EMPLOYMENT TRIBUNALS

Claimant: Mr P Newey

Respondent: Ocado Central services Ltd

Heard at: **Birmingham** **On:** **21 October – 1 November 2019**

Before: Employment Judge Miller
Mr G Bagnall
Ms S Outwin

Representation
Claimant: In person
Respondent: Mr J Feeny - Counsel

RESERVED JUDGMENT

1. The claimant's claim of constructive unfair dismissal is unsuccessful and is dismissed.
2. The respondent's application that the claimant's claim that contrary to s47B Employment Rights Act 1996 he was subject to detriments on the grounds that he made protected disclosures be struck out as having no reasonable prospects of success is refused.
3. The claimant's claim that contrary to s47B Employment Rights Act 1996 he was subject to detriments on the grounds that he made protected disclosures is dismissed. The tribunal does not have jurisdiction to hear the claimant's claim because

    a. The Claimant presented his complaint that he had been subject to detriments on the grounds that he made protected disclosures out of time.
    b. It was reasonably practicable for the Claimant to present his claim in time. Time is not extended for its presentation.

4. The claimant's claim that the respondent failed to make reasonable adjustments contrary to s21 Equality Act 2010 is dismissed. The tribunal does not have jurisdiction to hear the claimant's claim because

    a. The Claimant presented his complaint that the respondent failed to make reasonable adjustments out of time.
    b. It was not just and equitable to extend time for the presentation of the claim.

5. The claimant's claim that he was subject to unfavourable treatment because of something arising in consequence of his disability of cancer contrary to s15 Equality Act 2010 is unsuccessful and is dismissed.
6. The claimant's claim that he was harassed in relation to the protected characteristic of age contrary to s 26 Equality Act 2010 is dismissed. The tribunal does not have jurisdiction to hear the claimant's claim because

   c. The Claimant presented his complaint of harassment out of time.
   d. It was not just and equitable to extend time for the presentation of the claim.

7. The claimant's claim that he was victimised in relation to the protected characteristic of age contrary to s27 Equality Act 2010 is struck out as having no reasonable prospects of success.
8. The claimant's claim that he was victimised in relation to the protected characteristic of race contrary to s27 Equality Act 2010 is dismissed on withdrawal by the claimant.
9. The claimant's claim that he was subject to detriments on grounds related to trade union membership or activities contrary to s146 Trade Union and Labour Relations (Consolidation) Act 1992 is unsuccessful and is dismissed.
10. The claimant's claim of unlawful deduction from wages contrary to s13 Employment Rights Act 1996 is unsuccessful and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Service Engineer in the respondent's warehouse in Dordon. He worked there from 1 October 2012 until he tendered his resignation on 29 June 2017, leaving its employment on 28 September 2017. His substantive role was to carry out engineering maintenance activity and improvement works which required him to be on the "shop floor" in the customer fulfilment centre throughout his shifts.
2. Regrettably, the claimant was diagnosed with cancer in February 2015. He underwent treatment including chemotherapy shortly after that and had an operation in June 2015. He was off work sick until he returned in September 2015. Thereafter, the claimant says he experienced a number of issues relating to his disability or illness, the making of protected disclosures and his role as an elected representative to the respondent's work council.
3. This related broadly to the claimant's inability to obtain promotion, being ostracised by managers, being told to stop raising complaints and not being allowed reasonable adjustments. This culminated, the claimant says, in him handing in his notice on 29 June 2017.
4. The respondent's case, conversely, is that it acted reasonably towards

the claimant in every respect.

The issues

5. The issues to be decided in this case were identified by employment Judge Choudry at a Case Management hearing on 26 November 2018. That list is set out in the appendix to this judgment. In summary, the claimant brought claims of

   a. Constructive unfair dismissal

   b. Detriments on the ground of making protected disclosures

   c. Discrimination arising from disability

   d. A failure to make reasonable adjustments

   e. Harassment on the grounds of age

   f. Victimisation

   g. Trade union detriment

   h. Unlawful deductions form wages

The hearing

6. At the hearing the claimant represented himself. The respondent was represented by Mr Feeney of counsel. We checked with the parties whether any of the witnesses, parties or representatives needed any adjustments and all parties confirmed that a break in the morning and, if necessary, in the afternoon along with lunchbreak would be sufficient. In the event, we took morning and afternoon breaks on each day of the hearing.

7. We explained to the claimant how the proceedings would be conducted and what was expected in terms of evidence, cross examination and submissions.

8. We also noted the respondent's submissions that the claimant had produced very little detail in his witness statement. We explained to the claimant that he would be unlikely to be allowed to introduce new witness evidence and, particularly, we would not permit the claimant to introduce new unsubstantiated oral evidence from himself in the course of cross-examining the respondent's witnesses.

9. Following the respondent's applications discussed below we explained to the claimant that his witness statement stood as his evidence in chief along with the documents submitted attached to his claim form. Mr Feeny also helpfully suggested that in light of our decision (below) on the respondent's application to strike out the claimant's protected disclosure detriment claims, the claimant be permitted to bring a further short witness statement setting out further detail about the detriments he said he had experienced in relation to the alleged protected disclosures. The claimant did then produce a further email in response to this, but this email dealt exclusively with a new incident of 13 January 2016 which had not been pleaded or referred to in detail elsewhere. The claimant said that the matters set out in this email were further background evidence as to the attitude of the respondent towards him and its health and safety obligations generally. Mr Feeney objected to the inclusion of this evidence is far as it sought to raise new matters.

We admitted this new evidence but solely for the purposes that the claimant had identified, and we reiterated our warning to the claimant about the lack of apparent evidence he had brought support his claims.

10. In the event, the claimant did make numerous unsupported assertions throughout his cross examination of the respondent's witnesses. We explained to the claimant that we would not be able to give such unsubstantiated assertions much, if any, weight in our deliberations and in respect of such questions arising out of these new assertions it is likely that, in the absence of any other evidence, the tribunal would accept the evidence of the respondent's witnesses on those points insofar as any of that evidence was relevant.

11. We heard from the following witnesses for the claimant:
    a. The claimant
    b. Andrew Cooper
    c. Merrick Clarke
    d. Stephen Little
    e. A statement was provided in the form of two emails from James Sandford, but he did not attend to give evidence

12. We heard from the following witnesses for the respondent
    a. James Goacher
    b. Mark Clachan
    c. Darren Toon
    d. Michael Hiscock
    e. Christopher Revill
    f. Bethany Carr
    g. Susan Cuthbert

13. We were also provided with an agreed bundle of 511 number pages. The claimant applied to admit a further bundle of 29 numbered pages (including some sub-numbered pages) comprising of emails that had been obtained under a subject access request and which the respondent agreed to be admitted. We observed that some of these emails, at least, appeared to be relevant to the claimant's claims as originally set out and certainly following the list of issues. Particularly those numbered 26 and 29. We were surprised that these documents were not identified and disclosed properly in the course of tribunal proceedings by the respondent. The respondent provided an additional supplementary bundle of 29 pages relating predominantly to the conduct of these proceedings.

14. We adjourned for a day to read the witness statements and documents referred to in them.

Applications

15. At the outset of the hearing the respondent made a number of applications, some of which we dealt with straight away and some of which we deal with in this decision.

16. The first application was that the claimant's claims of victimisation be dismissed as having no reasonable prospects of success. The claimant withdrew his claim of victimisation on the grounds of race and we dismissed the claim of age discrimination for reasons that we gave at the time.

17. The respondent also made an application that the claimant's public interest disclosure claims be dismissed as having no reasonable prospects of success on the basis that the claimant had brought no evidence in his witness statement to show the pleaded detriments. We refused that application again for reasons given at the time.

Unless order application

18. The respondent also applied that the claimant's claims of failure to make reasonable adjustments be struck out or, more precisely, submitted that those claims had been dismissed by virtue of the unless order of employment Judge Dean of 14 October 2019.

19. We did not determine that issue at that time on the basis that we needed to hear evidence from the claimant about that order and what he had done to comply with it. Mr Feeny on behalf of the respondent renewed the application in the course of his closing submissions.

20. Having heard the evidence from the claimant on this matter, our decision on this application is as follows:

21. The order of Employment Judge Dean says "Unless by 14 October 2019 the claimant discloses his medical records as instructed in order 1.1 Employment Judge Dean's case management order dated 28 May 2019, the claim in relation to a complaint that the claimant is disabled by a condition known as Dumping Syndrome stand dismissed without further order".

22. The order of 28 May 2019 says "The claimant must by **24 July 2019** provide the respondent with a copy of all the medical records held by his GP and other medical practitioners treating the claimant **relating to Dumping Syndrome**. This will include all notes whether manual or computer of attendances by the claimant, referrals to other medical or other related experts, reports back from such experts, copies of the imagining [we assume that should say imaging], test results or other examinations relating to Dumping Syndrome and the effects of it". (Original emphasis)

23. At paragraph 4 of Employment Judge Dean's case management summary, she records that "the reason why it is necessary to disclose the medical records is to enable the respondent to consider whether or not based on those records and the impact statement they concede the claimant is disabled by the impairment of Dumping Syndrome or not".

24. The order of 14 October 2019 says that if the claimant has not complied with it, his claims relating to the asserted disability of Dumping Syndrome will stand dismissed. It is for the tribunal to decide, therefore, whether the claimant has complied with the order of employment Judge Dean.

25. It appeared to be the respondent's position throughout the hearing that the disability of Dumping Syndrome applied only to the reasonable

adjustments claims under sections 26 and 21 of the Equality Act 2010. However, having reviewed Employment Judge Choudry's case management order the only disability referred to is that of Dumping Syndrome. If, in fact, the only disability asserted was Dumping Syndrome then it appears that the effect of the unless order would be that the claimant's claim under section 15 (discrimination arising from disability) would also stand dismissed if the tribunal decides that the claimant has failed to comply with Employment Judge Dean's orders.

26. In identifying the claimant's claims, it is important that we refer not only to the list of issues but also the claim form presented by the claimant. We refer to *Price v Surrey County Council* UKEAT/0450/10/SM*,* in which Lord Justice Carnwarth said

> *"Even where lists of issues have been agreed between the parties, they should not be accepted uncritically by employment judges at the case management stage. They have their own duty to ensure that the case is clearly and efficiently presented. Equally the tribunal which hears the case is not required slavishly to follow the list presented to it. (See the President's comments in Wilcox v Birmingham CAB Services Ltd [2011] UKEAT/0293/10 2306 para 21.)"*

27. In his ET1 form, at paragraph 8.2 the claimant refers to a life changing illness. He does not at that point identify what that this is. At paragraph 12 of his ET1 the claimant ticks the box that says 'no' to the question 'Do you have a disability?'. The claimant also provided three attachments to his claim form: a grievance letter dated 15 September 2017, an email from Stephen Little to the claimant dated 30 August 2017 relating to an application for a promotional role, and the claimant's grievance appeal letter dated 21 October 2017. It appears that these documents have been taken to form part of his pleadings and, subsequently at the hearing, the respondent conceded that it was prepared to accept these documents as comprising part of the claimant's evidence in chief.

28. In the grievance letter of 15 September 2017, the claimant says, "since being diagnosed with cancer, being involved with the council and defending colleagues at disciplinary hearings my progression with the company has been blocked". In the grievance appeal letter of 21 October 2017 under the part entitled "<u>Discrimination after having cancer</u>" the claimant says "Firstly, I was never given an occupational health assessment or advised that I was classed as disabled and therefore have different rights at work. I should have been supported by occupational health, given advice and guidance and also been retrained. I felt under pressure to return to work. At times, I was called off my break by the management even though they were fully aware of my condition. You state that the breaks are flexible. This is not the case on blue shift as I've been told on numerous occasions that I cannot have a break when I needed to as there were other engineers on the break. I have witnesses to verify this who are willing to make statements and/or attend a tribunal".

29. The claimant in the same section then goes on to say "I have Dumping Syndrome that affects my blood sugar level and at times I need to eat

with urgency to stop myself from becoming dangerously low and losing consciousness. Despite making the management aware of this I was still refused breaks which majorly affected my health and well-being. Having to beg for breaks left me feeling unsupported, undervalued like my condition was a nuisance and annoyance to the management."

30. In its response form, the respondent recognises that the claimant said in his grievance appeal that "having been diagnosed with cancer and having been involved with the council, his promotion had been blocked".

31. Having regard, therefore, to the claimant's claim, the respondent's response and the respondent's position before the tribunal we find that the claimant's claim of Discrimination Arising from Disability under section 15 of the Equality Act 2010 is brought in reliance on the claimant's disability of cancer. The respondent concedes that claimant was disabled at the relevant time on the basis of him receiving treatment for cancer.

32. Therefore, the potential effect of the unless order of Employment Judge Dean is only that the claimant's claims under sections 20 and 21 of the Equality Act 2010 will stand dismissed if the claimant has failed to comply with that order.

33. The unless order is made under rule 38 of the Employment Tribunal Rules 2013 which says, as far as is relevant:

(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If the claim or response, or part of it, is dismissed on this basis, the Tribunal shall give written notice to the parties confirming what has occurred.

(2) A party whose claim or response been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interest of justice to do so. Unless the application includes a request for hearing, the tribunal may determine it on the basis of written representations.

34. Unless orders were considered in the recent EAT case of *Uwhubetine v NHS Commissioning Board England*, 2019 WL 03557817 (2019). At paragraphs 44 – 46, HHJ Auerbach said:

"44. Where a Tribunal is determining whether there has been compliance with an Unless Order and hence whether to give written notice as to whether the relevant pleading has been dismissed by the Order taking effect, the Tribunal is not concerned at that point with revisiting the terms of the Order: whether it should have been made, or whether it should have been made in those terms. Nor is it concerned at that point with the question of whether, if there has been non-compliance with the Order, there should be some relief from sanctions.

45. The starting point for the Tribunal engaged in that task is to consider the terms of the Order itself and whether what has happened complies with the Order or not. This may call for careful construction of the terms of the Order, both as to what the Order required and as to the scope of the Order in terms of the

consequences of non-compliance, particularly in cases where there are multiple claims or multiple parties. If there is an ambiguity the approach should be facilitative rather than punitive, and any ambiguity should be resolved in favour of the party who was required to comply. However, what the Tribunal cannot do is redraft the Order or construe it to have a meaning that it will not bear, though its words should of course be construed in context.

46. Next, the test to be applied is as to whether there has been material non-compliance, that being a qualitative rather than a quantitative test. In a case where the Order required some further Particulars to be given, the benchmark is whether the Particulars have sufficiently enabled the other party or parties to know the case that they must meet. However, the Tribunal is not concerned with the legal or factual merits of the case advanced, but merely with whether sufficient Particulars have been given to meet that test".

35. The first question, therefore, for us to consider in respect of this application is what the order required and the consequences of non-compliance. Particularly, His Honour Judge Auerbach said if there is an ambiguity the approach should be facilitative rather than punitive, and any ambiguity should be resolved in favour of the party who is required to comply.

36. The ostensibly simple question for us to resolve in this case is whether the claimant "provided the respondent with a copy of **all** the medical records held by his GP and other medical practitioners treating the claimant relating to Dumping Syndrome".

37. The claimant says that he has produced everything that references Dumping Syndrome. The respondent observes that in the claimant's disclosures there are no notes of consultations with the claimant's GP, and particularly no correspondence from Mr Nijjar, the claimant's consultant surgeon, confirming the diagnosis of Dumping Syndrome. They say, therefore, that as the referral to Mr Nijjar came from the claimant's GP there must at the very least be a note of the claimant's consultation leading to that referral. They also note that as the symptoms from which this condition was diagnosed first arose as a result of an accident and emergency admission on Christmas Eve 2015 there must also be notes associated with that.

38. The respondent says that as these documents have not been produced, all the relevant medical records have not therefore been provided and the claimant has not complied with the unless order.

39. The claimant, conversely, says that he went to his GP surgery, spoke to the receptionist and asked for "everything to do with Dumping Syndrome". The claimant did not take a copy of the order with him to show the receptionist and nor did he speak to his GP about providing the relevant information or complying with the order.

40. The claimant says that he did not know that he had Dumping Syndrome until receipt of the letter dated 22 April 2016 from Natalie Parkes, a nurse. However, that is not consistent with him telling Mark Clachan in a welfare meeting in January 2016 that he had Dumping Syndrome. In response to being questioned about that conversation on 21 January

2016 with Mark Clachan, the claimant said that he didn't think that was an accurate account … he has no recollection and he disputes that the meeting was at that date. The claimant was clear that his view was that the only evidence of him having Dumping Syndrome was the letter in April 2016 and that is when Dumping Syndrome was properly diagnosed.

41. In any event, the claimant said that his understanding of the order was that he needed to prove that he had been diagnosed with Dumping Syndrome. To this extent, his view was that one piece of correspondence would suffice.

42. We explored with the respondent whether the purpose of the order was to deal solely with the question of impairment under section 6 Equality Act 2010 or the *whole* question of disability. The respondent's view was that it related to the whole question of disability - both whether the claimant suffered from the impairment of Dumping Syndrome and whether this had a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities.

43. In our view the resolution of this question is key to determining whether there has been material non-compliance, that being a qualitative rather than quantitative test. It also accords with the purpose of an unless order being facilitative rather than punitive. If the purpose of the unless order was really for the purposes of establishing impairment, effective compliance with the order is satisfied if the claimant produces sufficient evidence to demonstrate that. If the purpose of the order was to help the respondent and the Tribunal determine the entire question of disability including the effects on the claimant, then more would be required.

44. The tribunal is not required, at this stage, to consider whether the evidence does or does not establish disability in this case, only whether the claimant has complied with the letter of the order and provided all medical records relating to Dumping Syndrome insofar as they are relevant to the question of whether the claimant is disabled by reason of Dumping Syndrome.

45. We accept that the scope and purpose of the order is open to interpretation. The claimant thought that he merely had to show that he had Dumping Syndrome. By his account he has complied with this. He says he has requested and provided everything that refers to Dumping Syndrome by name. Conversely, the respondent believed that the purpose and scope of the order was to enable a determination on the whole question of Dumping Syndrome as a disability.

46. Where there is ambiguity, we are required to resolve the question in favour of the party who is required to comply with the order. In this case, the order is made against the claimant and we therefore find that the meaning of the order was to require the claimant to provide all documents that refer to Dumping Syndrome by name.

47. The claimant gave evidence that he had asked for everything about Dumping Syndrome from his GP's practice. There is no reason to disbelieve him. There is therefore no material non-compliance with the unless order and the claimant's claims of disability discrimination under

s 20 and 21 Equality Act 2010 do not stand dismissed.

48. Notwithstanding this, the issue of disability is still for the tribunal to determine and if we find that there is insufficient evidence to support the claimant's claims, they will not succeed.

49. Having considered these applications, the list of issues is as set out in the appendix save that the tribunal is not required to determine issues relating to victimisation.

Disability

50. As discussed, it is not disputed that the claimant had cancer or that he was a disabled person for that reason. The respondent conceded in submissions that it was prepared to accept that the claimant's disability discrimination claims are based on cancer rather than Dumping Syndrome. This was on the basis that the claimant said that, despite what was recorded in the list of issues, he had never intended doing syndrome to be considered as a standalone disability. The claimant's view was that dumping syndrome was one of the effects of cancer and his treatment for it. Specifically, it was the effects of dumping syndrome that led to the claimant requiring breaks.

51. A person has the protected characteristic of being disabled if they satisfy the conditions set out in section 6 Equality Act 2010. It is not necessary to set those out here as paragraph 6 of schedule 1 of the Equality act 2010 provides that a person is disabled if they have cancer. It follows therefore that the claimant was at the relevant time disabled within the meaning of section 6 of the equality act 2010, cancer having been diagnosed in February 2015.

52. On this basis, it is not necessary for us to determine in respect of the claimant's originally identified disability of Dumping Syndrome whether *this* had a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities.

53. Having said that, however, there was no evidence before us of the effects of Dumping Syndrome on the claimant - whether that be treated as a consequence of cancer or a potential disability in its own right.

54. In a welfare meeting of 21 January 2016, the claimant reported to Mark Clachan that an incident on Christmas Eve 2015 resulting in his admission to A&E was the "hypo thing, related to cancer". Then on 3 February 2016 at another welfare meeting with Mark Clachan the claimant said that he had problems with his digestion. We refer to the letter from Natalie Parkes of 22 April 2016 which was the only medical evidence that referred to 'dumping'. This says, "he does notice some signs of dumping one eats a high sugar food which is able to recognise this now and is trying to be more slow release energy foods such as brown rice and pasta".

55. In cross-examination it was put to the claimant that provided he ate healthily and regularly this would cause no problems. The claimant said that part of Dumping Syndrome is that his body gets rid of sugar. It makes him crash and feel fatigued; or muscle damage may make him feel fatigued.

56. At the welfare meeting on 21 January 2016 the claimant said that the

condition would only affect him if he had a hypoglycaemic attack at work and this would only happen if he had drunk alcohol and had not eaten for 20 hours. We accept that the claimant was probably being flippant in this conversation, but the inference that we draw from this is that the effects of Dumping Syndrome were not a regular occurrence for the claimant.

57. We also note that the claimant was ordered to produce a witness statement setting out the impact Dumping Syndrome has on his ability to carry out day-to-day activities by employment Judge Choudry. The claimant did not produce any such evidence. He dd produce a document headed Impact Statement, but this did not deal with the impact of dumping syndrome or cancer on him.

58. The only medical evidence we had was a letter from Katie Parkes (a MacMillan nurse) dated 22 April 2016 which refers to “dumping”. The letter gives no further explanation and no details of the effects of this.

59. The only evidence we had about the effects of dumping syndrome on the claimant was that set out in his welfare meetings. We find, that the impairment of Dumping Syndrome did not, of itself, have a substantial adverse impact on the claimant’s day to day ability to carry out normal activities. The claimant’s own evidence was only that it could affect him if he did not eat a balanced diet and/or consumed large amounts of alcohol.

60. We further find that there is no evidence that Dumping Syndrome gave rise to any need for additional breaks for the claimant. As set out above, the effects of dumping syndrome were controlled by a balanced diet an regular meals.

Findings of fact

Sickness and return to work

61. The claimant was absent from work from June 2015 because of his operation for cancer on 2 June 2015. During his absence, on 24 August 2015, the respondent arranged a long-term sickness meeting with his then manager Mark Clachan, the Engineering Operations Manager (EOM) for the claimant’s shift at the time who was one level of management removed from the claimant, and Sophie Cullen from HR. There was a discussion about the claimant returning to work in the future.

62. There was a further meeting on 25 September 2015 with Mark Clachan and Sophie Cullen and on this occasion the claimant’s direct line manager, Darren Toon, also attended. The claimant’s return to work was discussed at that meeting and it was agreed that the claimant would be able to return to work on light duties. The claimant identified that what he could do would vary from one day to the next depending on how he was feeling and that the doctors couldn’t say what he could and could not do. He also said he would experience fatigue.

63. In respect of light duties, the respondent identified a training role away from the shop floor, as suitable for the claimant on his return to work from his operation and it was common ground that this was beneficial to the claimant at that time.

64. We find that throughout this period while the claimant was undertaking the training role, he was not prevented from taking breaks on any occasion. The claimant accepted in the course of questioning the respondent's witnesses that while undertaking this role he was able to manage his own time and could take breaks whenever he wanted to.
65. After this meeting, the claimant provided a note from his GP dated 29 September 2015 confirming that he will be fit to carry out the training role identified for him by the respondent. The note sets out briefly the nature of the tasks the claimant would be required to carry out in the training role and the GP signed form to say that the claimant would be fit to work in line with those requirements. The claimant then returned to work in this role from 30 September 2015.
66. The claimant said that on 24 December 2015 he had an episode relating to low blood sugar which resulted in him attending A&E. This is not disputed, and it was discussed at the next welfare meeting with the claimant on 21 January 2016. This meeting was with Mark Clachan and Sophie Cullen.
67. At this meeting it is recorded that the claimant referred to dumping syndrome when discussing this incident. The claimant was reluctant to accept that he raised dumping syndrome at this meeting. However, the notes were explicit, we do not accept the respondent has fabricated this record. We therefore find the claimant did tell Mark Clachan at this meeting that he had dumping syndrome.
68. Specifically, there was a conversation between the claimant and Mark Clachan as follows:

    "MC: low blood sugar affect, I can't see that would affect your job?

    PN: only if I had a hypo here, have to be drunk not ate for 20 hours

    MC: more down to the…

    PN: it being Christmas Eve I think, said quite common, why eat every meal now to keep it up"

69. It is clear that the claimant was preparing to come back to his substantive role at that meeting and on 27 January 2016 the claimant was certified fit to return to his main role by his GP. There is no mention of the claimant needing or asking for additional breaks in the record of that meeting.

70. There is then a further welfare meeting on 3 February with Mark Clachan and Sophie Cullen at which the claimant confirmed he was managing his role. Mark Clachan enquired after the claimant's welfare and, notably, offers the claimant extra breaks. In fact, what he says is "Ok from my point of view, going forward should you get any instances where feel fatigued, if you do feel fatigued I can accommodate that not an issue, need to make sure flag up to us, if possible and linked, make sure say". The claimant replied, "I will".

71. It was not disputed between the parties that the respondent had a policy of allowing no more than two engineers to take a break at the same time. We find that at this meeting, Mark Clachan confirmed to the claimant that additional breaks could be accommodated because the claimant had told him about the risk of fatigue. We further find that it was a condition of being allowed to deviate from the respondent's break policy that the claimant inform his manager that his need for breaks

outside the schedule was related to his illness.

72. It was put to the claimant in cross examination that provided he eat sensibly, the effects of Dumping Syndrome were well managed. This was supported by the letter from Natalie Parkes, a MacMillan Nurse who said “He does notice some signs of dumping when he eats a high sugar food but is able to recognize this now and is trying to eat more slow release energy foods such as brown rice and pasta” and the comments the claimant had made in the meeting of 21 January 2016. The claimant did not provide a convincing response to this.

73. We find, as set out above, that there is no evidence that the claimant needed to take regular or additional breaks because of Dumping Syndrome.

74. The respondent agreed, and it is in any event clear, that the claimant was not offered an appointment with an occupational health professional and nor was there a formal risk assessment at any point about the claimant returning to work either in September 2015 or January 2016. Mark Clachan says that the claimant was being managed by his GP and consultant. We find that it was reasonable for the respondent to rely on the advice of the claimant’s GP about his ability to work on 27 January 2016.

The conveyor belt incident

75. The claimant referred to an incident in January 2016 by reference to an email of 13 January 2016 relating to a complaint about people working on conveyors. This was the incident that the claimant introduced in the supplementary statement he produced on the second day of the hearing and the additional bundle of correspondence he produced. The claimant was concerned at that time about an issue relating to people standing on a live conveyor belt to try to clear a jam on another conveyor belt. He put it to Mark Clachan that Mark Clachan had told him to stop bringing issues to him following this email and in his supplementary statement he says that he was in fact given a dressing down by Mark Clachan for raising this issue. Mark Clachan denied this. His evidence was that the claimant had raised this particular issue with him, he told claimant that he would raise it in the appropriate arena but that the claimant had then sent out a further email raising it in a different forum without giving Mark Clachan the opportunity to properly address it.

76. We do not know where that further email sent by the claimant was sent as it is not included and there was a dispute between Mark Clachan and the claimant about the recipients. Nonetheless, we do accept Mark Clachan’s evidence that his issue with the claimant was not that he had raised this health and safety issue but that he had gone on to escalate it in some way without letting Mark Clachan have the opportunity to resolve it. This is because the contemporaneous email sent by Mark Clachan says “I am disappointed that he bypassed me for a start, but I discussed the fact we were talking about it and asked him for the conveyors affected last night. He seems to ignore this and just sent his own gripe for the hell of it even, which isn’t acceptable, if he has toned down his usual rhetoric”.

77. Even though this incident is not part of the claimant's claim, it happened before any of the alleged protected disclosures, and was introduced to the tribunal at the last minute we accept Mark Clachan's evidence that he did not at this time tell the claimant to stop raising issues with him.

The first ETM role

78. During this period, an Engineering Team Manager (ETM) job became available and on 23 January 2016 Mark Clachan wrote a recommendation for the claimant supporting him if he wished to apply for that role. That is set out at page 106 of the bundle. The role of ETM is the next level up from the claimant's role and has supervisory/managerial responsibility. It was part of the respondent's process that any applications for a promotional role must be supported by the applicant's manager. We note that Mark Clachan's recommendation was written shortly after the alleged altercation set out above. Although it does refer to Mark Clachan speaking recently to the claimant about the way to challenge correctly, it is supportive of claimant in an ETM role.

79. On 24 January 2016 the claimant emailed Mark Clachan to confirm that he would not be going ahead with the application at that time but would like to be considered for such a role in the future. The claimant said that he chose not to apply for this role because of his health issues at that time. This was of course a perfectly reasonable decision of the claimant, but the decision can in no way be attributed to the respondent.

Election to the council

80. The respondent operates a works council. Christopher Revill, Senior Engineering Operations Manager, who had line management responsibility for the Engineering Operations Managers (EOMs), describes the purpose of the Council as to listen to the views or issues of employees and to escalate those issues during council meetings where appropriate. Membership of the Council is by election and the claimant was elected as a council representative on 23 February 2016.

81. We find that the respondent's works council is not an independent trade union. No evidence was brought about this and it was not asserted by the claimant that it was anything other than an internal organisation set up by his employer and controlled and managed by the respondent. It was clear that the matters that could and could not be brought to the council were closely controlled by the respondent. For example, matters relating to wages could not be discussed.

82. The claimant said that in 2016 he was told by both Mark Clachan and James Goacher that he could not raise issues relating to contracts, wages or specific cases at the Council as this would be detrimental to him and it would stop him from being promoted.

83. James Goacher, who had also been a council representative before the claimant, said that the claimant would have had an induction about the council, and he agreed that he had had conversations with the claimant about the roles on the council. He confirmed that some issues, such as pay for example, were not for the general council meeting. James Goacher also said that his membership of the Council was one of the reasons he was able to secure a promotion. He explicitly denied that he

had told claimant that there would be adverse repercussions for him in raising certain matters at the council. We prefer the evidence of James Goacher in this respect. The claimant did not bring any specific evidence about this in his witness statement and we were not taken to any contemporaneous evidence about any conversations with James Goacher.

84. Mark Clachan said in cross examination that it was appropriate to raise council issues at council but that other issues should be raised in the relevant forums. For example, engineering issues should be raised with the engineering team.

85. Mark Clachan was involved in and supportive of a smaller listening group established within the engineering department to deal with issues within the engineering department that were not appropriate to be raised at the council. This was not disputed. Mark Clachan denied that he had said it would be detrimental to the claimant to raise issues at council and in common with the other of the respondent's managers who gave evidence he said that he would always listen to concerns raised by the claimant.

86. There is no compelling evidence that the claimant was told that it would be detrimental to him to raise issues in council. We find that neither Mark Clachan nor James Goacher said these things to the claimant, and we prefer their evidence on this point. The claimant did not identify any evidence to support his allegations and specifically could identify no specific occasions on which this was said to have happened.

87. Although the claimant was unable to identify any specific occasions on which these conversations were alleged to have taken place, we find that on the balance of probabilities conversations that James Goacher had with the claimant about the council role happened shortly after the claimant was elected to the council. We prefer James Goacher's evidence on this point - it is entirely likely that such conversations would take place about the nature of the role very soon after the claimant being appointed to that role.

Appraisals

88. We were taken to a number of the claimant's appraisals in which it was said that the claimant had a tendency to raise issues in the wrong way. An example is at page 93 where Mark Clachan has said in an appraisal from October 2015 to March 2016 that "I agree your personality does sometimes get misunderstood by others as you suggest. Sometimes the no-nonsense approach does vex people even if your intent is innocent. The soft skills provided on the conflict management course can help with this and suggest you try to employ them more often as this will be good towards your developing managerial ambitions. I never "look down on you" or anyone in the Department, I think this is a bad choice of words you have chosen to use as I think all have potential to improve and offer a valid contribution. What you may be mistaken for is that often your message is lost in the blunt voracious manner in which you convey it, which can tend to distract the listener from your point, and their concentration tunes into the truculent nature of the conversation; again conflict management skills would help here".

89. This is, in our view, a useful summary of the respondent's managers

views of the claimant. That he raised valid concerns but, in a way that was not always appropriate. This section is an example of the constructive feedback the respondent sought to give to the claimant on a number of occasions and which the claimant did take on board as reflected in his later appraisals. This feedback is also consistent with the reference provided by Mark Clachan in January 2016. This comment, and other comments of a similar nature to which were taken, do not amount ostracization in any reasonably meaningful sense of the word but also do not amount to the claimant being told not to raise issues.

90. The claimant said that in one-to-one meetings he was referred to as a senior engineer. It was common ground that there was no such position as senior engineer in the respondent's structure but that on any given job there would be a person with more experience than another. We accept Chris Revill's evidence that in so far as is relevant 'senior' referred to experience, not age. Any other interpretation did not make sense.

91. However, neither this appraisal, nor any of the other appraisals we were shown, contain any reference to the claimant being referred to as a "senior engineer" or told that the other engineers looked up to him. We also did not hear any evidence from the claimant or any other witnesses of any occasions when this was said. We therefore find that the claimant was not told in his appraisal meetings that he was a senior engineer and that the other engineers looked up to him.

92. In any event, we find that the use of the word senior in respect of claimant on any occasion could not reasonably have had the purpose or effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for him. It was put to the claimant in cross examination that there would be no harassment in referring to him as a senior engineer and the claimant was not able to provide an answer to this question. In our view, this is because being referred to as a senior engineer in this context did not amount to harassment of the claimant.

Protected disclosure – June 2016

93. The incidents that the claimant seeks to rely on as protected disclosures all arose from June 2016. Although not directly related to the disclosures, we note that Mark Clachan ceased responsibility for the claimant's shift on 4 June 2016 and the shift manager from then was Stephen Little.

94. The first incident relied on is that the claimant had witnessed three engineers in the crane aisle and one of the engineers had left the aisle without following a proper procedure.

95. It transpired that the claimant was not in fact a direct witness to this incident and that the incident happened in or around June 2016. Mark Clachan corrected his witness statement to this effect and that accords with the contemporaneous documentary evidence. This incident involved one of the claimant's witnesses, Andrew Cooper. Effectively what happened in this incident is that one of the engineers sought to

restart the crane on fully automatic mode while other engineers were still working in the aisle where the crane would operate automatically. The impact of this could be potentially that the engineers would be hit by the crane and suffer serious or fatal injuries.

96. Andrew Cooper was one of the engineers working in the crane aisle. Andrew Cooper said that he raised it with the step-up manager on site at the time, but nothing happened as far as he knew. A step-up manager was an engineer who was acting as a manager in the absence of the ETM. He then asked the claimant to chase it up. It was put to Andrew Cooper that he himself was in fact at fault for failing to raise this health and safety issue.

97. The claimant did then raise this issue with Mark Clachan. Mark Clachan agrees this and says that during a management meeting in June 2016 the claimant raised the health and safety issue about three engineers and the crane aisle. It was put to the claimant in cross examination that in raising this issue he was not in fact telling Mark Clachan anything, rather he was making enquiries as to what had happened with Andrew Cooper's previous report. The claimant agreed. He said that he was asking for information and wanted to get feedback about it for Andrew Cooper. He accepted that Mark Clachan was already aware of the incident.

98. We therefore find that claimant did not make a disclosure of any information in respect of this incident.

Protected disclosure – October 2016

99. The next incident on which the claimant relies is that at the end of October 2016 the claimant had stopped two engineers from entering a live crane aisle. When questioned, the engineers informed the claimant that the work had been signed off by a senior manager.

100. Chris Revill explained the incident. As we understand it, the aisles contained pallets of goods for workers to pick for the purposes of delivering to the respondent's customers. On a particular occasion when he was walking around the aisle Jonathan Bomphray, a senior manager for the respondent, noticed that there was debris in the aisle that was too deep to get to easily. Chris Revill said that a technician could reach under the aisle with a brush to remove the debris. It was assessed that this could happen while the crane continued to operate as technicians would be able to see the crane approaching and move out of its way. There had been a dynamic risk assessment in respect of this process.

101. Chris Revill accepted that the claimant had seen this operation in place and judged it to be unsafe. The claimant had therefore stopped the workers from continuing to operate in this way. Chris Revill further said that he completely supported claimant's actions in stopping the workers in those circumstances. He recognised that each employee has a duty to be aware of their own and their colleagues' health and safety.

102. It was accepted by the respondent that the claimant genuinely believed that the health and safety of the individuals working in the crane aisle

was at risk. This is confirmed by Mark Clachan who says in his witness statement that the claimant raised it with him and he in turn raised the issues that the claimant had raised in a management meeting. It was also accepted that the claimant disclosed information about his genuine belief in respect of this incident.

The second ETM role

103. The claimant submitted his application for the second ETM role on 21 December 2016. It was to work in Green Shift. In this case, the claimant's application was supported by Chris Revill.

104. The claimant took issue with the fact that he had been asked to provide evidence of his engineering qualifications to level 3 when he applied for this role. The interview was to be conducted by Michael Hiscock, the relevant Engineering Operations Manager. In evidence, Michael Hiscock said that he would not normally check the qualifications of an internal candidate but in this case no level 3 qualifications were listed for the claimant on the respondent's internal records. He therefore asked the claimant to provide copies which he duly did. In questioning Mark Clachan, the claimant accepted that they may have been misplaced since he originally provided them.

105. The claimant agreed that all permanent ETM's needed a level 3 engineering qualification. We find therefore that it was perfectly reasonable for Michael Hiscock to request copies of the claimant's qualifications in these circumstances.

106. The claimant said as part of his list of issues that in his interview with Mr Hiscock on 5 January 2017, he was asked if he was "unionised or shop steward like". In his witness statement Mr Hiscock said, "During his interview I did ask him about his management style i.e. whether it was Shop Steward like or Management-sided". In cross examination Mr Hiscock said that he "asked about management style e.g. shop steward or management". He also said that he asked this in every interview because he wanted to ensure his ETM would be on his side and part of the management team.

107. Mr Hiscock also said in his witness statement, however, that "I can remember having doubts about putting him in the role due to his general attitude. On several occasions I had witnessed outbursts from him in the hub area at members of staff on both my team and his team. He had a very strong opinion that he was always right and was unwilling to bend on this. I was worried that he would take these personality traits with him and therefore end up having difficulty managing the team". Similarly, in cross examination when the claimant asked him "do you think I was unionised or shop steward" Mr Hiscock said, "don't know you that well, you hear stuff and make your own opinions".

108. On balance, therefore, we find that Mr Hiscock asked the claimant whether he was shop steward or Management sided because he had concerns particularly about the claimant's management style. We consider that it would be very surprising for a person to habitually ask

this question of all applicants. Mr Hiscock did say in cross examination that in retrospect perhaps it was not the wisest question to ask and he would learn from this.

109. We do, however, accept that when asking this question Mr Hiscock was genuinely enquiring about the claimant's management style and not whether he was *actually* unionised or a shop steward. Even if Mr Hiscock specifically asked it of the claimant, his evidence that he was making enquiries about the claimant's personality or management style was credible. This interpretation is further supported by the way the quote is put in the list of issues as 'unionised or shop Steward <u>like</u>', the implication being that the claimant potentially acted like a shop steward; nobody thought he actually was one.

110. It was agreed at the hearing that the claimant was a member of USDAW trade union, although not a representative or other official. However, there was no evidence to suggest that Michael Hiscock was aware at that time of whether the claimant was a trade union member or not and no evidence to suggest that the purpose of the questions was to seek to prevent the claimant from accessing any trade union services or undertaking any trade union activities.

111. The claimant was interviewed for this role on 5 January 2017. However, after the interview, the job was withdrawn on or around 14 January 2017. The claimant's case seems to be that Michael Hiscock knew all along that the job would be withdrawn. The job had previously been undertaken by Dan Lowbridge who had handed in his notice to go and work somewhere else.

112. We were shown an email dated 6 January 2017, that is one day after the claimant's interview, from Dan Lowbridge to Michael Hiscock and Chris Revill in which he retracted his resignation. (We observe here that this email was only provided during the hearing. This email was obviously relevant and important, and we are again surprised that this was not identified by the respondent during disclosure). The claimant said in the course of cross-examining witnesses that he was aware before this date that Dan Lowbridge was not going ahead with his new role and wanted to return to work for the respondent. He had not, however, adduced any evidence of this and in any event the claimant's knowledge is not significant.

113. Michael Hiscock agreed that he had known all along that Dan Lowbridge was in two minds as to whether to take the new job. He said it was effectively two levels above the job he was leaving at the respondent and he had doubts about whether it was right for him. Michael Hiscock said that he had told Dan Lowbridge that he would be able to retract his resignation, but the cut-off date for him doing that was the point at which a job was offered to his replacement. Michael Hiscock said that after he had interviewed the claimant, the last applicant for this role, he then contacted Dan Lowbridge and said that he had finished all the interviews and if he was to retract his resignation he needed to do it now as he was going to make an offer.

114. This is wholly consistent with the email of 6 January 2017 which is the day after the claimant's interview.

115. We accept that Michael Hiscock knew that Dan Lowbridge might have come back, but he said that until he did, he needed to continue with the process of recruitment to cover his role. He said it was 50/50 as to whether Dan Lowbridge would return or not.

116. We consider that this was a reasonable position to adopt. We find that Michael Hiscock did not in fact know that Dan Lowbridge had retracted his resignation until 6 January 2017. That was after the claimant had had his interview. It follows that the reason the job offer was withdrawn was because Dan Lowbridge retracted his resignation and remained in his post. All the candidates for this job were put in the same position by Michael Hiscock's decision. We therefore find that his decision had nothing to do with the claimant personally.

117. Michael Hiscock confirmed that the claimant was not notified of this outcome until 14 January 2017. It was made public then because it had become known amongst the workforce in any event. The claimant asked why he didn't get any feedback until 14 January and Michael Hiscock said that he believed Stephen Little, the claimant's then EOM, should have fed back to him. We also accept that Dan Lowbridge wanted to tell his staff before it was more widely known. In so far as necessary, we accept this explanation but note that the delay had not previously appeared to form part of the claimant's claim in any event.

Protected disclosure – February 2017

118. The next incident in the list of issues on which the claimant relies is that in February 2017 the claimant said he had to stop two engineers from drilling into electrical panels. It is said that he raised the issue with Mark Clachan. Mark Clachan says in this witness statement "Around February 2017 the claimant informed me that he had stopped two engineers drilling into a live panel. He was concerned that the engineers did not have the correct panel training. I raised his concerns during a management meeting but was told by Carl Best that the engineers had been correctly trained for the work carried out. The matter was then passed to Carl Best to investigate."

119. In the course of questioning the respondent it became clear that the claimant's view of this incident was that he had seen two people drilling into a panel behind which was high-voltage electrical equipment. When questioned the claimant said he was not concerned about the training that the engineers had had, rather that they were driving the drill in and were 6 inches from death.

120. Mark Clachan gave evidence to the effect that, actually, the activity was not as dangerous as the claimant believed. However, he accepted that the claimant did believe that the activity was putting the health and safety of the engineers who were drilling into the panel at risk. In fact, the respondent explicitly conceded this. Mark Clachan also said that as

a result of the claimant raising this issue, they changed the process so that it was no longer necessary to drill into the panels.

121. Mark Clachan was clear, as was Chris Revill, that not only was the claimant permitted to raise health and safety issues he was encouraged to do so. We accept this evidence of Mark Clachan and Chris Revill. The witnesses were both consistent in their evidence and the claimant did not dispute that the process had been changed as a result of his intervention. A decision to act on the information the claimant provided, while not conclusive, is supportive of Mark Clachan and Chris Revill's evidence that the claimant, and other employees, were encouraged to raise concerns about health and safety.

The third ETM role

122. The claimant applied for another ETM role on 16 May 2017. Again, he received the manager's recommendation as confirmed in his invitation to the interview on 19 May 2017 from Chris Revill. His EOM at that time was Stephen Little.

123. The interview was on Friday 26 May, one week after the invitation to attend the interview. The invitation included a requirement to deliver a presentation to the interview panel answering six questions. The claimant's view was that while he struggled to prepare for this interview in the week available and during which he was working long shifts, Sam Cowan (who was the only other applicant) was given the opportunity to prepare his presentation in work time, was able to use the respondent's facilities to do so and particularly to print out a handout, and that Mark Clachan who was to be one of the interviewers had given assistance to Sam Cowan in the preparation of his presentation. The claimant said that he saw Mark Clachan standing with Sam Cowan when the presentation was on his computer.

124. On questioning, Mark Clachan denied that he gave any assistance to Sam Cowan. Mark Clachan said that Sam Cowan had asked for assistance and he had declined on the basis that he would form part of the interview panel. The claimant indicated that he accepted that response as true. After that, the claimant said in putting his questions that, in fact, it was the *perception* that Mark Clachan had assisted Sam Cowan that created difficulties for him.

125. When questioned about it, Bethany Carr said that had this issue been raised at the time it would have been addressed. It was not disputed that such assistance would be inappropriate.

126. Given the claimant's apparent acceptance of Mark Clachan's evidence on this point, and the absence of any evidence from Sam Cowan we find that Mark Clachan did not in fact help Sam Cowan in the preparation of his presentation. We also note that although the claimant gave a detailed description of the circumstances in which he saw Mark Clachan with Sam Cowan, this detail was not contained in his witness statement it was merely asserted in the course of cross-examination. The respondent was therefore denied the opportunity to question the

claimant about his assertions and, as we warned the claimant at the outset of the hearing, we can therefore give no real weight to those assertions. For all these reasons we prefer the evidence of Mark Clachan on this point.

127. In respect of the assertion that Sam Cowan was given the opportunity to prepare his presentation in work time using the respondent's stationary, we accept that it is possible that Sam Cowan prepared some of his presentation in works time. However, both Mark Clachan and Bethany Carr made the point that the claimant had not requested any time to prepare his presentation and the claimant accepted that. Both Mark Clachan and Bethany Carr also confirmed that had the claimant requested further time or such facilities in all likelihood that request would have been allowed. The claimant did not make such a request, and nor did he raise such issues.

128. The claimant also makes two complaints about the conduct of the interview. The first is that he was interrupted 15 minutes into his 20-minute presentation by Chris Revill. It was agreed between the parties that after 15 minutes the claimant had only addressed one of the six questions that he was required to answer as part of the presentation. The claimant said that it was up to him to present his presentation however he wanted, and he might have felt that it was more important to focus on one particular topic. Chris Revill said that the reason for the interjection was as a helpful reminder to the claimant that he had already used up three quarters of his time and he still had five topics to address. The claimant said that this interruption put him under pressure.

129. The claimant also conceded on a number of occasions that his presentation perhaps was not the best that he could have done. We accept Chris Revill's explanation that he was trying to be helpful to the claimant. It is obvious that both applicants should have been held to the same time limit so that a comparison of the presentations could be made. It is equally obvious that a reasonable interview panel will take the steps necessary, including interrupting, to help the candidate present their presentation as well as possible.

130. Finally, in respect of the interview itself, the claimant refers to comments relating to him being a shop steward. The evidence of Bethany Carr, Mark Clachan and Chris Revill was that the phrase "shop steward" that is recorded in the notes of the interview arose from the claimant. They say it was in response to a question 'what was the worst feedback you have received, and how did you react to it?'. Chris Revill and Bethany Carr said that the claimant said he had been told he was 'shop steward like' and he reacted by taking offence.

131. In his witness statement, the claimant says he was singled out for special questions by the interviewing panel as to his political beliefs, he was asked if he was too unionised. In cross examination the claimant said that he remembered Chris Revill saying that he was perceived as being too unionised and in fact he had said that his worst feedback was 'mouthing off' and 'voicing his opinion'.

132. On balance, we prefer the evidence of the respondent's witnesses in this matter that the words "shop-steward like" and "unionised" came from the claimant. Their evidence is consistent with the contemporaneous notes. We accept that this question might well have prompted a conversation in the course of the interview along the lines that the claimant suggests. However, the consistent evidence of all the respondent's witnesses was that references to 'shop steward like' or 'unionised' refer to the claimant's manner of behaviour. Namely, that he was outspoken and persistent and that in Mark Clachan's view he did not always present as seeing both sides of an issue. This is consistent with the issues about the claimant's manner set out in his appraisals.

133. We find therefore that the claimant was not asked about being a member of the union in his interview and nor was he asked about his political beliefs. References to 'shop steward like' or 'unionised' are references to the claimant's manner of behaviour, not related to actual union membership, and in any event came from the claimant.

134. In respect of the decision not to appoint the claimant to the position of ETM at this interview, we find that on the balance of probabilities the reason that Sam Cowan was appointed rather than the claimant was because Sam Cowan performed better in the interview. Chris Revill said that both candidates had been recommended to go forward for interview by their managers, both had previously unsuccessfully applied for an ETM role and both had areas for improvement. He agreed that what he knew about the candidates was in the back of his mind, but that the panel made a decision on the basis of the answers given in the interview.

135. We have had regard to the fact that there appears to have been discussion between Chris Revill and Mark Clachan as to whether the claimant would have been suitable for permanent appointment to the training role that he had temporarily occupied. However, Mr Revill said that the permanent training role was subject to funding approval and the claimant's success in the role added support to the business case for additional funding.

136. We saw an email dated 12 May 2017 from Chris Revill to Jonathan Bomphray which does give a clear indication that Chris Revill would like the claimant to take on the role of trainer. However, it is equally clear that that was because the claimant was very good at the role. This email was sent before the claimant applied for the ETM role.

137. In a similar vein, we refer to the letter of recommendation from Mark Clachan of 23 January 2016. This recommended the claimant as a strong candidate for an ETM role. It is therefore just not credible to assert that the panel, which included Mark Clachan, had made the decision not to appoint the claimant into the role before the interview.

Interview feedback

138. In an email dated 8 June 2017, the claimant requested feedback from Bethany Carr about his performance at interview. Bethany Carr agreed to give feedback, but the claimant had to delay his meeting with Bethany Carr for personal reasons. Then, on 27 June 2017, the claimant emailed Bethany Carr and said: "funny how you can be turned down for a job for a company you have loyally served five years and having gone the extra mile on numerous occasions, then two internationally renowned companies offer jobs at the first interview stage". This is described by Chris Revill as 'sour grapes' and we do not consider that that was an unreasonable reaction. The tone of the claimant's email clearly expresses a negative view of the respondent.

Council meeting in June 2017

139. The claimant asserts in his list of issues that he was told on numerous occasions that he was a troublemaker, the last occasion being in June 2017 when he says he was told this by Briony Flint the respondent's Head of HR. There was simply no evidence of this. The claimant did not during the hearing refer to any specific incidents. It was not referred to in the claimant's witness statement at all. It was put to witnesses in a general way that he had been referred to as a troublemaker and all of the witnesses to whom this was put denied it.

140. The general tenor of the claimant's questioning was, ultimately, that he did not appear to have a particular problem with any of the individual managers who appeared to give evidence. He referred to the culture at Ocado being the problem.

141. The absence of any evidence about this from any witnesses means we find that the claimant has not shown that he was called a troublemaker by Briony Flint or anyone else.

Refusal of breaks

142. We have already found that Mark Clachan told the claimant that he could be flexible with his breaks provided he let the respondent know that he needed to take an additional break or break at a different time because of his illness.

143. It emerged through the hearing that the claimant's real issue was that on between three and five occasions he had been unable to take a break while line managed by Darren Toon. Specifically, that Darren Toon had prevented him from going for breaks.

144. The claimant did not provide any detailed evidence about the occasions on which he said that Darren Toon had refused him a break. He did describe one incident in some detail that he put to Darren Toon. He said that he'd been working on the ,chilled inbound, when there had been a fault with the pallet conveyor. The claimant said he couldn't feel his hands because of the cold and the colleague with whom he was working, Dan, said go for a break. The claimant said that he walked

past Darren Toon who said where are you going. The claimant said that he replied he was going for a break and Darren Toon said he could not go for a break as there were two engineers off the floor.

145. Darren Toon said he could not remember that. He also said that if he had missed his break because of a breakdown, the claimant could have gone for his break in any event regardless of whether he was ill or not.

146. Darren Toon said that he would never refuse the claimant a break as he was aware of his illness. The claimant then said that maybe he never explained it - perhaps he didn't tell Darren Toon that he was feeling unwell.

147. The tribunal is in some difficulty with this point and others like it. The claimant has produced no direct evidence. This is not referred to in his witness statement and there is no detail in his claim. We explained to the claimant in the proceedings that in the absence of supporting evidence if he introduced new matters by way of questioning it is likely that we would have to give the respondent's witnesses evidence greater weight.

148. In light of this, we accept the evidence of Darren Toon. That evidence is effectively that he never refused the claimant a break. Had the claimant been able to set out in his witness statement details of the occasions on which he said he did not get the breaks he was entitled to, the respondent would have had the opportunity to question the claimant about those occasions and the tribunal would be able to weigh more effectively the tested evidence of the claimant against the tested evidence of the respondent.

149. As it is, all we have is the evidence, given under oath, of Darren Toon that he had never refused the claimant breaks when the claimant said he needed breaks because of his illness. Darren Toon did say that he would challenge engineers if they were standing around together apparently not working. This is reasonable. He also said that he would challenge the claimant if the claimant was going for a break out of his rota, but if the claimant said he was feeling unwell, or words to that effect, he would have let the claimant go for his break without further challenge.

150. In the absence of any more detailed evidence, and in light of the apparent concession of the claimant in questioning the respondent's witnesses that he might not have said that the breaks he needed were related to him feeling unwell, we find that, on the balance of probabilities, Darren Toon did not prevent the claimant from taking breaks outside the scheduled arrangement on any occasion when the claimant had told Darren Toon that he needed to have a break because he was feeling unwell.

151. The only other observations we make in respect of this issue are that firstly the claimant himself said that he was unlikely to always ask for a break because it is a proud person and a private person. Secondly, the

claimant asserted in the course of questioning that he had been called off a break early. This appeared to be a new issue but, in any event, the same evidential problems arise, and we find that there is no evidence to support this assertion.

Resignation

152. The claimant tendered his resignation on 29 June 2017. The reason for the claimant's resignation as set out in his resignation letter was because he needed an operation because he had damaged the discs in his neck and that it would take a long period to recover.

153. There is nothing in the claimant's resignation letter to suggest any dissatisfaction with his employment at the respondent. In fact, he says "Therefore, again *with regret* after five years of loyal and dedicated service I will be unable to continue employment as a service engineer with Ocado and wish to give you three months' notice". (Emphasis added).

154. Having tendered his resignation, the claimant nonetheless made an application for an ETM role in his notice period in August (see below). This action is wholly inconsistent with what the claimant now says he felt towards the respondent. In fact, it is only after having been refused a management recommendation for this role that the claimant submitted his grievances.

155. Prior to this, there is no contemporaneous evidence at all to suggest that the claimant was in any way dissatisfied with his employment at Ocado. In giving evidence the claimant did refer in general terms to being ostracised and ignored during his employment. There is, however, nothing at all to support these assertions. We therefore find that on the balance of probabilities the reason the claimant resigned his employment was for the reasons set out in his resignation letter, that being his neck injury and the operation that he needed to have for that and that it was his own decision.

Facebook issue

156. In the claimant's resignation letter, he had complained about neck problems. A welfare meeting was arranged for 5 July 2017 to discuss these issues with Stephen Little and Darren Toon as minute taker. It was adjourned, and continued on 11 July 2017 with Bethany Carr replacing Darren Toon as minute taker.

157. On the morning of 11 July 2017, before the resumed meeting, Christopher Revill received some information about some messages that the claimant had put on Faceboook. They say, "had enough of being mugged off for doing my job" and "they don't care I'm just a number pal as you know". We accept Chris Revill's evidence that one of the claimant's friends had raised this with the respondent and the claimant did not deny that he had written them. Sadly, this is an all too common occurrence in the modern workplace but having had the matter brought to their attention, this issue was raised with the claimant.

158. The claimant took issue with the matter being raised in the course of a welfare meeting. The respondent's case was that in fact the welfare meeting was brought to an end and a new meeting was immediately convened to discuss this matter. Bethany Carr agreed that the first part of that meeting was a welfare meeting but also said that in her view the matter was not serious enough to warrant a disciplinary investigation. The claimant did raise issues as part of his constructive unfair dismissal claim about the way his Facebook comments particularly were raised to him in a welfare meeting. However, as this meeting occurred after the claimant had tendered his resignation it cannot possibly have formed any part of his decision to hand in his notice.

159. In any event, the claimant did not dispute that he had written the comments. He agreed that he would remove them, and he did so.

Council meeting 11 July 2017

160. On the same day, 11 July 2017, the claimant attended a works council meeting. We were taken to some council minutes of 11 July 2017 where it is recorded that the claimant said, "Internal promotions (engineering) are given to people not gone through the interview process" and "management not bought into council - engineering ops/TMS". The claimant said that this conversation was an aside to the head of HR, Bryony Flint and he was properly raising it. He did not know how it found its way into the minutes. We note also the claimant's comments that the comments about promotions related to a different team, not his own issues.

161. We have heard no direct evidence from anybody apart from the claimant who was at that meeting at the relevant time. Susan Cuthbert said she was only present for part of the meeting. The suggestion that the minutes were fabricated or that the comments were recorded when not part of the meeting is simply not credible in light of all the surrounding circumstances.

162. On the balance of probabilities, we find that the minutes accurately record the tone of the comments that the claimant made.

The fourth ETM role – August 2017

163. The claimant's final application for an ETM role was in August 2017. The claimant had handed his notice in on 29 June 2017 so that when he said he wanted to apply for this role he was working his notice.

164. On this occasion, the claimant was not recommended for the role by his manager who at that time was Stephen Little.

165. The reasons that Stephen Little gave at the time for not putting the claimant forward are set out in an email dated 30 August 2017 at page 230 of the bundle. He said, "In view of recent events such as the comments made in the council meeting and Facebook comments along

with general response not getting the last position, it would not be right for me to recommend you for this position."

166. Stephen Little gave evidence on behalf of the claimant. He said that he felt under pressure from Chris Revill to refuse to recommend the claimant and that the reasons he had said were Chris Revill's reasons. There is an email of 14 August 2017 at page 212 of the bundle from Chris Revill to Stephen Little which says

> "I guess in light of recent behaviour is the first question is would he get your recommendation which the first part of the selection process?
>
> We do need to take into account the following previous record both positives and concerns…
>
> - email to Bethy about not wanting feedback from first interview as he is going
> - telling people the last time it was a done deal and never had a chance
> - resignation letter and claim for neck injury
> - Facebook comments
> - comments in council minutes regarding no support from EO management yet never discussing it with you Darren or me
> - general reaction and behaviours to not getting the last position"

167. We agree that these observations broadly mirror the reasons set out in Stephen Little's email refusing to recommend the claimant. We accept that the tone of the email from Chris Revill to Stephen Little does imply that the claimant should not be put forward by Steve Little for that role. We do not accept that this was inappropriate. The reasons outlined were, for the reasons set out below, reasonable reasons. We heard that Stephen Little was subject to some performance-related intervention around this time and Chris Revill said that he was trying to get Stephen Little to make decisions as this was one of his weaknesses as a manager. This evidence is consistent with the tone of the email and we prefer the evidence of Chris Revill that although he had expressed a view in the email, the decision whether or not to put the claimant forward was that of Stephen Little. In any event the decision not to put the claimant forward in all the circumstances was reasonable whether it was actually made by Chris Revill or Stephen Little.

168. In respect of bullet point one, the tone of the claimant's email discussed above clearly expresses a negative view of the respondent.

169. In respect of bullet point two, we accept Chris Revill's evidence in his witness statement that he believed the claimant had described Sam Cowan's appointment as a fix. In effect that continued to be part of the claimant's claim - he clearly believed at the time that Sam Cowan had been given additional support and time off to prepare for his interview.

170. In respect of bullet point three, the claimant had resigned – this is not in dispute. It is unclear what the relevance of the claimant's neck injury

was, and the matter was not explored in questioning. Again, we accept Mr Revill's view that this indicated that the claimant was critical of the management team so he did not see how he could reasonably expect to join that team.

171. In respect of bullet point four, we accept Chris Revill's view that the Facebook comments discussed above disclosed a dislike of or possibly contempt for the management team within which the claimant aspired to work. There was some dispute as to the context of those comments; whether they were in a public arena or in a private chat and whether the claimant was identified publicly as working for the respondent. Nonetheless, we accept Chris Revill's view that these comments disclosed a dislike of or possibly contempt for the management team within which the claimant aspired to work, regardless of whether they were made in public or private.

172. In respect of bullet point five, Mr Revill's particular concern about the comments discussed above was that the claimant had not brought the matter to him directly before raising it in the council. Mr Clachan and Mr Revill both said that there was a clear process to go through before raising matters that council that is to raise with the relevant managers and escalate if possible and only takes council if not able to get a good resolution. Mr Revill said he found it insulting that he would take something as big as this to the council without raising it first.

173. Again, we accept Mr Revill's view that this indicated that the claimant was critical of the management team so he did not see how he could reasonably expect to join that team.

174. Finally, in respect of the claimant's reaction to not getting the job, we again accept that it was reasonable for Mr Revill to have this view. It forms part of the claimant's claim that the reason he did not get that job was because of the inappropriate actions of the respondent's managers rather than his own performance at interview compared to that of Sam Cowan. Again, we accept Chris Revill's broad view that this reflected a lack of confidence on the part of the claimant in the respondent's management team that he was seeking to join.

175. We find that these were reasonable reasons for any employer to not put an employee forward for promotion, whether that decision was made by Stephen Little or Chris Revill.

Other matters

Ostracised

176. Turning to the claimant's assertion that he was ostracised, we have had great difficulty making any findings of fact about this for the simple reason that the claimant has brought no direct or explicit evidence about what he says happened. We addressed with the claimant what he meant by being ostracised, and he said that he felt it meant being dismissed by his managers. Being generous to the claimant, we are

prepared to accept that that could in principle include being told not to raise complaints about health and safety matters with his managers.

177. The claimant did not bring any evidence in his witness statement or in his claim, including the two attached grievance letters, of specific occasions when this had occurred. Chris Revill was very clear in his evidence that the claimant was able to raise issues with him. In fact, in respect of the Council meeting issues, he was explicit that his issue with the claimant was, as it had been with Mark Clachan, that the claimant had not raised an issue with him *before* taking it to the council, rather than that he had raised it at all.

178. The claimant also questioned most of the respondent's witnesses about investigations into the health and safety issues he said that he raised. The thrust of his questioning was that the respondent did not take the breaches seriously, did not have sufficient understanding of the relevant regulatory requirements and did not conduct proper investigations. The claimant also asserted in his questioning that people who raised complaints including the claimant did not receive feedback about the outcome of those complaints. The evidence of Chris Revill, Mark Clachan and, as far as relevant, Michael Hiscock, was consistently that the appropriate people conducted investigations, those people being the respective team managers of the people who were said to be culpable for the alleged health and safety breaches. Any action taken against a particular employee as a result of those investigations would be confidential to the employee concerned and it would not be appropriate to feed that back to the complainant. We accept their evidence on this point. This is a wholly reasonable approach for any employer to take. However, we observe that a failure to act on complaints and/or feed feedback to the claimant is not explicitly part of the claimant's pleaded claim.

179. If part of the claimant's claim that he was ostracised could at a stretch be said to include the alleged failure to feedback to the claimant as to the outcome an investigation, we find that the reason the claimant received no feedback on any occasion in relation to the three complaints that he said he made was because the respondent had a policy of not disclosing details of health and safety breaches to its employees. Chris Revill and Mark Clachan both said that if the health and safety breach gave rise to a change in process, the change in process would be circulated. Mark Clachan said that he would not question the change in process unless it caused problems in his area. We accept this evidence of the respondent's witnesses as consistent and credible.

180. Potentially, this part of the claimant's claim also included a complaint that he was not questioned about the reports of health and safety breaches he made. Mark Clachan and Chris Revill gave evidence that it would not always be necessary to question the person who reported the alleged breach if enough information could be obtained otherwise. We accept this as a reasonable explanation but in the specific cases referred to, none of the respondent's witnesses were directly involved in the investigations in any event.

181. We note also the evidence of Andrew Cooper, the claimant's witness, who was involved in the health and safety incident of June 2016 discussed above. Andrew Cooper's evidence was that his life was put in danger as a result of that incident. It was put to Andrew Cooper in cross examination that in fact he had been reprimanded because he had not raised the health and safety issue arising. Andrew Cooper disputed that – he said that had reported it but in any event, he received no disciplinary warnings and there was no formal action but, there had been a discussion. Andrew Cooper clearly accepted that there had been a discussion with his managers to the effect that he ought to have raised the health and safety issue himself.

182. This evidence is inconsistent with the claimant's assertions that the respondent objected to the claimant raising health and safety issues. We recognise that the claimant felt undervalued because he was not consulted about the health and safety issues he raised and he did not receive, in his view, adequate feedback. However, this was a matter of the claimant's perception of Ocado's actions. We find that the claimant was both in theory and practice able to raise any health and safety concerns he had at any time with his managers without significant adverse effect to him.

183. The claimant asked the respondent a great deal of questions about the subsequent process relating to the incidents he reported, particularly in respect of the respondent's investigations. We do not need to make any findings as to whether the respondent dealt properly with these disclosures for the purposes of determining the claimant's claims except to the extent that we accept the respondent's witnesses evidence that they did respond, but the claimant felt that response was inadequate.

184. The only issue that is potentially relevant is that the claimant says he was not interviewed directly about any of these incidents. We accept that evidence and in fact the respondent did not dispute it. What Mark Clachan, Chris Revill and Michael Hiscock said was that an appropriate investigation was carried out on each occasion. They said it would not always be necessary to interview the claimant about any of these incidents, particularly if the individuals directly involved immediately corroborated what had been disclosed. Further, none of the respondent's witnesses who came to give evidence were directly involved in these investigations because they were not the managers responsible for the individuals concerned.

185. Insofar as it is necessary to determine this issue in respect of the claimant's claim that he was ostracised, we find that the respondent practice of not interviewing the claimant in respect of these three incidents was reasonable and did not amount to ostracising the claimant.

Attacked by head of HR

186. The claimant also asserts as part of the list of issues that he was verbally attacked by the Head of HR at the council meeting in June 2018. This is clearly a typo as the claimant left in September 2017. In response to questions about the council meeting in July 2017, the claimant said that he was told by the Head of HR that the issue he raised about the maintenance team and people being promoted without

an interview was none of the claimant's business. The claimant has never used this form of words before in any of his evidence but even if it was said while this might have been inappropriate, we do not agree that it amounted to him being "attacked" by the head of HR.

187. There was no other evidence about this allegation at all. In the absence of any evidence to support this we find, that the claimant has not shown, on the balance of probabilities, that this happened.

Audits

188. It was part of the claimant's list of issues that one of the detriments he said he suffered as a result of making protected disclosures was that he was challenged on his audits.

189. The first time this was raised by the claimant was in his submissions. We heard no evidence about this at all and there is nothing in his witness statement. We therefore find that the claimant has not demonstrated that he was challenged on his audits.

The claimant's contract

190. The claimant says that he was entitled to be paid a bonus as he had been paid one for the five previous years.

191. We were referred to the claimant's written employment contract which says as far as relevant,

> "a bonus will only be payable if you remain employed with Ocado at the date payment is being made and, at that time, you are not working under notice of termination of employment (whether notice has been given by you or by us)".

192. The undisputed evidence of the respondent was that the bonus was payable in October 2017. The claimant tendered his resignation on 29 June 2017, he finished working for the respondent on 28 September 2017.

193. We find that at the date bonus became payable in 2017, the claimant was no longer working for the respondent.

194. The claimant sought to argue that because there was no signed copy of the contract in the papers before the tribunal, he was not bound by it.

195. Both the claimant and the respondent relied on the mechanism set out in the contract for calculating the payment of the bonus. No evidence was brought to suggest that the claimant was working to different terms or had not received a copy of this contract. We find, on the balance of probabilities, that the claimant was working to this contact and considered himself bound by the terms set out in it.

Matters of fact relating to public interest

196. The claimant asked the respondent's witnesses questions about the visitors to the respondent's warehouse. It was clear that visitors might

include contractors, schoolchildren (albeit not very frequently), and other persons outside those directly employed by Ocado

197. We accept that the claimant was diligent in raising health and safety concerns generally, and we find that he did this out of a sense of obligation, an intention to comply with regulatory health and safety requirements and concern for his fellow workers. It was accepted by the respondent's witnesses that all workers had an obligation to raise health and safety issues and we refer particularly to the raising of the issue with Andrew Cooper and the warning given to one of the other engineers in respect of the first crane aisle incident in this regard.

Law

Constructive unfair dismissal

198. In respect of the claimant's claim for unfair dismissal, the only question in this case is whether the claimant was dismissed within the meaning of s 95(1) Employment rights Act 1996 (ERA). The respondent does not assert that, if the claimant was dismissed, he was dismissed for a potentially fair reason within section 98 ERA.

199. Section 95 ERA sets out the circumstances in which an employee is dismissed, and s 95(1)(c) says that this includes circumstances where "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

200. In *Western Excavating (ECC) Ltd v Sharp* *[1978] QB 761* the Court of Appeal confirmed that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer'.

201. In *Malik v Bank of Credit and Commerce International SA* *[1997] IRLR 462*, *[1997] ICR 606* it was held that contracts of employment include the following implied term:

> *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

202. The question for the tribunal to determine is therefore whether the respondent without reasonable and proper cause conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, thereby breaching its contract of employment with the claimant.

203. If the respondent is in breach of the implied term of trust and confidence set out above, the tribunal must then determine if that breach was repudiatory – if it was sufficiently serious so as to allow the claimant to treat the contract of employment as discharged.

204. Finally, the tribunal must decide whether, if there was such a breach, the claimant resigned in response to that breach.

Protected disclosures

205. The law relating to protected disclosures is set out in Part IVA of the employment rights act 1996.

Section 43A (Meaning of "protected disclosure") provides:

> In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

Section 43B (Disclosures qualifying for protection) says, as far as is relevant:

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> …
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,

Section 43C (Disclosure to employer or other responsible person) provides:

> (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure . . .—
>
> (a) to his employer, or

206. This means that in order to be protected, the relevant disclosure must satisfy all of the following requirements:

    a. It must be the disclosure of information
    b. The worker disclosing the information must reasonably believe both:
        i. That the information tends to show one of the listed matters; and
        ii. That the disclosure is in the public interest.

207. The disclosure must also be made to an appropriate person – namely the worker's employer or, where the conduct relates to someone other than his employer, that person or, in respect of any other matter for which someone other than his employer has responsibility, that person. It is not disputed that the alleged disclosures were made or the claimant's employer, and that the claimant was a worker.

208. The tribunal considered *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)* 2018 ICR 731, CA in respect of the question of what it means to say that the worker has a reasonable belief that the disclosure is made in the public interest. There is, in effect, a two-stage test for the tribunal in determining this question:

    a. At the time of making the disclosure, did the worker actually believe that the disclosure was in the public interest; and

b. If so, was that belief reasonable.

209. It was also explained in *Chesterton* that "while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it".

210. Finally, in respect of the legal position relating to protected disclosures, it was held in *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436 at paragraphs 35 and 36 that

> *"35. The question in each case in relation to s 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]'. Grammatically, the word 'information' has to be read with the qualifying phrase, 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in sub-s (1). The statements in the solicitors' letter in Cavendish Munro did not meet that standard.*
>
> *36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in s 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief".*

211. In respect of each of the disclosures, therefore, the claimant must have actually disclosed sufficient factual information to be capable of showing that that the health or safety of any individual has been, is being or is likely to be endangered.

Detriments

212. The law relating to detriments is set out in Part V of the Employment Rights Act 1996

213. Section 47B (Protected disclosures) provides:

> (1) 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.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

214. Detriment is not defined in the statute. However, it has a wide meaning and includes being put at a disadvantage. It does not necessarily have to be an economic disadvantage and should be considered from the worker's perspective.

215. In respect of bringing a claim of detriment on the grounds of making a protected disclosure

216. Section 48 (Complaints to employment tribunals) provides

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(3) An [employment tribunal] shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done.

(4A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).

217. This means that it is for the employer to show the ground on which any act or deliberate failure to act was done. This is explained in Volume 14 of the IDS handbook as follows:

218. "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".

219. In *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, it was held that *'A reason for [an act or omission] is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to [act or refrain from acting]'*

220. This means that if the claimant is able to show that he made protected disclosures, and that he was subject to a detriment the burden moves to the respondent to show the reason that caused the respondent to subject the claimant to the detriment.

Disability discrimination

221. We are concerned with the following provisions of the Equality Act 2010

222. Section 15 – Discrimination arising from disability which says

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

223. In *Secretary of State for Justice, HM Inspectorate of Prisons v Dunn* UKEAT/0234/16/DM, the EAT said at para 49 and 50

> *"There are four main elements identified by section 15 that must be established for such a claim. First, there must be unfavourable treatment. No comparison is required. Secondly, there must be something arising in consequence of the disability. Those are ordinary words to be given their natural meaning. The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences are likely to be obvious, such as where the disability causes a claimant to be ill and absent from work so that absence is a consequence. Others may be less so. It is a question of fact for an employment tribunal to decide whether something does in fact arise in consequence of a claimant's disability. The third element is that the unfavourable treatment must be because of the something arising in consequence of the disability. As Mr Kirk submits, this*

involves a consideration of the thought processes of the putative discriminator in all but the most obvious cases in order to determine whether the something arising in consequence of the disability operated on the mind of the putative discriminator, whether consciously or subconsciously, at least to a significant extent (see paragraph 17 of IPC Media Ltd v Millar). If so, the treatment will have been because of the "something" even if there were other reasons for the impugned treatment.

Finally, unfavourable treatment because of something arising in consequence of disability will not amount to unlawful discrimination if the alleged discriminator can show that the treatment is a proportionate means of achieving a legitimate aim and therefore justified".

224. We note that there is no justification defence pleaded in this case.

225. It was further held at paragraph 54 that

"We agree with [the respondent's counsel] that motive is irrelevant. Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability. As we have said, it need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary".

226. In the context, therefore, of the claimant's claim that he failed to secure promotion because he had cancer we need to consider whether something arose in consequence of the claimant's cancer and, if it did, the extent to which this "something" operated on the minds of the respective managers on each of the occasions when the claimant's applications for an ETM role were unsuccessful.

227. Section 20 – Duty to make adjustments says

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice 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.

228. Section 21 – Failure to comply with duty says

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

> (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

229. The particular issue in dispute in respect of reasonable adjustments is whether the prohibition against more than two engineers taking a break at the same time puts the claimant at a substantial disadvantage in relation to people who don't have cancer and particularly in relation to the effects of Dumping Syndrome.

230. In *Fareham College Corporation v Walters* UKEAT/0396/08/DM at paragraph 58 the EAT said:

> *"…a like-for-like comparison has no place in a disability discrimination reasonable adjustments complaint, as is clear from the case of Archibald v Fife. It was not therefore necessary for this Claimant to satisfy the Tribunal that someone who did not have a disability but whose circumstances were otherwise the same as hers would have been treated differently. To hold otherwise, in our judgment, would defeat the purpose of the Disability Discrimination legislation".*

231. The ratio of that decision is summarised in the Westlaw head note which says

> *"When considering whether an employer had failed to comply with a duty to make reasonable adjustments, the tribunal should identify non-disabled comparators only where it was appropriate to do so, Environment Agency v Rowan [2008] I.C.R. 218, [2007] 11 WLUK 3 considered. In many cases, the facts would speak for themselves and the identity of the non-disabled comparators would be clearly discernible from the provision, criterion or practice found to be in play".*

232. It is, for the tribunal to decide whether in this case it is appropriate to identify non-disabled comparators.

233. The respondent submitted that it would be wrong for the tribunal to conclude that the effects of Dumping Syndrome are part of the claimant's disability of cancer. Mr Feeny said that Dumping Syndrome, to the extent that it had an effect on the claimant, was a consequence of the claimant's operation and not therefore a consequence of his cancer.

234. Mr Feeny was able to direct us to any case law dealing with the question of remoteness between the primary disability and the impact of consequential matters arising including treatments for that disability.

235. In our view the question is simply a matter of fact and to be decided having regard to the test set out in section 20 and the comparative exercise. The comparison in this case being between the claimant and someone who does not have cancer. We refer again to *Dunn* where it was said *"The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences are likely to be obvious, such as where the disability*

causes a claimant to be ill and absent from work so that absence is a consequence. Others may be less so. It is a question of fact for an employment tribunal to decide whether something does in fact arise in consequence of a claimant's disability".

236. The same analysis must apply in respect of the question as to whether "a provision, criterion or practice 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". It is a matter of fact and degree as to whether Dumping Syndrome is a consequence of the claimant's cancer or not.

237. The claim was put, we understand though not very clearly, on the basis that the operation the claimant had was solely for the purposes of treating his oesophageal cancer and that Dumping Syndrome was a consequence of that operation.

238. It appears to us, therefore, that the comparison must be between claimant and someone who does not have oesophageal cancer. We will, therefore, be entitled to find that a person who does not have oesophagal cancer would not have the treatment for oesophageal cancer and would not therefore experience any of the consequences of that treatment.

239. Section 26 – Harassment

(1) A person (A) harasses another (B) if—

(*a*) A engages in unwanted conduct related to a relevant protected characteristic, and

(*b*) the conduct has the purpose or effect of—

(*i*) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.…

(4) In deciding whether conduct has the effect referred to in subsection (1)(*b*), each of the following must be taken into account—

(*a*) the perception of B;

(*b*) the other circumstances of the case;

(*c*) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

240. The question of whether conduct is unwanted is to be assessed subjectively (*Thomas Sanderson Blinds Ltd v English* EAT 0316/10).

241. The question as to whether the conduct had the effect set out in section 26(1)(b) is to be assessed both subjectively and objectively in accordance with subsection 4. The question of whether it was reasonable for any conduct to have that effect is to be assessed objectively, but having regard to the perception of the claimant.

Unlawful deduction from wages

242. In respect of the claimant's claim of unlawful deduction from wages, the relevant provisions of the Employment Rights Act 1996 are

243. Section 13 - Right not to suffer unauthorised deductions which says

> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (*a*) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (*b*) the worker has previously signified in writing his agreement or consent to the making of the deduction.

244. Section 27 – meaning of 'wages' etc which says

> (1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including—
>
> (*a*) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise…

245. In *Agarwal v Cardiff University and Another* [2018] EWCA Civ 1434 the Court of Appeal confirmed that the tribunal does have the power to construe a contract with the purposes of determining whether any amount is probably payable.

246. The tribunal must therefore construe the contractual provisions to determine whether the claimant was entitled to be paid a bonus under that contract and if so, how much he should have been paid.

Trade union detriment pursuant to section 146 of the Trade Union and Labour Relations (Consolidation) act 1992

247. The relevant provisions of the Trade Union and Labour Relations (Consolidation) act 1992 are

248. Section 146 – Detriment on grounds relating to union membership or activities says

> (1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—
>
> (*a*) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,

(*b*) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, …

(*ba*) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or

(*c*) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

(2) In subsection (1) 'an appropriate time' means—

(*a*) a time outside the worker's working hours, or

(*b*) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;

and for this purpose 'working hours', in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.

(2A) In this section—

(*a*) 'trade union services' means services made available to the worker by an independent trade union by virtue of his membership of the union, and

(*b*) references to a worker's 'making use' of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

…

(5) A worker or former worker may present a complaint to an employment tribunal on the ground that he has been subjected to a detriment by his employer in contravention of this section.

(5A) This section does not apply where—

(a) the worker is an employee; and

(b) the detriment in question amounts to dismissal.

249. Section 5 – Meaning of 'independent trade union' says

In this Act an 'independent trade union' means a trade union which—

(a) is not under the domination or control of an employer or group of employers or of one or more employers' associations, and

(b) is not liable to interference by an employer or any such group or association (arising out of the provision of financial or material support or by any other means whatsoever) tending towards such control;

and references to 'independence', in relation to a trade union, shall be construed accordingly.

Discussion and analysis

Constructive unfair dismissal

250. The test set out above as to whether the claimant has been constructively dismissed (and in this case therefore constructively unfairly dismissed) is whether the respondent acted in breach of the implied term of trust and confidence. The matters relied on by the claimant are those set out in the list of issues which we do not need to repeat. We have found, in respect of all the acts relied on, that the respondent acted reasonably and for a genuine reason. The respondent did not conduct itself in a way calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee and it had a reasonable and proper cause for undertaking each of the acts relied upon.

251. In respect of the following issues, it is clear that the claimant cannot possibly have relied on them as breaches of his contract prior to handing in his notice because they occurred after he had already handed in his notice. Those matters are: Stephen Little refusing to recommend the claimant for an interview in August 2017; being overlooked for promotion at the same time; and being asked questions by Stephen Little and Beth Carr about comments the claimant posted on Facebook in the meeting in August 2017.

252. We refer also to our finding that, in any event, the claimant did not rely on any acts of the respondent in his decision to resign. The claimant did not resign in response to the pleaded acts (whether they were actually in breach of contract or not). We have found that he resigned because he had problems with his neck and was going to have an operation.

253. We refer also to the claimant's decision to apply for a further promotional role in August 2017 after he had tendered his resignation. This is compelling evidence, if more were needed, that at that time it seems inherently unlikely that the relationship between him and the respondent had broken down to such an extent that it could be considered a breach of term mutual trust and confidence or any other repudiatory breach. If that had been the case, we do not consider that the claimant would have been prepared to make an application for a further role at the respondent. We note that the claimant's grievance was only submitted after Stephen Little had refused to give the manager's recommendation for the August ETM promotion and this further supports our view that until that point - which was of course after the claimant had decided to resign - the claimant was content to continue working for the respondent.

254. It follows therefore that we find that the claimant was not constructively dismissed but in fact chose to resign from the respondent.

255. In respect of this claim we recognise that the claimant relies on the failure by the respondent to provide him with an occupational health assessment when he returned to work in 2015. In our view, the decisions of the respondent to meet with the claimant in the welfare meetings and to take into account the advice of his GP was sufficient to meet its obligations to the claimant in respect of his fitness to return to

work, the roles he would undertake there and in respect of its duties under the Equality Act 2010 (as to which see below). To that extent it is not in breach of the implied term of trust and confidence.

256. However, we do observe that the claimant felt that the respondent could have been more proactive in ensuring that he was looking after himself while at work, and that his disability was not putting himself or any other person at risk. While we have found that the respondent has met its legal obligations in this respect, we do recognise the claimant's concerns and observe that it would have reflected good practice if the respondent had been able to adopt a more proactive role in monitoring the claimant's well-being at work while he was undergoing chemotherapy, and on his return from treatment.

Public interest disclosure claims

257. In respect of the alleged disclosure in or around June 2016 involving Andrew Cooper, we find that this did not amount to a protected disclosure because there was no disclosure of information. We refer to *Kilraine* (above).

258. In respect of the alleged disclosure in February 2017 relating to the drilling into the panels and the alleged disclosure in October 2016 relating to the open crane aisle; we find that these were both qualifying protected disclosures. The respondent agreed that the claimant had a reasonable belief that the information he disclosed tended to show that the health and safety of an individual was at risk in each case. Although the claimant gave very little direct evidence about his motivation for making the disclosures, it was abundantly clear that the claimant had a genuine belief in the importance of maintaining high quality health and safety environment. The respondent accepted the importance of this. The respondent accepted that there were numerous visitors to its premises, albeit that it did not accept there was a real risk to schoolchildren.

259. We are required to consider whether the claimant had a reasonable belief that the he was making the disclosure in the public interest. We accept that the claimant actually believed that he was making the disclosures in the public interest, that he had a reasonable belief that the health and safety breaches that he perceived presented a risk to visitors to the site. Furthermore, we find that that was a reasonable belief for the claimant to hold. The public interest in reporting health and safety breaches is obvious.

260. For these reasons, we accept that the claimant did have a reasonable belief that he was making the disclosures in the public interest and for these reasons we find that the disclosures in October 2016 and February 2017 were qualifying protected disclosures.

Detriments

261. The detriments that the claimant sought to rely on in respect of the public interest disclosures were that he was ostracised by the managers for raising the health and safety issues and that he was constantly challenged on his audits.

262. As set out above in our findings of fact, we do not accept that the claimant was subject to these detriments. The claimant brought no

evidence directly relating to him being ostracised and he did not mention audits at all until his closing submissions. We have not made explicit findings about the way the respondent dealt with each health and safety issue raised to them in terms of investigations and remediation. That is not part of the tribunal's role. We have found, however, that the respondent did undertake investigations in respect of those reports and took action on the basis of the respective reports. The claimant's main complaints were really that he felt the respondent had not dealt with the report adequately, they had not spoken to him about the reports he made, and he did not receive adequate feedback.

263. In our view, these actions of the respondent do not amount to detriments against the claimant in this case but, in any event, they certainly do not amount to ostracising the claimant or challenging him on his audits.

264. For these reasons it follows that the claimant's claim of detriment for making protected disclosures must fail.

Failure to make reasonable adjustments

265. It was accepted by the respondent that it had a PCP of requiring no more than two engineers to be on a break at the same time.

266. The substantial disadvantages that the claimant was said to be put to by the application of that PCP were that he was withheld regular breaks, that the regular breaks he said he was going to get didn't materialise, and the respondent failed to make a risk assessment on his return to work in September 2015.

267. With respect to Employment Judge Choudry, we do not think that those can in fact be the substantial disadvantages - they were rather a restating of the adjustments the claimant felt he should have had. However, we accept that the effect of these disadvantages as set out, were the claimant able to demonstrate the impact of Dumping Syndrome arising from his cancer, would be that the claimant would experience some difficulties, discomfort or risk were he prevented from having a break when he said he needed one.

268. This difficulty in setting out the substantial disadvantage serves to highlight the lack of evidence from the claimant as to what he says the impact of Dumping Syndrome was. He said that he got tired, and that there was a significant adverse risk to his health in the event that he was unable to eat. We accept, again as a matter of principle, that this would amount to a substantial disadvantage were those the effects and if the claimant was required to comply with the respondent's PCP. We also accept that this must be the meaning of the substantial disadvantages set out in paragraph 10.2 of Employment Judge Choudry's order.

269. However, having said that, as referred to above there was simply no evidence of either what the impact of Dumping Syndrome is generally or, more importantly, what the impact was on the claimant *specifically* beyond that referred to under 'disability' above.

270. That evidence was that Dumping Syndrome remained controlled provided the claimant ate slow release carbohydrates and ate regularly. This does not provide evidence of the substantial disadvantages

referred to arising from not being able to take breaks. We therefore find, in respect of the disability of cancer as pleaded and in respect of the effect of Dumping Syndrome, that the PCP of there being no more than two engineers on break at any one time did not put the claimant at a substantial disadvantage.

271. In any event, we have found that the respondent agreed to be flexible with its PCP in respect of the claimant and the claimant was never refused a break when he said that he needed one because he was feeling unwell.

272. The tribunal is of course aware that cancer and treatments for cancer affect people in many different ways. It would not be at all surprising that a person in the claimant's position needed more breaks than a person without treatment. However, the tribunal is only able to adjudicate on the claim that is put before it and the claim that it was required to adjudicate on in respect of the alleged failure to make reasonable adjustments was put on the basis that the claimant was refused breaks that he needed because of Dumping Syndrome.

273. There was insufficient evidence to support this claim but, in any event, we are satisfied that the claimant was not prevented from taking any breaks that he needed on occasions when he had made his need known to his line manager.

Section 15 - discrimination arising from disability

274. The claimant's claim is that he failed to secure promotion on four occasions as the respondent felt the claimant was not well enough following his illness. The 'something' arising in consequence of the claimant's disability must have been the respondent's alleged perception that the claimant was not well enough to perform an ETM role.

275. We have considered the reasons that the claimant was not selected for promotion on each of the occasion set out above. In our view, the reason on each occasion was for reasons unconnected with his disability or any alleged perception by the respondent that the claimant was not well enough to perform his role. The role where the claimant was interviewed by Michael Hiscock was withdrawn when Dan Lowbridge returned. This was the reason he did not get that job and it was unconnected with his disability.

276. The second role the claimant himself chose not to apply for. This cannot possibly therefore have been a reason of the respondent.

277. In respect of the third job, in May 2017, we have found that the reason the claimant didn't get the job was because Sam Cowan got the job. We have found that the reason Sam Cowan got the job was because he performed better in interview and the claimant conceded that his presentation "was not best". We accepted the respondent's evidence that it had a fair recruitment procedure and operated it fairly. We recognise that the respondent had the claimant in mind for a training role, we have found that the reason for this was because the claimant was good at that role, not for a reason related to his cancer or the respondent's perception of the effects of his cancer. And in light of our findings that there was a fair process in respect of the interview where

the claimant was in competition with Sam Cowan it follows that the potential availability of training role was not an influencing factor in the respondent's decision not to appoint the claimant to the ETM role.

278. It follows, therefore, that while the claimant did fail to secure promotion on four occasions, this was not because of something arising in consequence of his disability and this claim must therefore fail.

Harassment on grounds of age

279. The claimant was unable to give any information about any particular circumstances why, subjectively, in his particular circumstances being referred to as a senior engineer might amount o harassment. The claimant's view that being referred to as a senior engineer had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him was not reasonable.

280. The respondent's witnesses were unable to recall an occasion when the specific words set out in the list of issues were used to the claimant and the claimant did not bring any evidence of that. The claimant said that the phrase referred to in the list of issues should be "that he was one of the senior engineers and that the younger engineers looked up to him and that he should behave accordingly".

281. We do accept that this could be unwanted conduct viewed subjectively from the claimant's perspective. We do not accept, however, that "senior engineer" referred to the protected characteristic of age at all. We accepted the respondent's explanation that senior in this context referred to experienced.

282. For these reasons this claim must fail.

Trade union detriment

283. Insofar as the claimant's claim is based on his membership of the respondent's works council, it is clear that the works council is not a trade union or an independent trade union within the meaning of the 1992 Act. The organisation was wholly organised and controlled by the respondent and so the claimant's claims must fail on that basis.

284. However, we also found that the claimant was refused an interview by Stephen Little in August 2017 for the reasons set out in the email from Chris Revill to Stephen Little. That email does refer to comments allegedly made in the works council but that is not a trade union. Other matters were unconnected with the claimant's membership of a trade union in any way whatsoever. That claim must fail for that reason as well.

285. Finally, with reference to the comments about the claimant being "shop steward like or unionised" in interviews we have found that these comments were related to the claimant's management style, rather than any actual union activity. Particularly in the second interview with Chris Revill, Mark Lachlan and Bethany Carr we have found that the comments came from the claimant in any event.

286. Section 146 is very specific – any detriment must be for the sole or main purpose of—

(*a*) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,

(*b*) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, …

(*ba*) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or

(*c*) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

287. We have found that the reason the claimant was asked whether he was “shop steward like” or “unionised” in his interview with Michael Hiscock was because Michael Hiscock wanted to understand his management style. This is not for a reason set out in s 146.

288. We have found that the claimant was not asked about union membership by Chris Revill but to the extent that there was a discussion about whether the claimant was “shop steward like” or “unionised” this related to feedback he had received and/or his management style. It was asked for the legitimate purposes of assessing his suitability for the ETM role, not for a proscribed reason in s146.

289. The reason that the claimant was refused an interview in June 2017 was for the reasons set out above relating to his apparent views of the management team, not for a proscribed reason set out in s1446.

290. For these reasons the claimant’s claim of trade union detriment pursuant to section 146 trade Union and Labour relations (Consolidation) act 1992 must fail.

Unlawful deduction from wages

291. We have found that the claimant was working in accordance with the terms of the contract referred to in the bundle and more particularly that he relied on its provisions in relation to the bonus for the calculation of the bonus each year. We therefore find that the terms of that contract applied to the claimant.

292. The term set out in clause 3 of that contract namely

> “The bonus will only be payable if you remain employed with Ocado at the date the payment is being made and, at that time, you are not working under notice of termination of employment (whether notice has been given by you or by us)”

is perfectly clear. Bonus is not payable if the claimant is working under notice or has left the respondent’s employment on the date the bonus became payable.

293. It was agreed between the parties that the bonus was payable in October, the claimant handed in his notice on 29 June 2017 and left the respondent on 28 September 2017. The claimant was not therefore entitled to be paid any bonus and his claim for unlawful deduction from wages on this basis also fails.

Time points

294. We are mindful that the issue of whether the claimant's claims were out of time was live before the tribunal. Particularly, in respect of the claims of detriment on the grounds making protected disclosure and failure to make reasonable adjustments.

295. We had some evidential difficulty as the claimant was unable to point to any specific dates when any of the incidents he sought to rely on happened. The claimant commenced ACAS Early Conciliation on 10 November 2017. Therefore, claims in respect of any acts occurring before 11 August 2017 are out of time.

296. In respect of the detriment claim of being ostracised, the claimant was unable to bring any evidence that he was ostracised. All of the matters that we have addressed as *possibly* amounting to ostracization above occurred before 11 August 2017.

297. The final disclosure was made in February 2017 in respect of drilling into panels. It was clear to the claimant almost as soon as he raised that he was not going to be spoken to about it. It is the claimant's case, although we have not accepted it, that he resigned at least in part because he believed he was not able to raise issues. The claimant submitted his resignation on 29 June 2017. The claimant must therefore on his case have formed the view that he was not going to be spoken to about the incidents he raised by this date at the very latest. This was 6 weeks before 11 August 2017.

298. In respect of the allegations about the claimant's audits, there is no evidence that this happened.

299. Consequently, the claimant's claims of detriment for making protected disclosures were not brought in time. The claimant provided no evidence as to why the claims were late or why it was not reasonably practicable for the claimant to bring his claims sooner. The claims were not presented until 11 December and there was no evidence brought as to the reasons for the further delay.

300. For these reasons, the claimant's claims of detriment on the ground that he made protected disclosures is out of time and the tribunal therefore has no jurisdiction o consider this claim.

301. In respect of the claimant's claim of failing to make reasonable adjustments, the claimant said in the list of issues that the last incident was in February 2017. This claim was therefore out of time, as early conciliation was commenced on 10 November 2017 and the very last date for commencing proceedings in respect of an incident on 28 February 2017 was 27 May 2017.

302. The claimant said, submissions, that he was awaiting the outcome of internal procedures before bringing a claim. However, this was the first time this issue had been raised. We note that the claimant was a member of the union and is currently pursuing a personal injury claim with the benefit of legal advice.

303. We heard no explanation from the claimant as to why he did not bring his claims sooner.

304. As has been seen from the evidence, the respondent's witnesses had

some difficulty in addressing the claimant's allegations because of the absence of any specific detail It may be that had the claimant brought his claims earlier, both parties would have been in a better position to provide useful information about the alleged incidents(in so far as they are identified at all). As it is, the respondent has been required to try to answer non-specific allegations a considerable time after the event.

305. We note the potential prejudice to the claimant in having his claim stuck out but in reality, he has had the opportunity to present his case and that has been substantively unsuccessful.

306. For these reasons, we find that it is not just and equitable to extend time for the claimant to bring a claim of failure to make reasonable adjustments until 10 November 2017. Therefore, the tribunal does not have the jurisdiction to hear these claims.

307. In respect of the claimant's claim of harassment, again we are unable to identify a date on which any alleged incident was said to have happened as the claimant brought no evidence. Specifically, however, the claimant has failed to bring any evidence of any "harassment" after 11 August 2017. Before and, therefore, on the balance of probabilities and as far as is necessary that the claimant was not subject to any harassment on the grounds of age after 11 August 2017 and the claimant's claim is therefore out of time.

308. We refer to our reasons in respect of the claims of failure to make reasonable adjustments as the same circumstances apply. These reasons also we declined to extend time for claimant bring his claims of harassment the grounds of age the basis that it is not just and equitable to do so.

Conclusion

309. For the foregoing reasons the claimant's claims of constructive unfair dismissal, public interest disclosure detriment, harassment on grounds of age, discrimination arising from disability, victimisation, failure to make reasonable adjustments, trade union detriment and unlawful deduction from wages are dismissed.

Employment Judge **Miller**

Date: 6 January 2020

Appendix 1 – list of issues as agreed at the preliminary hearing of Judge Choudry at a Case Management hearing on 26 November 2018

The issues

Constructive unfair dismissal

1. Was the claimant entitled to terminate the contract under which he was employed in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct? The claimant relies on the following

    a. Unfavourable treatment by the respondent due to him being a trade union representative. The claimant relies on the following matters in this regard:

        i. The respondent through one of its managers (Stephen Little), refused to give him an interview for a vacancy in July 2017 [this is an error-it should be August 2017] as a result of raising matters in a council meeting

        ii. In previous applications for promotion (the end of December 2016 (Chris Revill), April 2017 (Michael Hiscock) and July 2017 (Chris Revill) [again this should be August 2017]) the claimant was asked if he was "unionised or shop steward like"

    b. Being hounded as a result of being a trade union representative. The claimant relies on the following matters in this regard:

        i. When the claimant joined the respondent's counsel in 2016 he was told by Mark Clachan that he could not raise issues relating to contracts, wages or specific cases as it would be detrimental to him and it will stop him from being promoted

        ii. Being told the same by James Goacher 2016.

        iii. Being verbally attacked by the head of HR in a council meeting in June 2018.

    c. Failure by the respondent to give the claimant breaks and/or make reasonable adjustments as a result of the respondent's policy no more than three [that should be 2] engineers can be off at the same time. This occurred on numerous occasions from September 2015 to February 2018 [this should be 2017 as the claimant had left employment by September 2017]. On the last occasion in February 2018 Darren Toon advised the claimant that he could not have a break due to the respondent's policy that no more than three [two] engineers could be off at the same time

    d. Failure to provide the claimant with an occupational health assessment.

    e. Being overlooked for promotion is on four occasions-twice in late 2016; one in April 2017 and finally in June 2017. [I refer to previous comments - it should be up to August 2017]

    f. Being harassed and victimised as a result of raising a protected disclosure. In particular, from the last two years of his employment ending in June 2017 he was told on numerous occasions that he was a troublemaker. The claimant alleges that the last occasion on which this occurred was in June 2017 when the respondent's head of HR advised him that it was troublemaker in a council meeting.

    g. Being asked questions by Stephen Little and Beth Carr about comments he had posted on social media in a return to work interview. This occurred in June 2017 [this should be in fact July 2017]

h. Another candidate for promotion being given preferential treatment in June 2017. The claimant alleges that the candidates were asked to give a presentation. The other candidate (Sam Cowan) was helped with this presentation in work time by Mark Clachan, the latter also being on the interview panel.

2. Did these acts or omissions by the respondent amount to a fundamental breach of contract

3. Has the claimant affirmed the contract following the breach?

4. Has the claimant been constructively dismissed?

5. Has the respondent shown the reason for the dismissal?

6. Was the reason for dismissal a potentially fair one?

7. Did the respondent act otherwise reasonably?

Public interest disclosure claim

8. What did the claimant say or write?

    a. The claimant informed the respondent in a management committee meeting in April 2017 that dangerous acts were being carried out. Namely that he had witnessed three engineers in the crane aisle and that one of the witnesses had left the aisle and failed to follow procedure. The claimant alleges that he was told not to tell anybody by Mark Clachan.

    b. In February 2017 the claimant had to stop two engineers from drilling into electrical panels. When the claimant raised the issue with Mark Clachan he was told that he did not need to raise the issue as it had already been dealt with.

    c. At the end of October 2016 the claimant had to stop two engineers from entering a live crane aisle. When questioned, the engineers informed the claimant that the work been signed off by a senior engineer. The claimant made a disclosure to Mark Clachan as the claimant was the responsible manager. The claimant was informed by Mark Clachan to forget about the incident and not to raise it.

    d. The claimant was brought to a meeting in early 2017 and told by Stephen Little and Darren Toon not to report so many health and safety matters on his audits. [It is not clear why or in what way this is said to be protected disclosure and was not pursued in any real way by the claimant. It may be reasonable to treat this as a detriment alleged by the claimant that has been recorded in the wrong part of the case management order. However, we will deal with this in detriments as set out below].

9. In any or all of these, was information disclosed which in the claimant's reasonable belief tended to show one of the following?

    a. The health or safety of any individual had been put at risk.

10. If so, did the claimant reasonably believe that the disclosure was made in the public interest?

11. If so, was that disclosure made to the employer?

12. If the protected disclosures are proved, was the claimant, on the ground of any protected disclosure found, subject detriment by the employer or another work in that

    a. Up until the termination of his employment the claimant alleges he was ostracised by other managers for raising the above issues; and

    b. Constantly challenged on his audits.

13. If the act of detriment was done by another worker

    a. Can the employer show that it took all reasonable steps to prevent that other worker from doing the thing or acts of that description; or

    b. Can that worker show that he had relied on a statement by the employer that the doing of the act did not contravene the Act, and it was reasonable to rely on that statement.

Disability

14. Does the claimant have a physical or mental impairment, namely Dumping Syndrome?

15. If so, does the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

16. If so, is that effect long-term? In particular, when did it start and:

    a. Has the impairment lasted for at least 12 months?

    b. Is or was that impairment likely to last between at least 12 months or the rest of the claimant's life, if less than 12 months?

Section 26: harassment on grounds of age

17. Did the respondent engage in unwanted conduct as follows:

    c. being told by Darren Toon and Stephen Little in every appraisal and one-to-one meeting (the last appraisal being in May 2017) that he was one of the senior engineers and that younger engineers looked up to him.

18. Was the conduct related to the claimant's protected characteristic?

19. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

20. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

21. In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Section 15: discrimination arising from disability

22. The allegation of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 Equality Act 2010 is the claimant's failure to secure promotion on four occasions as the respondent felt that the claimant was not well enough following his illness. No comparator is needed.

23. Does the claimant prove that the respondent treated the claimant as set out in paragraph 27 above?

24. Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?

25. Does the respondent shown that treatment was a proportionate means of achieving a legitimate aim?

26. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

Section 27: victimisation

27. Has the claimant carried out a protected act? The claimant relies upon the following:

    a. The claimant raised matters on behalf of colleagues relating to race and age discrimination on numerous occasions (the last occasion being in June 2017) at council meetings and in management meetings. As a result of this the claimant was labelled as a troublemaker and prevented from getting promotion.

28. If there was a protected act, has the respondent carried out any of the treatment set out above?

Reasonable adjustments: section 20 and section 21

29. Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely the respondent's policy, which applied to the claimant's department that no more than three engineers [as above, this should be two] could be offered any one time. This provision applied to the first two alleged substantial disadvantages identified by the claimant below. The claimant was unable to identify a provision in relation to the third alleged substantial disadvantage identified below. Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

    a. The claimant was withheld regular breaks-with the last occasion being February 2017;

    b. The claimant indicated that he was advised by Mark Clachan and Darren Toon in September 2015 and Stephen Little and Mark Toon (sic) in December 2016 that he would be provided with reasonable adjustments and breaks on his return to work, but this did not materialise; and

    c. the respondent failed to make a risk assessment on his return to work in September 2015.

30. Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

    a. That the claimant should have been allowed to take breaks when he needed them.

31. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or is likely to be placed at the disadvantage set out above?

Trade union detriment pursuant to section 146 of the Trade Union and Labour Relations (Consolidation) act 1992

32. The claimant relies on S146 on the basis that he was voted a representative of the respondent's representative council and also he was a member of a trade union.

33. The claimant relies on the following acts of detriment:

    a. Being refused an interview by Stephen Little in June 2017;

    b. During previous interviews in late 2016 and in April 2017 the claimant was asked about his trade union involvement by Chris Revill and Michael Hiscock respectively.

Unlawful deduction from wages

34. The claimant's claim is for a bonus of £1500 he says should have been paid to him on 29 September 2017. He makes no other claim for unlawful deduction of wages.

35. As such the tribunal need to consider whether the bonus was properly payable to the claimant.

36. These were the substantive matters identified by employment Judge Choudry to be determined by this tribunal. A further issue arose in respect of time and limitation. It was identified that some of the claimant's claims are potentially out of time so the tribunal may not have jurisdiction to hear them. The matters that fall to be determined in that respect were identified as:

    a. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of that period? Is such conduct accordingly in time?

    b. Was any complaint presented within such other period as the employment tribunal considers just and equitable?