about employees buying and selling rounds.
21. The eighth alleged disclosure was some 15 months later in or around September 2016 and related to the first claimant reporting in conversation with Mr Higgins that staff were stealing money from petty cash, which disclosure was claimed to have engaged those categories of the relevant failures comprising the commission of a criminal offence, the failure to comply with any legal obligation and the occurrence of a miscarriage of justice. In her witness statement she claimed that when she reported the malpractice to Mr Higgins he laughed and said that he did it all the time for petrol. In cross-examination she stated that she had told him that a member of staff called Keith had just left waving a £20 note that he said he had taken from the cash box. For his part Mr Higgins stated that the delivery office does not have a petty cash tin but a surcharge till, in which cash is held that has been paid over where the correct postage has not been paid on items of mail and that any mail, which requires a surcharge is accounted for both in terms of what is sent to the delivery office for delivery and also in terms of the money received ready to be sent back for processing by the Revenue Protection teams meaning that cash in and out of the till is very carefully documented and that it would be apparent if anything was missing. He further stated that he had not had it reported to him by the first claimant or anyone else that money in the till was being stolen.
22. The ninth alleged disclosure related to the second claimant informing Mr Higgins in conversation on or around 20 September 2016 that Ms Greig and

others were buying and selling postal rounds and not reporting additional income, which was claimed to have engaged that category of the relevant failures comprising the commission of a criminal offence. In variance with this the second claimant in his witness statement makes no reference to any such disclosure having been made on this date but states rather that he made a complaint to Mr Higgins on 13 September 2016 that he had missed out on overtime pay, for which he says that he received an apology and was provided with one day's overtime pay and that on the same day he also informed him that he wished to raise a formal grievance about Ms Greig booking fraudulent overtime and the ongoing private deals between various colleagues and asked for it to be referred to Mr Chris Nugent, the Area Manager. He also states that he was informed by Ms Linda Smith, a colleague, on 14 September 2016 that Ms Greig had made a complaint to Mr Higgins about him and the first claimant and that he had later spoken with Mr Higgins to ask when he could expect a reply from Mr Nugent regarding his grievance and what had been alleged by Ms Greig against him and the first claimant in answer to which questions Mr Higgins declined to comment. For his part Mr Higgins in his witness statement stated that he had no recollection of the second claimant informing him on 20 September 2016, or any other date, of employees buying and selling postal rounds and not reporting additional income and in cross-examination denied that the second claimant made complaints to him on 13 September 2016.

23. This sequence of events as alleged by the second claimant has to be seen in the context of the complaint made by Ms Greig against the claimants, which according to page 62 of the bundle was first raised by her in a letter dated 15 September 2016, in which she complains that she has felt singled out for unwanted attention by them for over three years and that it was becoming intolerable. The second claimant's contention is that his complaint to Mr Higgins on 13 September 2016 was the catalyst for her complaint against them. We considered, however, that this was unlikely to be the case for the reason that the date would have assumed significant importance for him and yet it had not featured in their ten strongest alleged protected disclosures, which was doubly surprising when one considers that over and above the allegation relating to private deals there is also the fresh accusation allegedly made by him that Ms Greig had fraudulently claimed overtime. We therefore had doubts as to the reliability of the second claimant's evidence as to this alleged sequence of events.
24. The tenth and final alleged disclosure related to the second claimant reporting to Ms Pipe during the course of her interview with him on 25 October 2016 as part of her investigation into Ms Greig's complaint against the claimants about the practice of the buying and selling of rounds and individuals receiving cash in hand. Her complaint had been formalised as a bullying and harassment one on 26 September 2016 by the completion of a complaint form (H1) in which she indicated that she would prefer it if her manager, Mr Higgins, did not handle it, which saw the complaint being allocated by the respondent to an independent investigator, Ms Pipe, based at Chester Mail Centre. The claimants were invited by letters dated 18 October 2016 to attend formal interviews in connection with Ms Greig's complaint of having been singled out

for unwanted attention by them accompanied by a companion, if so desired, on 20 October 2016, which date was changed to 25 October 2016 in order to allow for the arranging of union representation. The notes of the second claimant's interview at pages 89-94 reveal that after asking for time alone with his trade union representative he ventured to suggest that overtime seems to be the crux of all the trouble in his opinion stating that Ms Greig wants it all and that he wanted his share before adding that he had even seen cash in hand transactions taking place to do bits of work.

25. It seemed to us that the second claimant hit the nail on the head when suggesting that overtime was at the root of the dissension between the claimants and Ms Greig in that it was apparent from the notes of interview taken by Ms Pipe that they each wanted the chance to earn extra through overtime and that the claimants were resentful of the change in overtime arrangements that came about as a result of her proposing a system at the end of 2014, according to her interview notes with Ms Pipe at pages 64-67, whereby people could put their names on a sheet indicating their availability for overtime on certain days, whereas before the Delivery Office Manager would call out the overtime and distribute it between those employees who wanted it to the extent that an hour's overtime could be shared between four people according to an example given by the second claimant at page 90 of his interview notes. His complaint with the changed arrangement as made known by him to Ms Pipe was that he was not getting his fair share of overtime under it.
26. In addition to the complaints forming the alleged protected disclosures the first claimant also claimed in her witness statement that she and the second claimant were excluded from the annual staff survey and suggested that this was because the respondent did not want them to record what practices were being undertaken. During cross-examination she claimed that their exclusion from participation in the survey had been ongoing for five years. For his part Mr Higgins stated in his witness statement that he was very clear that he had not excluded either of the claimants from the survey pointing out that as Delivery Office Manager he is placed under great pressure each year from his line managers to ensure that there is a high return rate on the surveys as they have a vested interest in the results and that if there is anything less than an 85% return rate he would be asked to explain why meaning that it was not in his interests to exclude the claimants as to have done so would have reduced the maximum possible rate of return to 89%.
27. She also claimed that she was subjected to name calling by Mr Donal such as "witch" and "slag" on a daily basis around the time that she says that she reported the buying and selling of rounds in early 2015 from which point she began closely monitoring her in order to report back to Mr Higgins and that she and the second claimant were referred to by Mr Ian Mullock as "home wreckers", which in cross-examination was established with her as having been said in 2007 or 2008. More recently she claimed that whilst she was on light duties and was asked to sort the late post she had said to Mr Higgins that it was too repetitive and would hurt her hands which led Mr Donal to comment "lazy bitch, if she can't do the job get rid of her" and that he had on 7

November 2016 thrown a parcel at her which struck her on the back of her leg. In relation to these allegations, which in so far as they related to Mr Donal were denied by him, there was no evidence save for the parcel incident that they had been raised by the first claimant as matters of concern. In regard to this matter and the claimant's claim that her reporting of the incident was ignored it was Mr Higgins' evidence that he had looked into it by speaking with Mr Donal, who was unaware of any issue and satisfied himself that any contact by the parcel with the claimant's leg had occurred accidentally in the course of Mr Donal dropping off packets and parcels at the different delivery frames due to the space constraints within which staff had to work before informing the claimant that he did not believe that the incident warranted any further investigation or action.

28. The first claimant also claimed in support of her reasonable adjustments complaint in her witness statement that between 2014 and 12 November 2016 Mr Higgins regularly refused to allow her to attend regular blood test appointments and specifically that he refused her request to attend a scheduled appointment on 18 October 2016. Mr Higgins denied both the general allegation stating that whenever he was advised by her of an appointment he would always check as to whether the time fell within her duty time and, if so, whether she was able to move it to nearer the end of her duty so as to minimise the disruption to her deliveries and stated in regard to the appointment on 18 October 2016, which was claimed to have been a morning one but was rescheduled to 4.00 p.m. that he had no recollection of her asking to attend that morning. In cross-examination the first claimant accepted that Mr Higgins had accommodated her requests by either allowing her to attend at the appointed time or by asking if there was workplace pressure if she could re-schedule which she did without complaint.
29. As part of her reasonable adjustments complaint the first claimant also claimed that on 3 November 2016, in circumstances where she was subject to a reduction in her duties on the recommendation of Occupational Health Mr Higgins told her that irrespective of what they had said she had to fully fulfil her work duties. In this connection following a sickness absence the first claimant was referred by the respondent to its occupational health advisers, OH Assist, on 5 September 2016, who carried out a consultation with her on 12 September 2016 when she reported that she suffers from Hughes syndrome, which makes her blood thick requiring warfarin and weekly blood tests and that she had been experiencing pain in her wrists and fingers that was impacting on her at home and in work. Following the obtaining of a medical report from her GP a further consultation was undertaken on 25 October 2016 which saw the adviser commenting that the claimant was fit for work and suggesting that she resumed her delivery role starting with 50% delivery duties for the next 1.5 weeks with the remaining 50% to be spent on indoor light duties such as sorting letters before resuming her normal delivery role with no restrictions as from 7 November 2016.
30. Notwithstanding that this division of duties was, we were told, how a delivery duty was made up in any event it was common ground that the claimant was more than accommodated in line with the occupational health

recommendation by being allowed to perform an indoor role, which included a small element of delivery certainly it would seem up to Wednesday 3 November 2016. In response to the allegation that at this time he required her to resume her full duties it was Mr Higgins' evidence that a conversation took place about her going back to do some delivery work, which was not ruled out by the recommendation and that as part of it the first claimant indicated that she would also want to perform overtime as well, which would not have sat with her only doing part of her delivery and resulted in her resuming her full delivery role slightly in advance of 7 November 2016.

31. In so far as the second claimant is concerned he also claimed in his witness statement that on 16 September 2016 he began to receive inappropriate comments from Mr Donal and that on or around 24 September 2016 he spoke with Mr Higgins to report them at which same time he asked when his grievance of 13 September 2016 would be dealt with and was told by him that he was looking into it. Such alleged conversation was denied by Mr Higgins who added that no specific grievance had been raised with him previously by the second claimant and that had he have complained to him about a colleague's inappropriate behaviour such complaint would have simply not been ignored.
32. The second claimant claimed further that on or around 11 November 2016 he raised an oral grievance with Mr Higgins regarding the investigation into Ms Greig's allegations against him in response to which, he alleged, Mr Higgins said to him words to the effect that what was going on was a private matter which did not involve him and that he would not interfere. Again Mr Higgins' evidence was that he had no recollection of this conversation although he did recall an earlier conversation with the first claimant on 22 October 2016 relating to the bullying and harassment complaint brought by Ms Greig, in which he informed her that it would not be appropriate for him to discuss the matter or for him to become involved.
33. On 9 November 2016 Ms Pipe wrote to the claimants to inform them that she had concluded the interview and information gathering stage of the investigation into Ms Greig's bullying and harassment complaint and to enclose all witness statements relevant to the investigation. In her letter she explained that the investigating manager has discretion to anonymise the relevant documentation where they consider there is a legitimate reason for doing so and that in this investigation she had exercised her discretion to do so. Thus four of the six statements received by the claimants made by Mr David Jones, Mr Ian Mulloch, Mr Ed Lanning and Mr Phil Exley had been anonymised principally to the extent that their names/ initials were not used but in the case of Mr Jones the anonymisation went further in that a question as to whether he had ever paid anyone cash to cover part of his delivery and his response in affirmation were omitted from the statement because, Ms Pipe explained, it would have identified the maker of the statement and two other individuals. The claimants were given five working days to communicate any issues or concerns with the content of the enclosures.
34. In terms of the content there were comments made that did not paint the

claimants in a particularly good light. For example Mr Mulloch remarked in reference to them that "if Ms Greig had been susceptible to harming herself or worse she would have been pushed over the edge and that prior to her there was Ed and others and that if it wasn't her it would be someone else" and that "we all know they are focused on Ms Greig at the moment, I don't understand why they need the confrontation." Similarly Mr Lanning stated " everyone has had it, Malcolm used to get it and he helps everyone but he used to do overtime, Ms Greig gets it now, she can't do anything right" and that "overtime can be amicably worked out but when they are involved it becomes complicated and leads to nastiness that would not exist if they were not involved." On the subject of overtime Mr Exley stated "OT is a bone of contention - there are two people who are not happy if it is not allocated the way that they would like it (the first and second claimants) primarily SW (the first claimant) - they are both all for fairness however only for some for example holiday collections are always SW no one else" and in relation to the complaint of Ms Greig about being singled out he commented "my overall view is that SW particularly singles people out for unwanted attention. AW is a nice guy but SW leads him. I was warned about SW when I started and with good reason she is the most malicious, vindictive person I have ever come across". We considered that it must have been apparent to the claimants that in the light of these and other comments supporting Ms Greig's complaint that it was likely that it was going to be upheld to some degree or other, which would require the respondent to consider whether its Conduct Policy would need to be invoked against them.

35. On 12 November 2016 the claimants submitted a joint letter of resignation at page 102 stating that they had decided that the treatment which they had received lately from the respondent and certain members of staff to be more than they were willing to take and commenting that after reading the statements of case the things of which they had been accused had been overtaken by what seemed nothing more than a vicious attack on their characters before accusing the company of condoning the making of cash payments from one member of staff to another and referring to the inequality of dishing out overtime and the company's lack of action in response to their complaints. It concluded by alleging that the first claimant had frequently been denied time to go for her compulsory blood tests and that she was even told to do her full duty when she had a letter from occupational health stating that she was only to do 50% of her delivery.
36. Despite the claimants' resignation Ms Pipe considered having regard to the stage which she had reached in her investigation that it ought to be concluded not least because it was important that Ms Greig received an outcome. She therefore prepared a report dated 17 November 2016 at pages 109-115 in which she upheld the overall complaint and also made four recommendations that (i) the practice of private deals must cease with immediate effect and that any evidence of this moving forward would be dealt with under the conduct code (ii) duties in the office should be reviewed to address consistent extended deliveries and daily overtime for new builds (iii) the overtime process for the office should be reviewed and agreed as an office approach (iv) all grievances received should be investigated as per business processes.

37. On 3 March 2017 claims were presented to the Employment Tribunals by the claimants, which were responded to by the respondent within the prescribed time limit.

Law

38. In regard to a constructive unfair dismissal the relevant law is to be found in section 95 (1)(c) of the Employment Rights Act 1996 ("ERA"), which provides that an employee is dismissed by his employer 'if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct'. The conduct of an employer giving rise to a constructive dismissal must involve a repudiatory breach of contract i.e. a serious breach going to the root of the contract of employment which shows an intention no longer to be bound by one or more essential terms of that contract. In order to claim constructive unfair dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning so that he did not affirm the contract and lose the right to claim constructive dismissal.
39. In regard to whistleblowing dismissals section 103A of ERA provides that an employee will be regarded as unfairly dismissed if the reason, or principal reason, for the dismissal is that the employee has made a 'protected disclosure'. The first step in establishing that a disclosure attracts protection under the ERA is showing that it meets the qualifying criteria in section 43B. Thus a qualifying disclosure is any disclosure of information which, in the reasonable belief of the worker, tends to show one or more of the following: (i) that a criminal offence has been committed, is being committed or is likely to be committed - s43B(1)(a) (ii) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he/she is subject - s43B(1)(b) (iii) that a miscarriage of justice has occurred, is occurring or is likely to occur - s43B(1)(c) (iv) that the health or safety of any individual has been endangered, is being endangered or is likely to be endangered - s43B(1)(d) (v) that the environment has been damaged, is being damaged or is likely to be damaged - s.43B(1)(e) and (vi) that information tending to show any matter falling within any one of the above has been, is being or is likely to be deliberately concealed - s43(B)(1)(f). These six forms of malpractice or wrongdoing are collectively referred to as the 'relevant failures'. The disclosure must also be made in the correct manner with sections 43C-H setting out seven permissible methods of disclosure amongst which at s43C(1)(a) is disclosure to the employer.
40. Protection for workers arising from the making of a protected disclosure is also provided by section 47B of ERA which states that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

41. The relevant law for the purposes of the discrimination complaint is to be found in the Equality Act 2010 ("EqA"). The duty to make reasonable adjustments as set out in section 20 of EqA comprises three requirements. The first of these requirements, which is the relevant one for the purposes of this case, is a requirement, where a provision, criterion or practice (PCP) of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage.

Conclusions

42. Applying the law to the facts as found the Tribunal considered first of all the complaint of unfair constructive dismissal. Where as in these cases a claimant claims that he or she was constructively dismissed contrary to section 103A ERA it is not strictly possible for a Tribunal to examine the employer's reason for dismissal because the decision that triggers the dismissal is the claimant's resignation. Rather, the question for consideration is whether the protected disclosure was the principal reason that the employer committed the fundamental breach of the claimant's contract of employment that precipitated the resignation.
43. In addressing the question whether the respondent was guilty of conduct that was in fundamental breach of the claimants' contracts of employment it was argued in submissions advanced on their behalf that we had to look at what they were putting forward as their reasons for tendering their resignations as set out in their letter at page 102, which was condensed to their not having been listened to in respect of their complaints relating to two matters concerning (1) cash payments and (2) overtime not being shared out equally. It was submitted that these were the matters that the second claimant raised orally with Mr Higgins on 13 September 2016 the day before Ms Greig raised her grievance and that in resolving the conflict of evidence arising from Mr Higgins' lack of recollection of any such oral grievance having been raised by the second claimant on this date we ought to have regard to the resignation letter and to the notes of Ms Pipe's interview with the second claimant on 25 October 2016 at page 93 which it was suggested reiterated the evidence that a complaint had been made and made it more likely than not that the second claimant had raised these matters with Mr Higgins.
44. It was further submitted that this grievance was effectively ignored having regard to the fact that it was raised again through Ms Greig's grievance but because the focus here was on her complaints it was viewed only as a supplementary matter, which whilst taken forward to some degree by the questioning of Mr Jones who admitted that he had paid cash to other employees to complete his round and claimed that managers were aware, this was not apparent from the notes of interviews provided to the claimants because of the anonymisation applied by Ms Pipe to them to preserve confidentiality, which led the claimants to believe that the respondent was not acknowledging what they had been saying about malpractice and that the respondent's failure to do so was a breach of the implied term that employee complaints would be addressed by their employers and that this in turn was

likely to damage the implied term of mutual trust and confidence entitling them to terminate their employment without notice.

45. As observed above, however, we had concerns about the reliability of the second claimant's evidence regarding his alleged disclosure to Mr Higgins on 13 September 2016 for the reasons stated. Our principal concern was that this date did not feature in the claimants' ten strongest alleged disclosures despite it being advanced as a significant event in terms of the claimants' decision to resign. It appeared to us that even if the second claimant had spoken to Mr Higgins on 13 September 2016 it would not have registered with him as being any different to the numerous other occasions that the claimants had voiced complaints about myriad matters that they felt had disadvantaged them in some way or other and that it did not mark a line in the sand whereby they had formalised matters, which noticeably they seemed reluctant to do which may have had something to do with the fact that their complaints seemed to be largely borne out of resentment at what they believed other colleagues were getting that they weren't. We did not consider therefore that the respondent had unreasonably failed to address the claimants' concerns, which we viewed as being no more than everyday office gripes and that the real reason for their resignations was the information contained in the statements of interviews sent them on 9 November 2016 which did not paint them in a good light and suggested very strongly that they would have cases to answer under the respondent's conduct code for the manner in which they had singled out Ms Greig for unwanted treatment. Accordingly we do not find that their complaints of unfair constructive dismissal contrary to section 103A ERA to be well-founded.
46. Turning to the claimants' complaints under section 47B ERA of their having been subjected to detriment on the ground that they had made a protected disclosure it is the case pursuant to section 43B(1) ERA that protection will only be afforded in respect of a disclosure if, in the reasonable belief of the worker making it, it is made in the 'public interest'. Having regard to how we viewed the matters relied upon by the claimants as protected disclosures as being everyday office gripes which we considered had been raised out of self-interest we did not believe that the claimants reasonably considered their grievances to be in the public interest and that the making of them served that interest. On this basis we did not find that their complaints of detriment contrary to section 47B ERA to be well-founded. However, even if we had believed that the alleged disclosures amounted to qualifying disclosures for the purpose of section 43B(1) we struggled, even allowing for the fact that detriment has to be assessed from the viewpoint of the worker. to see what unfavourable treatment the claimants had been put as while the atmosphere in the office may have been unpleasant this appeared to have been caused to a significant degree by the manner in which the claimants treated Ms Greig culminating in her bullying and harassment complaint against them and as at no point was any formal grievance lodged by them in respect of their treatment by other members of staff.
47. Dealing finally with the first claimant's disability discrimination complaint relating to the duty to make reasonable adjustments there were two situations

relied upon by her as showing that the respondent was in breach of section 20(3) EqA. The first in time of these was on 18 October 2016 when she says that she sought permission to attend a weekly medical appointment for the purpose of a blood test in connection with her disabling condition of Hughes syndrome which thickens her blood. In the claimants' resignation letter it was alleged that she had frequently been denied time to go for compulsory blood tests and in her witness statement she claimed that over a three year period prior to her resignation she was either forced to change the date or time of the appointment or refused permission to attend at least a third of the time. However in cross examination she accepted that during the time Mr Higgins was her manager her requests to attend appointments were accommodated by either his allowing her to attend at the time she stipulated or by his exploring with her whether it would be possible for her to attend at a different time due to workplace pressure which she agreed to without complaint.

48. In regard to her request on 18 October 2016 it was the first claimant's case that she needed to attend her appointment in the morning and that she was not allowed to do so and instead had to attend later in the day which meant that she did not receive her correct dosage for her condition. In this connection it seemed to us that this particular day was no different to the many other occasions that the first claimant had such an appointment and accepting Mr Higgins' evidence that he was unaware that her attending her appointment in the morning that day was important for her we were satisfied that it would not have been reasonable for Mr Higgins to appreciate that his practice of assessing in the light of workplace pressure whether the first claimant could be released during her working duties at a specific time required adjusting on this occasion but even if we had thought otherwise we did not consider that she had been subjected to a substantial disadvantage by having to attend her appointment later that day.
49. The second situation relied upon by the first claimant relates to her allegedly being required to return to her full duties by Mr Higgins on 3 November 2016 when subject to restricted duties on the recommendation of Occupational Health (OH). In regard to this situation there is a fundamental difference in evidence between the first claimant and Mr Higgins as to how she came to return to her delivery duties. On her case she says that on this date she was informed by Mr Higgins that irrespective of what occupational health had said, which was that she should be restricted to 50% of her delivery duties until 7 November 2016, he told her that she must fully fulfil her work duties. In response Mr Higgins says that he asked her to do some delivery work in line with the OH recommendation with the balance of her normal delivery to be covered by others on overtime but that consistent with the history of aggravation concerning the allocation of overtime she wanted her share of the available overtime, which led him to inform her that in order to qualify for it she would need to resume a full delivery, which was in any event pretty much 50% of her working day to which she agreed. In resolving this conflict we found Mr Higgins' account to be more credible having regard to the fact that this alleged heavy-handed approach on his part did not sit comfortably with the manner in which the first claimant had been dealt with to this point with her having been more than accommodated in terms of the recommendation by being allowed

an indoor role with minimal delivery duties and as the explanation given by Mr Higgins as to how she came to resume her full delivery duties by not wishing to forego any overtime opportunity chimed with what had been said about her during the course of the investigation into the bullying and harassment complaint brought against her and the second claimant. As such we accepted that the adjustment implemented in respect of her duties had been curtailed by her and not the respondent and that there had been no breach of section 20(3) EqA either in respect of this matter or her medical appointment on 18 October 2016 leading us to find that her reasonable adjustments complaint to be not well-founded.

Employment Judge Wardle

30 January 2018

JUDGMENT, REASONS & BOOKLET SENT TO THE PARTIES ON

30 January 2018

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS