EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4103053/2019

Held at Glasgow on 13 (reading day), 14, 15 and 16 January 2020

Employment Judge: W A Meiklejohn
Tribunal Member: Mr G Noble
Tribunal Member: Mr J Burnett

Mr Kevin Colhoun	**Claimant** **Represented by:** **Mr A Khan -** **Solicitor**
Veolia ES (UK) Limited	**Respondent** **Represented by:** **Mr P Grant-Hutchison -** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunals is that the claimant's claims of constructive unfair dismissal, automatically unfair constructive dismissal and unlawful deduction from wages do not succeed and are dismissed.

REASONS

1. This case came before us for a final hearing on both liability and remedy. Mr Khan appeared for the claimant and Mr Grant-Hutchison appeared for the respondent.

Claims

2. The claimant had provided further and better particulars of his claims (pages 58-59 of the joint bundle of documents) including a useful chronology of events (pages 60-66). In this the claims were expressed as follows –

Constructive unfair dismissal

The claimant alleges that the respondent was in repudiatory breach of contract, namely a breach of the implied terms of trust and confidence that must exist between an employer and employee in relation to the following -

(a) alleged delay in managing the claimant's absence and providing support.

(b) failing to uphold all of the claimant's grievances.

(c) applying the grievance procedure rather than the whistleblowing procedure.

(d) failing to apply said procedure fairly.

The claimant ultimately resigned because of the failure of the respondent to uphold his grievance the outcome of which was dated 26 November 2018.

Whistleblowing

The disclosure (whistleblowing) was raised on 28 August 2017 at 17.57. This was done by way of email sent to Mr R Crusher, Regional Director, North who then sent it to Mr G Holliday, General Manager. The claimant alleges that section 43B(1)(d) of the Employment Rights Act 1996 ("ERA") has been breached. This is with specific reference to point no 6 in the said email which states inter alia the following –

"*Arla: Manpower is still an issue but also the lack of progress on site with issues such as HV, LV and L8 and the recent LRQA audit…."*

The detriment suffered in consequence of the whistleblowing was the loss of the claimant's job. No other detriment is alleged.

Unlawful deduction of wages

This claim relates to unpaid holiday pay amounting to £4899.77. This outstanding holiday pay relates to the period 1 January to 1 December 2018. In addition 2 days annual leave are claimed which were outstanding from 2017. These sums should have been paid no later than 28 January 2019.

The claimant initially also intimated a disability discrimination claim but this was subsequently withdrawn.

Procedural history

3. The claimant had submitted two claims – the present one and a claim against Veolia Environmental Services (UK) Ltd (case no 4103052/2019). Once it was agreed that the claimant's employer had been the respondent, the other claim was withdrawn but not dismissed because of a concern about res judicata. A separate Judgment has now been issued dismissing the claims in case no 4103052/2019.

4. Preliminary hearings took place on 24 July 2019 (Employment Judge Mellish), on 7 October 2019 (Employment Judge Whitcombe) and on 18 December (Employment Judge McFatridge).

Evidence

5. We heard evidence from the claimant. For the respondent we heard evidence from Mr I Roberts, General Manager – Public and Commercial, and from Mr I Williams, Regional Director, Water and Industrial Customers. Mr Roberts had dealt with the claimant's grievance and Mr Williams had dealt with his grievance appeal. The evidence in chief of each witness was contained in witness statements which were taken as read.

6. We had a joint bundle of documents extending to 589 pages to which we refer by page number.

7. In the course of the hearing references were made to a number of other employees of the respondent, as follows –

- Mr G Holliday, General Manager – the claimant's line manager
- Mr R Crusher, Regional Director – Mr Holliday's line manager
- Ms A Burke, General Manager – temporarily the claimant's line manager as described below
- Mr G Mallaby, Contracts Manager – as such the claimant's peer
- Mt T Honeyman, Risk and Assurance Adviser
- Mr K Harrison, QHSE Manager
- Ms A McShannon, Employee Relations
- Ms C Joyce, Employee Relations
- Ms S Andrew, Employee Relations
- Ms F Grucock, Employee Relations

Findings in fact

8. The respondent operates in the field of environmental solutions. It provides a range of waste, water and energy management services. It is part of the Veolia Group.

9. The claimant commenced employment with AHSEmstar on 5 January 1998 as a Technician. He progressed to Supervisor and then to Contracts Manager. At the time of the events described below, the claimant had been a Contracts Manager for some 15 years. Over this period his employer changed, firstly to Dalkia and then, we understood in 2016, to the respondent.

10. In his role as Contracts Manager the claimant had responsibility for a number of sites where the respondent operated in the provision of contracted services to customers. One of these was Arla at Lockerbie. The claimant was based at East Kilbride. He reported to Mr Holliday.

11. Between July and October 2017, Mr Holliday was suffering from severe headaches and other symptoms, and was worried that he might have a brain tumour. He had been involved in a serious road traffic accident some two years earlier. He was working from home and this impacted upon the level of support he could provide to the claimant.

12. During the week commencing 21 August 2017 the claimant spoke with Mr Crusher about his concern that Mr Holliday was not keeping on top of things and that there were some issues within his own portfolio of sites which needed to be addressed. According to the claimant, Mr Crusher was also concerned. The outcome was agreement that the claimant would email Mr Crusher.

Claimant's email of 28 August 2017

13. The claimant sent an email to Mr Crusher at 17.57 on 28 August 2017 (178). The subject was "*Kevin Colhoun Update*". The email began as follows –

> "*After our conversation last week I wanted to make you aware of the lack of progress within my patch and I know your time is tight so hence the email to digest. I will briefly detail each site which will hopefully give you an idea on where we are as of today."*

14. The email then referred to a number of sites. In relation to Calachem, the claimant's update to Mr Crusher (at numbered paragraph 5) included the following –

> "*I have been asked to have John Dalgleish to work a couple of days outside my patch at Roseisle and HV work at Lockerbie, this I can't afford but I'll try to accommodate."*

15. In relation to Arla (at numbered paragraph 6) the claimant said the following -

"*Arla: Man power is still an issue but also the lack of progress on site with issues such as HV, LV, L8 and the recent LRQA audit, all these require my time on site to resolve or that of someone under my direction. I have discussed with you about dropping in a Team Leader in to Arla but have had no feedback from Gordon again my concern is that he is on sick leave and I struggle to understand this arrangement. I attended site on Friday for the disciplinary issue between Neil and Paul and I don't believe we will be able to substantiate anyones version so a further problem exists where we have two staff who will not communicate with each other and one being the team leader. No*[t] *all would be lost if I can get the correct person temporarily for the Team Leader role which would allow Neil back on the tools along with Robert, Paul and the sparky for engineering services this would give us a full complement. With a team in place the team leader can then start the recruitment process and run to ground the issues that need addressing which are a lot more than I've indicated. I would suggest a secondment if possible till year end. Can I confirm the name we mentioned isn't the solution from what I have been told, we can discuss."*

16. The claimant had a further conversation with Mr Crusher on 30 August 2017. Mr Crusher told the claimant that Mr Holliday wanted to see his email. The claimant sent a slightly amended version to Mr Crusher (179) but Mr Crusher forwarded the original version to Mr Holliday.

17. We should add that HV meant high voltage, LV meant low voltage and L8 meant legionella.

Conversations on 31 August 2017

18. Mr Crusher arranged a conference call with Mr Holliday and the claimant for 31 August 2017. Before this took place the claimant had a telephone call from Mr Holliday who by then had seen the claimant's email to Mr Crusher of 28 August 2017. According to the claimant Mr Holliday "*was clearly not happy with the contents"* and the *"conversation turned sour"* when Mr Holliday said he would send in Mr Mallaby if the claimant did not follow his suggestions

(which included the claimant spending three days a week at Arla Lockerbie). According to the claimant, Mr Holliday said that this "*would not look good"* and would "*damage any future promotional prospects"* for the claimant. Again according to the claimant, he told Mr Holliday that he found this *"wholly unacceptable"* and that Mr Holliday was "*undermining"* him, to which Mr Holliday responded "*damn right I am, and you should be concerned".* The claimant then ended the call.

19. Later the same day the claimant was told that Mr D Stubbs, an Employee Relations Specialist, was visiting Mr Holliday for the purpose of removing him from the business due to his illness.

20. Later still, the scheduled conference call took place. The claimant's description of this was that it did not address the concerns he had raised but felt more like *"senior management flexing its muscles to put me in my place".* He said the response made him feel "*isolated".*

21. At 19.05 on 31 August 2017 Mr Holliday emailed Mr Crusher and the claimant (180) with "*notes on our discussion points"* which was a reference to comments from Mr Holliday inserted into the claimant's email of 28 August 2017 (183). These comments related to 4 of the 6 numbered points made by the claimant but not to point 5 (Calachem) or point 6 (Arla). The claimant was not impressed with Mr Holliday's suggestions, particularly as he was proposing that the claimant get assistance from Mr S Wilcox, a national sales person who was about to leave the business.

Mr Mallaby sent to Arla

22. On 4 September 2017 Mr Crusher emailed the claimant, Mr Mallaby and Ms Burke (185) "*to clarify the temporary arrangements in Gordon's sickness absence".* These were (so far as relevant) as follows –

- Mr Mallaby to assume temporary day-to-day operational management of the Arla Lockerbie site.

- The claimant to maintain close liaison with Mr Mallaby during such temporary period.

- The claimant to lead a recruitment process for a new permanent site-based Team Leader for the Arla site.

- The claimant temporarily to report directly to Ms Burke for his other sites.

23. The claimant met with Mr Mallaby at Arla Lockerbie on 5 September 2017. On 6 September 2017 Mr Mallaby emailed the claimant (187) in terms which supported the claimant's view that the problems at Arla were a lack of site labour and the need to recruit a Team Leader.

Claimant meets with Ms Burke

24. It was arranged that the claimant would meet with Ms Burke in Grangemouth on 7 September 2017. On the way to this meeting the claimant took a call from Mr Honeyman. The claimant said that Mr Honeyman had told him that the senior management team (Mr Crusher, Ms Burke and Mr Holliday) had blocked a *"resource"* passed to the claimant by Mr Honeyman "*to manage quality issues around site documentation".* According to the claimant, Mr Honeyman said "*you are fucked, it's sink or swim".*

25. The claimant said that Mr Honeyman had also, during their call, accused Ms Burke of *"steering"* an external audit to Arla Lockerbie. This was a reference to LRQA which we understood to mean Lloyds Register Quality Assurance, an external certification body for quality, environment and health and safety management systems.

26. The claimant told us that he had felt unwell after his conversation with Mr Honeyman and had considered going home and seeking an appointment with his doctor rather than attending the meeting with Ms Burke. However, he decided to go ahead with the meeting. In the chronology of events attached to the claimant's further and better particulars (see paragraph 2 above) the claimant described this meeting (at page 61) in these terms –

"*Told my additional resource for Arla was not going to happen. Discussed concerns I had with another manager being put into my patch. This threat would be removed but for this to happen I would need to base myself on site. This arrangement took me away from my home for long days and affected my role as a carer for my son. This was the only option for me to save any promotion opportunities that were left after Gordon Holliday sabotaged my career.*"

27. When Mr Roberts was investigating the claimant's subsequent grievance, he conducted a telephone interview with Ms Burke on 28 September 2018. The notes of this call (442-445) included the following –

"*the first meeting I had was surprising, he was really nervous, he actually said that if someone from HR was in room he would have left, I sort of said I don't understand what you are saying and I spent a lot of time putting him at ease as an introduction, A lot of our time was spent discussing the audit for Arla Lockerbie. Previously there was a panic that the site was not audit ready, I had a belief sites should always be audit ready. Tom Honeyman suggested that he needed to go to Arla to do a pre-audit and subsequently he came out with 38 points of non-compliance. On the 7th Sept there was a discussion around how* [the claimant] *would try and get this in line, I suggested that I would help him to sort out the "mess" – his words and put one of my managers in to support and he suggested he wasn't savvy with the BMS and Veolia systems which surprised me because he'd been in place as part of Veolia for 12-18 months and one of my managers with similar service, Gavin Mallaby was aware of BMS, so I had to go through the BMS and where to find everything. He suggested that whilst he was with Dalkia he didn't need to do this because other people did it for him, but I explained that he needed to do it as it was his job to do so.*"

28. In the same notes, Ms Burke was recorded as saying that she discussed with Mr Crusher her view that the claimant did not require additional support, and Mr Crusher agreed. She was recorded as saying that the claimant was

"*concerned about his job"* and suggested that she was "*going to sack him"* and that she had "*reassured him that wasn't the case".* According to the notes, Ms Burke did not recall a discussion with the claimant about his feeling undermined but did recall that the claimant had not been happy with Mr Holliday.

29. The notes also recorded Ms Burke as saying that the claimant was unhappy with Mr Mallaby being involved at Arla Lockerbie, and suggested he was "*stressed"* by this. Ms Burke was recorded as telling Mr Roberts that she suggested to the claimant that "*if he can turn it round by himself then fine".* The outcome was the claimant agreeing to spend three days a week at Arla Lockerbie.

30. The claimant made a covert recording of this meeting and we return to this below. We believed that Mr Honeyman did tell the claimant that the respondent's senior management had blocked additional resource for the claimant at Arla Lockerbie. The claimant had reacted negatively to this, compounding his concerns about his job security following the telephone conversations on 31 August 2017. We also believed that those concerns were unfounded and that Ms Burke had been truthful when she sought to reassure him.

Claimant begins sick leave

31. We had little evidence about what happened between 7 September 2017 and the claimant commencing sick leave in November 2017. The was only one paragraph in the claimant's witness statement in which he referred to keeping his head down and working up to 60 hours a week "*to try and manage the issues within my contracts".* He referred to *"my physical and mental health deteriorating"* and continued "*Relationships at home were strained due to the long hours being worked and my lack of commitment to my family, my mood was low, and I was suffering from anxiety".*

32. We understood that Mr Holliday returned from sick leave during October 2017 and resumed line management of the claimant.

33. On 20 November 2017 the claimant had an appointment with his GP and was certified as unfit for work. There were some references to this having occurred on 30 November 2017 but the point was not material.

34. On 1 December 2017 the claimant sent an email to Mr Holliday (227-228) attaching his medical certificate and stating "*My GP has suggested an appointment with our Occupational Health".* Mr Holliday replied by email on 5 December 2017 (227). This email was copied to Ms McShannon and also to Mr R Walkland of Employee Relations and contained a paragraph addressed to them – "*Richard/Angela, Are you able to arrange a meeting for Kevin with O/H as soon as possible? Could you please confirm by return that this issue is being addressed."*

First welfare meeting

35. Mr Holliday wrote to the claimant on 19 December 2017 (240) inviting him to a welfare meeting on 22 December 2017. This meeting in fact took place on 3 January 2018. Mr Holliday attended with Ms McShannon. The meeting lasted for almost 5 hours.

36. There were no minutes prepared of this meeting. The claimant made a covert recording of the meeting and we return to this below. Apart from this, we had evidence of what took place from (a) the claimant's evidence and (b) Mr Roberts' evidence about his meetings with Ms McShannon on 30 August 2018 and with Mr Holliday on 30 October 2018 (and the notes of Mr Roberts' said meetings at 433-436 and 459-466 respectively).

37. Drawing from these sources, we found that Mr Holliday had said that he would "*go to any length to get the job done"* and had repeated what he said when he and the claimant spoke on 31 August 2017 about it *"not looking good"* for the claimant for Mr Mallaby to be brought in to sort out the Arla Lockerbie site. We also found that Mr Holliday had said that Mr Mallaby going to Arla Lockerbie was to "*motivate"* the claimant.

38. There was discussion about the claimant being called out of hours. This had happened twice over Christmas in 2016 and while the normal incidence of call-outs might be only 3 or 4 times per year, this was clearly a significant issue for the claimant, perhaps because he was refused time off in lieu on the basis that occasional call-outs came with territory of being a contracts manager.

39. The subject of the referral of the claimant to Occupational Health was discussed but we did not have much detail of this, partly because the transcript of the covert recording stopped at this point (i.e. after 4.24 hours of recording, continuing at 4.29 hours – page 257). Ms McShannon expressed some reservation about the value of a referral, saying "*What is the doctor going to tell you in a half hour slot that you haven't gained today?"* According to the claimant, Ms McShannon said that Mr Holliday had been too busy to deal with the occupational health referral but our understanding from his email of 5 December 2017 (227) was that Mr Holliday had expected his Employee Relations colleagues to arrange an appointment.

40. On 16 February 2018 the claimant had a telephone conversation with Ms McShannon and was asked to list his main concerns from the meeting on 3 January 2018. The claimant sent an email to Ms McShannon on 19 February 2018 (261) in which he described the "*topics for discussion*" as follows –

- *"Working weekends and public holidays. I will work these when available but would expect lieu days in return. I will look at the call out rotas within the teams to ensure availability of a second man. If this cannot be facilitated then a preferred contractor could be utilised to provide this back up facility.*

- *My availability has been 24/07 except while on annual leave, this I feel is not sustainable. I'm currently a carer along with my wife Sandra for our son Connor who has Duchene Muscular Dystrophy. I will review what procedures are available for crisis management in the event of plant failures or events that result in a failure to provide the service to*

our clients, this is to ensure we have a response for after hours and weekends.

- *My average hours have been excessive however they are not recorded. I will keep a record to see how these can be managed more efficiently for myself.*
- *Travelling and working away from home. Due to my caring responsibilities working within my patch the Scottish area would be preferred.*
- *Manpower in Scotland with the Mobile and Arla teams*
- *To have agreed times to complete PDD, P and L's, Operational and CSR meetings held with Gordon while in Scotland at either the EK, Grangemouth and Falkirk offices and current/future Scottish sites.*
- *Additional support with regards to compliance, health and safety, environmental, admin, finance, project management, engineering support, business development and customer retention. Who will be covering Asset Management at Calachem and Ahlstrom in the role that Garry Gibbon has vacated.*
- *Arla site management, at no time was I asked or agreed to be site manager at Arla. My responsibility are Contracts manager overseeing a team including a site manager.*
- *Occupational health visit for sickness period"*

First occupational health report

41. An appointment for the claimant with Health Management (who we understood to be the respondent's occupational health advisers) was eventually arranged for 28 February 2018. The claimant duly attended despite the extreme weather conditions on that date.

42. Health Management produced a report dated 14 March 2018 (267-269). The opinion and recommendation section of the report advised that the claimant was not currently fit to return to work – and estimated that he would remain so for 6 weeks - and recommended (a) psychological support, (b) structured dialogue, (c) formal risk assessment and (d) a phased return to work.

Second welfare meeting

43. This took place on 16 March 2018. This was attended by the claimant and Ms McShannon with Mr Holliday participating by telephone. Due to another overrunning commitment, Mr Holliday was late in dialling in. A note of the meeting was prepared by Ms McShannon (258-260), the accuracy of which the claimant questioned. The meeting was also covertly recorded by the claimant.

44. According to the note, there was agreement that there should be a formal risk assessment, ongoing dialogue to address the claimant's stressors leading to a phased return to work and counselling sessions for the claimant. Thereafter, the structure of the meeting was to look at each of the points listed by the claimant in his email of 19 February 2018 (261) and responses from Mr Holliday were recorded. Possibly the most significant of these was that the claimant would not "*look after Arla in the foreseeable future".*

45. The claimant raised an issue relating to his outstanding expenses which was later, and somewhat belatedly, resolved.

46. Following the meeting on 16 March 2018, there were exchanges of emails relating to matters discussed at the meeting including a return to work date, adjustments to the meeting note, the provision of psychological support and implementation of the terms of the Health Management report.

Third welfare meeting

47. This was originally set for 3 May 2018 but Mr Holliday had to reschedule. An email proposing 4 May 2018 was not received in time by the claimant and the meeting took place on 29 May 2018. Once again the claimant and Ms

McShannon attended in person and Mr Holliday participated by telephone. A note of the meeting was prepared by Ms McShannon (325-327), the accuracy of which was again questioned by the claimant. The meeting was covertly recorded by the claimant.

48. By this time the claimant had attended 5 out of 6 of his counselling sessions and indicated that he was feeling *"a lot better"* (according to both Ms McShannon's note and the transcript of the covert recording). The claimant referred to be "*micro-managed".* The meeting focussed on two issues – the requirement for the claimant to be available out-of-hours and his need for additional support. There was also discussion about a stress risk assessment for the claimant and the prospects of the claimant making a phased return to work. It was clear from the meeting notes and the transcript of the covert recording that the claimant's perception of being expected to be on call 24/7 when not on holiday (ie to keep his phone switched on) remained a significant issue for him despite Mr Holliday's efforts to provide reassurance.

49. The claimant sent an email to Mr Holliday and Ms McShannon on 1 June 2018 (392) with suggestions as to what should be considered for the risk assessment. He then stated –

> "*I regretfully have to say that our meeting on Tuesday this week was very difficult and disappointing in that we discussed the one stressor (out of hours availability) for two and a half hours. Some of the comments discussed in particular the reference made several times that I'm the only Contracts Manager in the region who is having issues is not addressing my concerns with my current situation and indeed makes me feel inadequate which is not helpful."*

50. Mr Holliday responded to the claimant by letter dated 15 June 2018 (397-398) attaching a risk assessment form (401-402). He set out the respondent's position in relation to out of hours availability and additional support. In respect of out of hours availability he said that from the respondent's perspective "*the position of management availability has not changed"* and that throughout the respondent there operated "*an escalation procedure*

managed centrally through SMC, whereby any call is escalated throughout the management hierarchy until a resolution is found". Mr Holliday's letter continued "*Given the management position which you hold the expectation is that where at all possible you are able to assist and support this procedure to deliver the service levels for your region".* Mr Holliday attributed the length of the discussion to the claimant "*not being fully satisfied as to the previously mentioned procedure".*

Second occupational health report

51. On 20 June 2018 Mr Holliday sent an email to the claimant (403) advising him of a further occupational health appointment made for 22 June 2018. The claimant declined to attend at such short notice (and also declined to attend an absence review meeting proposed for the same date) and the OH appointment was rescheduled for 5 July 2018.

52. The claimant duly attended and Health Management thereafter wrote to the respondent on 9 July 2018 (416-417). They said the following under "*Current situation" –*

> "*I understand from Mr Colhoun that since the last occupational health report there has been progress in terms of trying to reach a consensus view on the various issues which have led to his absence. I understand that there remains an ongoing issue which has not been resolved to mutual satisfaction.*
>
> *Mr Colhoun did benefit from the therapy available via Veolia Employment Assistance Program. However he remains signed off work at the moment. He is keen and eager to return to work but clearly this cannot happen until the outstanding issues have been addressed.*
>
> *It is important to try and address these in a timely manner as possible since he has now dropped to half pay.*

The issues in relation to his ongoing absence are really not medical in terms of reaching a resolution but managerial/organisational. It may be that the engagement of a third-party mediator should be considered in order to see if a consensus view can be reached on the outstanding issues."

53. The Health Management report was addressed to the respondent and it was for them to act on the suggestion of third-party mediation. They did not do so.

Claimant submits grievance

54. The claimant submitted a grievance on 25 July 2018 (419-422). The substance of this was broken down by Mr Roberts into 8 elements which, in our view, provided a convenient summary of the claimant's grievance. These elements were as follows –

(i) Mr Holliday was still involved with the business whilst absent from work leading to issues such as operational challenges, performance management and health and safety, specifically in relation to labour at Arla.

(ii) The concerns in relation to the HV, LV and L8 testing at Arla.

(iii) Mr Holliday's management style causing the claimant stress and being undermined by his manager, Mr Holliday.

(iv) An LRQA audit being steered towards Arla Lockerbie in an attempt to undermine the claimant.

(v) The return to work process taking too long.

(vi) Mr Holliday being the cause of the claimant's stress and anxiety.

(vii) No satisfactory conclusion to out of hours working.

(viii) Being shoddily treated during the return to work process.

55. The claimant's grievance was headed "*Formal grievance/whistleblowing".* The claimant asked that it be accepted as a grievance against Mr Holliday and the respondent. He also stated that he was making qualifying disclosures under sections 43A, 43B(1)(b) and (d) and 43C ERA to the respondent and asked that his letter be accepted as invoking the whistleblowing policy and procedures.

56. Mr Roberts was asked to be the grievance manager in relation to this matter. He could not recall whether the request came from Ms Joyce or Ms Andrews. Mr Roberts was experienced in dealing with grievances and had also dealt with two cases under the respondent's whistleblowing policy. He did not know the claimant.

57. Mr Roberts recognised that there was an issue as to whether this should proceed under the respondent's grievance procedure (85-88) or their whistleblowing policy (89-96). Mr Roberts' own view was that it was a grievance matter – he drew support for this from the terms of the whistleblowing policy which included (at 93) the following –

> "*This policy and procedure should not be used for complaints relating to an individual employee's personal circumstances such as the way they have been treated at work. In those cases employees should use the establish*[ed] *Grievance Procedure."*

Grievance hearing

58. Mr Roberts wrote to the claimant on 15 August 2018 (424) inviting him to a meeting to discuss his grievance, to be held on 30 August 2018. Mr Roberts advised the claimant of his right to be accompanied.

59. At this meeting Mr Roberts was accompanied by Ms Andrew who acted as notetaker. The claimant was accompanied by Mr J Docherty, his GMB representative. The meeting notes were 425-433 and we had no reason to doubt their accuracy. The meeting lasted almost 4 hours.

60. At the start of the meeting Mr Roberts raised two matters. The first of these was to ask the claimant what he was seeking as an outcome. He did not get a clear answer. The claimant was recorded as saying "*I have been unfairly treated and I cannot get what has happened to me in 2017….I don't know what I am looking for. I want to explain what has happened, I want to see what happens."*

61. The second matter related to the procedure to be followed. Mr Roberts brought copies of both the grievance procedure and the whistleblowing policy into the meeting. His evidence was that he told the claimant that he intended to proceed under the grievance procedure and that "*Kevin agreed with my approach and made no further mention of the whistleblowing policy".* It was not in our view correct to say that the claimant "*agreed"* but more accurate to say that he did not object. This was not surprising as Mr Roberts had already said, according to the minutes (at 426), that he intended to read through the claimant's grievance and indeed had started to do so.

62. Mr Roberts asked the claimant about his email to Mr Crusher of 28 August 2017 and in particular numbered paragraph 6 – the alleged health and safety point. The claimant described the HV, LV and L8 issues. According to the minutes he said "*If one of these transformers go then there could be a risk to my team, their staff and people coming on to site".* The claimant said that he had raised these issues with Mr Holliday but had not had a satisfactory response and so he sent his email to Mr Crusher.

63. The claimant made reference to the LRQA audit at Arla Lockerbie which took place in July 2017. He said that he had asked Mr Honeyman to do a pre-audit and that this had disclosed 42 actions (175-177). He referred to his conversation with Mr Honeyman on the way to his meeting with Ms Burke on 7 September 2017 (per paragraphs 24-25 above).

64. The claimant told Mr Roberts about his meeting with Ms Burke. According to the minutes, he told Mr Roberts that when he said to Ms Burke that he felt undermined she replied "*Well I would too".* He said that Ms Burke had asked him what he wanted and he had replied that he did not want Mr Mallaby on

his site (Arla Lockerbie). The outcome had been as recorded at paragraph 29 above, ie the claimant spending three days per week at Arla Lockerbie which entailed a 170 miles round trip.

65. Mr Roberts asked the claimant about the welfare meetings on 3 January, 16 March and 29 May 2018. According to the minutes, the claimant referred to being undermined by Mr Holliday and to the delay in arranging his occupational health referral. He also referred to the discussions about being on call 24/7 except when on holiday.

66. The meeting concluded with both the claimant and Mr Docherty alleging that there was a *"hidden agenda".* Mr Roberts said that he needed to "*conduct a thorough investigation"*. Mr Roberts summarised the grievance meeting in these terms – "*The main focus of the meeting was Gordon's treatment of* [the claimant] *and the issue of working 24/7 and being "on call". He certainly did not link that back to having raised any complaints about health and safety".*

Claimant's "Plan B"

67. Following the grievance hearing on 30 August 2018 the claimant had a conversation with Ms Andrew about a "*soft exit".* The claimant said in evidence that he was thinking in terms of a redundancy payment. The claimant raised this again in his email to Ms Andrew of 4 October 2018 (449).

68. On 4 September 2018 the claimant incorporated a new company called Tara Consultancy Ltd (Company no SC607154) of which he was sole director and a 75% shareholder (the remaining 25% of the shares being held by his wife). The company incorporation documentation was at 437a-437l. The claimant described the setting up of his own company as his "*Plan B"* if he did not get a satisfactory outcome from his grievance.

Grievance investigation

69. Mr Roberts' investigation involved a series of meetings/calls as follows (with references to the relevant notes in the joint bundle) –

- On 30 August 2017 a meeting with Ms McShannon (433-436)
- On 19 September 2017 a call with Mr Crusher (438-441)
- On 28 September 2017 a call with Ms Burke (442-445)
- On 30 October 2017 a meeting with Mr Holliday (459-466)
- On 2 November 2017 a meeting with Mr Honeyman (470-471)
- On 2 November 2017 a meeting with Mr Harrison (472-473)

70. The points which Mr Roberts regarded as significant arising from these meetings/calls were highlighted in the grievance outcome letter and report.

Grievance outcome

71. Mr Roberts wrote to the claimant on 26 November 2018 (476-481) with his grievance outcomes. He enclosed a grievance report of the same date (482-490). Mr Roberts' conclusions in respect of the 8 elements of the claimant's grievance were as follows –

(i) ***Mr Holliday was still involved with the business whilst absent from work leading to issues such as operational challenges, performance management and health and safety, specifically in relation to labour at Arla***

Mr Roberts referred to the discussions about the claimant spending three days a week at Arla Lockerbie which he found to be a "*not….unreasonable solution".* He referred to the claimant's assertion that Mr Mallaby had only been given as support to undermine the claimant and said that he had "*not been able to identify any evidence to support this".* He found that additional support had been provided. Mr Roberts' outcome was expressed in these terms –

> *"My conclusion is that there is no substance to this element of your grievance however as part of my feedback to the business my advice is that if someone is absent and unable to work for a*

prolonged period then other measures should be put in place to complete the workload of that manager. In this instance I note that [Ms Burke] *was subsequently given responsibility to cover during* [Mr Holliday]*'s absence."*

(ii) ***The concerns in relation to the HV, LV and L8 testing at Arla***

Mr Roberts referred to his interviews with Mr Honeyman and Mr Harrison as confirming that there were "*no concerns with HV or LV and that L8 was being managed".* He referred to the expenditure of over £70k on external labour during 2017 and the reference in the claimant's email of 28 August 2017 to Mr J Dalgleish and "*HV work at Lockerbie".* He also referred to confirmation from Mr Holliday that Mr B Phillips of Veolia Water had confirmed that the L8 testing had been carried out correctly. Mr Roberts' outcome was expressed in these terms –

"*I have found no evidence to substantiate this element of the grievance."*

(iii) ***Mr Holliday's management style causing the claimant stress and being undermined by his manager, Mr Holliday***

Mr Roberts referred to the claimant's negative perception of Mr Holliday's statement that he would "*do whatever it takes"* to get people to perform. He acknowledged that this could be misinterpreted and should have been fully explained. Mr Roberts noted that the claimant's perception was not shared by Ms Burke. Mr Roberts' outcome was expressed in these terms –

"*I cannot identify any evidence to substantiate this element of the grievance that Gordon Holliday was deliberately undermining you however the perceived impression that this gave you does need to be fed back and will be included in my recommendations."*

(iv) ***An LRQA audit being steered towards Arla Lockerbie in an attempt to undermine the claimant***

Mr Roberts referred to the evidence he had obtained from Ms Burke, Mr Honeyman and Mr Harrison to the effect that *"nobody intervened to specifically choose Arla Lockerbie for an LRQA audit".* He noted that both Ms Burke and Mr Honeyman had confirmed that it was Mr Honeyman's decision, and not the claimant's, to perform the pre-audit. Mr Roberts' outcome was expressed in these terms –

> "*Therefore there is no evidence to substantiate this element of the grievance."*

(v) ***The return to work process taking too long***

Mr Roberts found that there had been an "*unacceptable delay"* in arranging the claimant's referral to occupational health but that this had not been deliberate. He also found that there had been a failure to follow "*best practice"* in relation to the stress management tool. Mr Roberts' outcome was expressed in these terms –

> "*I do find that there is partial substance to this element of the grievance due to the following:*
>
> - *An unnecessary delay to the occupational health referral*
> - *The stress risk assessment tool not being completed with you, although I do acknowledge that this was completed following the welfare meeting and sent to you for comment*
> - *No welfare meeting invite letter being sent*
> - *The welfare meetings being conducted by phone*

I do note that during the welfare meetings both Gordon Holliday and Angela McShannon attempted to discuss and resolve your concerns in order to facilitate a return to work and had been discussing dates for a return and as such this is the reason why this element is only partially upheld and not fully."

(vi) ***Mr Holliday being the cause of the claimant's stress and anxiety***

Mr Roberts noted that while it could have been interpreted that the reference to "*lack of support"* in the occupational health report should have excluded Mr Holliday from the process, there was no evidence that the claimant had stated that his absence was due to Mr Holliday. Mr Roberts' outcome was expressed in these terms –

"*As such whilst there is no evidence to support this element of the grievance my feedback would be to clarify any points raised in occupational health reports that could be interpreted in a number of ways for any future cases."*

(vii) ***No satisfactory conclusion to out of hours working***

Mr Roberts noted that the claimant made reference to this as his *"main stressor"* and after summarising the discussions about this at the welfare meetings, he expressed his outcome in these terms –

"*If this was the main stumbling block preventing your return to work then I can see that alternatives to address this issue may have been available. Whilst the number of calls that you received was low it is reasonable that a perception of having to keep your company phone on when not on annual leave or attending something socially could have had a perceived impact on you.*

As such the evidence shows that there may be partial substance to this element of the grievance, however, as this was still under discussion in terms of a solution my recommendation is that this is passed to the directors of the Industrial Customers division to

conduct a review to ensure that there is a consistency across the business. This will be initiated through the Senior ER Specialist at the appropriate HR committee meeting."

(viii) ***Being shoddily treated during the return to work process***

Mr Roberts noted that this related to Ms McShannon's objectiveness, the quality of minutes and the claimant not being permitted an accompanying person at the welfare meetings. Mr Roberts' outcome was expressed in these terms –

"*I do find that there is partial substance to this element of the grievance and have detailed this within point 5."*

72. Mr Roberts' grievance outcome letter concluded with a number of recommendations –

"● *That feedback and appropriate action be taken in relation to the perception of what is said and that points should be clarified (particularly in relation to points as detailed above) so that all parties have a clear understanding of what is agreed.*

- *That feedback and appropriate action be taken in relation to ensuring a fuller understanding of the sickness absence process. All Veolia managers have recently undertaken training with regards to the new Absence Management Procedure however the learnings from this case will be passed to the Senior Management Team (SMT) for a further briefing to all managers.*

- *The out of hours expectations and process is passed to the directors of Industrial Customers (North and South) to conduct a review to ensure that there is a consistency across the business. This will be initiated through the*

Senior ER Specialist at the appropriate HR committee meeting.

I have also recommended that an initial mediation meeting is held between you and Gordon Holliday supported by an independent person in order to move forward and in order to support you in your ongoing relationship with Gordon. I also recommend the continuation of support and that welfare meetings should continue with an independent person until the mediation has taken place and you have returned to work. This is to enable the recommencement of the return to work and welfare meetings."

Sick pay

73. The claimant's terms and conditions of employment (129-141) provided (at 132) that, as an employee with over 4 years' continuous service, the claimant should when absent due to certified sickness or injury normally receive company sick pay of "*Up to six months on full pay and six months on half pay".*

74. On 19 October 2018 the respondent's Payroll Manager wrote to the claimant (456) to advise that there had been an overpayment of company sick pay. The letter stated that this should have ceased on 22 June 2018 but this did not happen and the claimant had continued to receive full pay for July, August and September 2018. The letter also advised the claimant that his company sick pay would be adjusted with effect from October 2018 and that he would require to repay the overpayment.

75. When the claimant did not respond to the letter of 19 October 2018, a reminder was sent by the respondent's Payroll Manager on 13 November 2018 (474).

76. A further letter was sent, this time by Mr Holliday, on 28 December 2018 (494) advising the claimant that the overpayment was £5548.03 net and that, after offsetting his accrued holiday entitlement, there was a balance of £1677.26 net due by the claimant to the respondent.

77. The claimant did not receive the two letters from the respondent's Payroll Manager and these were emailed to him by Ms Joyce, which the claimant acknowledged by email on 31 December 2018 (495).

78. Ms Joyce wrote to the claimant on 18 January 2019 (517-519). She explained that as he had been absent from 20 November 2017, his company sick pay should have reduced to half pay on 21 May 2018. However, as he had been incorrectly advised that the relevant date was 22 June 2018, Ms Joyce said that the respondent would honour that date.

79. With her letter Ms Joyce sent the claimant a breakdown of his salary payments since May 2018 (520-521) which disclosed a revised overpayment amount of £634.84 net. She told the claimant that the respondent had been "*authorised under legislation"* to recover the overpayment of company sick pay.

80. The claimant's evidence to us was that he had been moved to half pay in June 2018 but restored to full pay in July 2018. This was borne out by the breakdown provided to the claimant by Ms Joyce which, reflecting the adjustment of the transfer point from full to half pay from May to June, showed a balance of £605.96 net due to the claimant for June 2018. The claimant said that he had assumed that the restoration to full pay was because he had submitted a grievance. We regarded that as wishful thinking on the claimant's part.

Claimant resigns

81. Having received the grievance outcome from Mr Roberts, the claimant decided to resign. He did so in terms of his letter to Mr Roberts which, so far as relevant, was in the following terms –

> "*Unfortunately, I am very disappointed with the outcome, therefore I have decided to tender my resignation effective 1 December 2018. I am exercising my legal right to resign without notice, because I believe that Veolia has repudiated my contract of employment. I believe this because of the following:*

I refer to your letter of 26 November 2018 and note that you have upheld my submission that Veolia delayed in managing my absence and support and that I have been shoddily treated [me] during the return to work process. Consequently, I take the view that you accept that Veolia, have breached the term of mutual trust and confidence that exists between an employer and employee. In doing so Veolia have failed in its duties in terms of the Equality Act 2010 to reasonable [sic] *adjust my working environment because of my stress related illness and my responsibilities as a carer.*

Further, I do not accept that there was insufficient evidence for you not to uphold the other points of my grievance. I provided sufficient evidence for you to sustain my belief and you have offered no explanation as to why you have chosen to believe other people over my point of view. You have not even provided me with the benefit of doubt. You have failed to provide me with a copy of the witness statements relied on by you. Therefore, I have not been able to test the credibility and reliability of the witnesses.

I note that you have not treated my grievance in line with the whistleblowing procedure. In this regard I understand that your reason for so doing was because my union representative and I agreed not to invoke the whistleblowing procedure. Even if that was the case, Veolia's responsibilities to investigate my allegation of whistleblowing are still relevant. Yet you have failed to comment on my allegation of whistleblowing and failed to deal with a very serious allegation. This is another reason why I believe Veolia has repudiated my contract.

Moreover, I rely on the points raised in my grievance letter of 25th July 2018 and my solicitor's letter dated 16 October 2018 as the reasons why I believe Veolia has repudiated my contract of employment, which has led to my decision to resign.

Notwithstanding that I have resigned, please also treat this letter as an appeal against your decision to reject my grievance."

82. The solicitor's letter dated 16 October 2018 to which the claimant referred (454-455) complained (inaccurately) that a period of almost 4 months had passed since the claimant submitted his grievance (on 25 July 2018), asserting that a delay in progressing an employee's grievance amounted to a breach of contract. The letter also asserted that (a) the respondent had breached the ACAS Code of Practice on Disciplinary and Grievance procedures (the "ACAS Code"), (b) the delay in progressing the claimant's grievance had exacerbated his stress related illness, enhancing his claim for less favourable treatment and (c) the respondent had taken no steps to address the claimant's major concerns about risks to the public.

83. Ms Joyce replied to this letter (undated – 457-458) referring to the fact that "*key witnesses are currently out of the business and for reasons which are outside of our control".* She declined to comment further pending conclusion of the investigation.

Grievance appeal hearing

84. Mr Williams was asked by Mr Crusher to deal with the claimant's appeal against Mr Roberts' grievance outcome. Mr Williams had no prior knowledge of the claimant's case. He had met the claimant but did not really know him. Mr Williams did know Mr Roberts and had dealt with the appeal in a previous case where Mr Roberts had been the decision maker.

85. Mr Williams met with the claimant on 10 January 2019. He was accompanied by Ms Grucock, Employee Relations Specialist. The claimant was not accompanied. Ms H Fairgrieve attended as notetaker.

86. At the start of the meeting, the claimant sought permission to record the proceedings. Mr Williams declined. There was a break to allow the claimant to contact his solicitor. When the meeting resumed, the claimant confirmed that he was content to proceed.

87. The claimant then disclosed that he had made covert recordings of his meeting with Ms Burke on 7 September 2017 and his meetings with Mr Holliday/Ms McShannon on 3 January, 16 March and 29 May 2018. An outcome of the grievance appeal hearing was that Mr Williams and Ms Grucock agreed to listen to the claimant's covert recordings.

88. The grievance appeal lasted for some 6 hours. We had no reason to believe that the notes (501-514) were other than accurate. These confirmed that Mr Williams had worked through the grievance outcomes and the matters raised in the claimant's letter of appeal.

Grievance appeal investigation

89. Mr Williams decided that it would be appropriate to speak to Mr Roberts as part of the appeal process. He did so by conference call (with Ms Grucock) on 6 February 2019. Mr Williams wanted to understand why matters had proceeded under the grievance procedure rather than the whistleblowing policy. Mr Roberts confirmed that this had been his decision and said that the claimant had agreed. We observe that it might have been more accurate to say that the claimant did not object.

90. According to the notes of their discussion (522-524), the accuracy of which we found no reason to doubt, Mr Roberts told Mr Williams, when asked about the claimant's alleged whistleblowing –

> "*Only point I would have considered were the safety concerns at Arla. However the point he was getting across was how he had been treated in relation to this. The lack of support, Gordon involved with telephone calls whilst he was off sick. The support he was getting and the audit at Arla."*

91. Mr Williams then had a conference call with Mr Honeyman, with Ms Grucock participating, on 8 February 2019. The note of this call was at 525-527. Mr Honeyman told Mr Williams that there was no "*hidden agenda"* in the choice of Arla Lockerbie for LRQA audit. Mr Honeyman confirmed what he had told

Mr Roberts – that it was Mr Honeyman himself who had suggested the pre-audit.

92. Mr Williams asked Mr Honeyman about the action points contained in the internal audit action list he had prepared (175-177) and Mr Honeyman responded that he had *"tracked* " this and had supported the completion of 30 out of the total of 42 actions. When asked by Mr Williams if there was any *"immediate danger to site or personnel"*, Mr Honeyman stated "*The issues around audit non compliance were of a procedural nature rather than physical risk. It was more out of date documents and processes."*

93. On 11 February 2019 Ms Grucock spoke with Ms Andrew (Mr Williams being unavailable) about the decision to follow the grievance procedure rather than the whistleblowing policy. The notes were at 528-532. Ms Andrew was recorded as saying –

> "*We invited Kevin into a meeting, at that time we were going along lines of both processes….The morning of the meeting we had with Kevin, Ian was looking at both policies based on all of content concerns put into the letter, he really wanted to investigate as a grievance instead of whistleblowing. Ian said he would ask Kevin at the meeting. That's why….it was minuted at the beginning to address that point. I can confirm there was no pressure whatsoever and no concerns raised by the union rep, no pressure from either of us for Kevin to choose between the whistleblowing or grievance procedure."*

Ms Andrew commented that it might have been better if the choice of policy had been covered in Mr Roberts' outcome letter.

94. Ms Grucock then spoke with Ms Joyce on 13 February 2019 by conference call (533-534). Ms Joyce said that she had a concern about the matter being dealt with as a grievance when the claimant had specifically called it "*whistleblowing"*. Mr Williams' position was that this did not give him any cause for concern.

Claimant's covert recordings

95. The claimant made the covert recordings detailed at paragraph 87 above. He used a pocket sized wireless digital recording device to do so. He had the recordings transcribed as follows -

- The recording of the claimant's meeting with Ms Burke was transcribed by a service called Way With Words (188-219).

- The recording of the first welfare meeting on 3 January 2018 was transcribed by the claimant's wife (244-257). From the timings included in the transcript it appeared that some parts of the recording had not been included and at one point (253) the transcription stated "*The conversation went a bit like this".* We imply no criticism of Mrs Colhoun and we found no reason to doubt the accuracy of the transcript as placed before us.

- The recording of the second welfare meeting on 16 March 2018 was transcribed by Way With Words (271-304).

- The recording of the third welfare meeting on 29 May 2018 was transcribed by Way With Words (330-391).

96. Due to his work commitments Mr Williams was not able to listen to the covert recordings until mid-February 2019. He spent some 16 hours over a weekend doing so. He made notes of the parts he believed were relevant and checked these against the transcripts. He referred to these in his witness statement.

97. Mr Williams summarised his view of the recordings in these terms –

> "*I felt that the recordings showed the meetings in general were well conducted and indeed the feedback by Kevin that the sessions were unreasonable in nature I feel was undeserved. At the time, and indeed now having reviewed the transcripts, I am amazed Kevin genuinely believes that they support what he was saying. Kevin, I felt, reiterated a number of times some of his key issues, possibly to try and generate*

a different answer or indeed to antagonise. Gordon did on a couple of occasions speak a little more forcefully but he didn't shout and it was not out of context in my opinion as the main reason was merely due to repetition of the questioning and I suspect Gordon was frustrated at being asked the same question numerous times during one meeting."

Grievance appeal outcome

98. Mr Williams wrote to the claimant on 7 March 2019 setting out his decision in relation to the claimant's grievance appeal (535-549) and enclosing his detailed findings (550-570). He upheld each element of Mr Roberts' grievance outcome and provided his rationale for doing so. We were satisfied that Mr Williams, for the reasons expressed in his letter, reached conclusions which it was reasonable for him to reach on the basis of the material available to him.

99. Mr Williams also set out his findings in relation to the following issues highlighted by the claimant in the course of the appeal process –

- ***Health and safety issues*** – Mr Williams accepted that it would have been "*preferable to have provided reassurance"* to the claimant that the issues raised in his email of 28 August 2017 were or had been addressed and that communication with the claimant "*could have been better".* He stated –

  "*However, no specific health and safety concerns were raised by you on RIVO and any issues raised between the client and Veolia were concluded prior to the handback of the contract."*

RIVO was a management system for the recording of health and safety issues with the use of which we were satisfied the claimant was familiar.

- ***Whistleblowing process*** – Mr Williams accepted Mr Roberts' reasoning for using the grievance procedure but acknowledged that, with hindsight, it would have been better if this had been confirmed in

writing. Mr Williams' view was that the claimant had benefitted from a comprehensive investigation based on himself under the grievance procedure whereas he would have been simply a witness to an investigation under the whistleblowing policy. He told the claimant that he was satisfied that –

> "*there was no imminent danger to yourself or others in relation to the issues you raised as the issues were either already known to the Company and/or being addressed appropriately in accordance with the Company's relevant health and safety procedures."*

- ***Audio recordings by you*** – Mr Williams told the claimant "*….in the majority, the contents of the tapes in fact did not support your belief and in some cases actually supported the grievance outcome findings".*

- ***Failure to make reasonable adjustments*** – as no claim under the EqA was being advanced at the final hearing, we did not require to deal with this.

- ***Grievance meeting notes*** – Mr Williams enclosed copies of the meeting notes compiled during Mr Roberts' grievance investigation and his own appeal investigation.

- ***Your solicitor's letter dated 16 October 2018*** – Mr Williams addressed various matters raised in the said letter.

100. In his conclusions/recommendations (547-548) Mr Williams said the following –

- *"It appears that as things were moving to you returning to work, you raised the grievance. You then received the grievance outcome and resigned alleging that, as it was accepted that the absence review process had taken longer than it should, this must mean that Veolia*

had fundamentally breached the implied term of trust and confidence entitling you to resign. I do not agree with this. Just because an employer could and should have done things differently does not mean that this is serious enough to be a fundamental breach as you are suggesting…."

- *"I am satisfied that there was sufficient evidence to not uphold your grievance and in fact the evidence that you provided to me of the audio tapes strengthened the evidence not to uphold your grievance."*

- *"It appears that your perception of the situation was sometimes quite different to how others (and I listening to the tapes) interpreted it. An answer or point can be reasonable even if it is not what you were hoping or expecting."*

- *"….I do not agree that Veolia failed to deal with the health & safety issues raised in your grievance….I do not agree that alleged failure amounted to a fundamental breach. However it would have been preferable if Veolia had formally confirmed that the issues were or had been addressed so as to reassure you."*

- *"….while the absence review process did take longer than expected, it was making progress relating to return to work. I consider that your grievance was properly considered, even if you did not agree the outcome, and it offered mediation to assist you* [to] *return to work."*

101. Mr Williams advised the claimant that he had a further right of appeal. The claimant did not exercise this.

Loss/mitigation

102. We had a schedule of loss for the claimant which valued his claims at a total of £99,234.00. This was based on net weekly earnings with the respondent of £683.00. Pension loss was calculated on the basis of 12% employer contributions. Allowance was given for earnings of £189.00 per week from the claimant's current employment.

103. Following his resignation, the claimant had not sought employment elsewhere but instead had focussed on establishing his own business operating through the company he had set up in September 2018. He provided details of earnings between January and November 2019 (571) totalling £5,752.00.

104. It seemed to us that the level of the claimant's earnings might have been calculated to mitigate his liability to income tax and National Insurance contributions and so we asked for details of his company's income and expenditure. This was duly produced in the form of a profit and loss account on the last day of the hearing and covered the year to 30 September 2019.

105. Noting that the claimant had undertaken work through his company only from January 2019, we observed that this disclosed turnover of £63,147 for 9 months' trading and profit before dividends and tax of £34282. Dividends of £13,360 to the claimant and £3,507 to his wife had been paid.

106. The claimant had not received any form of state benefit.

Comments on evidence

107. It is not the function of the Tribunal to record every piece of evidence presented to us and we have not attempted to do so. We have focussed on those parts of the evidence which we considered most relevant to the issues which we had to decide.

108. The respondent's witnesses gave their evidence in a straightforward and generally measured way. We did not agree with Mr Khan's submission that Mr Roberts had been evasive under cross-examination. It seemed to us that Mr Roberts and Mr Williams had both undertaken their responsibilities as grievance and grievance appeal officer respectively in a conscientious manner. Delays in the grievance process appeared to be due initially to Mr Roberts being on annual leave and then Mr Holliday being on sick leave. The grievance appeal process was lengthened by the need for Mr Williams to listen to the claimant's covert recordings.

109. The claimant's evidence was given through the prism of his perception that he had been treated poorly by the respondent, and by Mr Holliday in particular. He was telling the truth as he saw it. His belief that the covert recordings supported his version of events seemed to us to be misguided.

Submissions

110. We had the benefit of helpful written submissions from Mr Khan and Mr Grant-Hutchison, supplemented by oral submissions at the hearing. As the written submissions are available within the case file we shall comment on their submissions only briefly.

111. Mr Khan argued that the claimant had made qualifying disclosures to his employer in terms of his email to Mr Crusher of 28 August 2017. He disclosed information which he reasonably believed to be true, and the disclosures were made in the public interest. The respondent had then acted in a way which breached the implied term of trust and confidence and was repudiatory, entitling the claimant to resign and treat himself as constructively dismissed. The claimant's disclosures had caused the respondent's treatment of him and his constructive dismissal was therefore automatically unfair.

112. Mr Khan also argued that the claimant's constructive dismissal was unfair even if not caused by his whistleblowing disclosures. He highlighted the delays for which the respondent had been responsible, referring to the ACAS Code. The grievance outcome had been the last straw for the claimant.

113. Mr Khan advanced the argument that in assessing the claimant's loss of earnings we should exclude dividends, under reference to a decision of the Manchester Employment Tribunal, ***Sheridan v GTECH Solutions Ltd 29 January 2015***.

114. In relation to the holiday pay claim Mr Khan referred to ***Avon County Council v Howlett [1983] 1 WLR 605***, a case where the employer was barred from recovering the overpayment because it had represented to the employee that he was entitled to it and the employee had relied on that representation.

115. Mr Khan also referred to the following cases –

- ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 IRLR 38***
- ***Kilraine v London Borough of Wandsworth 2016 IRLR 422***
- ***Darnton v University of Surrey and Babula v Waltham Forest College 2007 ICR 1026***
- ***Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979***
- ***Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401***
- ***Fecitt v NHS Manchester [2012] ICR 372***
- ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***
- ***Woods v WM Car Services (Peterborough) Ltd 1981 IRLR 347***
- ***Malik v Bank of Credit and Commerce International SA [1997] UKHL 23***
- ***Buckland v Bournemouth University [2010] EWCA Civ 210***
- ***Lewis v Motorworld Garages 1985 IRLR 65***
- ***London Borough of Waltham Forest v Omilaju 2005 IRLR 35***

116. Mr Grant-Hutchison said that the breaches of contract by the respondent alleged by the claimant were (a) delay in managing the claimant's absence, (b) failing to uphold his grievances and (c) applying the grievance procedure rather than the whistleblowing policy. He submitted that the claimant had effectively decided to resign by the time he attended the grievance hearing on 30 August 2018 so that failing to uphold his grievances or applying the wrong procedure could not have formed part of his decision.

117. Mr Grant-Hutchison argued that for the claimant's automatically unfair dismissal claim to succeed, he had to show a "*direct and sustained*

conspiracy" between August 2017 and November 2018. He had to prove that those who carried out the alleged acts of repudiation had the claimant's alleged whistleblowing in their minds when they did so.

118. Mr Grant-Hutchison submitted that the claimant's email of 28 August 2017 lacked sufficient informational content to be a disclosure qualifying for protection. It was simply a complaint about lack of resources. The claimant's letter of 25 July 2018 was simply a grievance. There was no public interest – if the claimant had believed there was, he should have recorded his concerns in RIVO. He did not do so.

119. Mr Grant-Hutchison argued that section 14(1) ERA applied and therefore there had been no unlawful deduction from wages.

120. In addition to the cases referred to by Mr Khan, Mr Grant-Hutchison referred to the following cases –

- ***Eiger Securities LLP v Korshunova 2017 IRLR 115***
- ***Royal Mail Group Ltd v Jhuti [2019] UKSC 55***
- ***Smith v London Metropolitan University 2011 IRLR 884***
- ***Goode v Marks & Spencer UKEAT/0442/09***

Applicable law

121. The right not to be unfairly dismissed is found in section 94 ERA –

An employee has the right not to be unfairly dismissed by his employer.

122. Constructive dismissal arises under section 95(1)(c) ERA –

For the purposes of this Part an employee is dismissed by his employer if….

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

123. The provisions of ERA relating to protected disclosures, so far as relevant, are as follows –

> ***43A Meaning of "protected disclosure"***
>
> *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.*
>
> ***43B Disclosures qualifying for protection***
>
> *(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 and safety of any individual has been, is being or is likely to be endangered….*
>
> ***43C Disclosure to employer or other responsible person***
>
> *(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure…*
>
> *(a) to his employer…*

124. The right not to be unfairly dismissed for making a protected disclosure is found in section 103A ERA –

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

125. The right not to suffer an unlawful deduction from wages is found in section 13(1) ERA –

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.

126. However, certain deductions are excluded from the ambit of section 13. Section 14(1) ERA provides -

Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of –

(a) an overpayment of wages…

127. Section 27(1) ERA contains the definition of "*wages"* -

In this Part "wages", in relation to a worker, means any sum 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….

Discussion and disposal

128. We reminded ourselves of the terms in which the claimant's alleged protected disclosure had been made (at 178) –

"Arla: Man power is still an issue but also the lack of progress on site with issues such as HV, LV, L8 and the recent LRQA audit…."

129. For this to amount to a protected disclosure it had to be –

- a disclosure of information

- which in the reasonable belief of the claimant
- was made in the public interest and
- tended to show
- that the health and safety of an individual had been, was being or was likely to be endangered

130. We considered each of these elements. We had considerable doubt as to whether "*the lack of progress on site with issues such as HV, LV, L8 and the recent LRQA audit"* could properly be regarded as a disclosure of information within the meaning of section 43B(1) ERA. We noted that it did not matter for this purpose whether the claimant was disclosing something of which the respondent was already aware – that was the effect of section 43L(3) ERA. However, he had to be disclosing *"information"* and it seemed to us that "*lack of progress*" with reference to certain issues was too vague to constitute information, without more.

131. We recognised that the statutory language did not require that the claimant should state expressly that he was making a protected disclosure. Equally, it did not deprive a protected disclosure of its status just because the employer did not recognise it as such. In ***Cavendish Munro***, the Employment Appeal Tribunal observed that the ordinary meaning of giving "*information"* was "*conveying facts"*. They contrasted this with an "*allegation".*

132. We had no difficulty with the purported disclosure being *"in the reasonable belief"* of the claimant. We found that he did have a concern about the lack of progress in the context of manpower being an issue on the Arla Lockerbie site. Given the lengthy list of items detailed in the internal audit action list (175-177), this was hardly surprising.

133. We were prepared to give the claimant the benefit of the doubt in relation to whether he reasonably believed that his disclosure was in the public interest. We understood he was concerned about potential danger caused by lack of

proper maintenance of transformers at a location where employees, contractors and the public might have access.

134. However, the lack of detail in the "*information"* made it difficult to accept that what was disclosed *"tended to show"* an endangering of any individual's health and safety. We considered that there had to be something more than disclosure of some non-compliance with regulatory or contractual obligations – which would have been relevant if the claim had been pursued under section 43B(1)(b). The claimant's alleged disclosure had to "*tend to show"* the actual or likely endangering of health and safety and, in our view, fell short of doing so.

135. That finding was fatal to the claimant's section 103A ERA claim but, for the sake of completeness, we did consider whether that claim might have succeeded assuming that we found that (a) the claimant had made a protected disclosure and (b) he had been dismissed for the purposes of section 95(1)(c) ERA.

136. For the claim under section 103A to succeed we would require to find that the reason or principal reason for the dismissal was the claimant had made a protected disclosure. In other words we would need to find that the treatment of the claimant by the respondent said to amount to a repudiatory breach of contract was because he had made a protected disclosure on 28 August 2017.

137. We did not believe that the evidence supported such a finding. The claimant had been unhappy at the position in August 2017 with Mr Holliday still line managing him while unwell and working from home. He took his concerns to Mr Crusher. The main outcomes were (a) the provision of support at Arla Lockerbie in the form of Mr Mallaby and (b) the provision of Ms Burke as temporary line manager for the claimant in place of Mr Holliday. These were not the outcomes the claimant would have wished because he saw the provision of Mr Mallaby as a threat to his own prospects of future promotion and he saw Ms Burke as delivering what he regarded as unsatisfactory solutions put forward by Mr Holliday. However, while we could understand

the claimant's concerns, these were steps the respondent was entitled to take. They were reasonable management responses to the matters the claimant had raised.

138. Thereafter the claimant was unhappy with the absence welfare process. He was complaining about matters such as the delay in his being referred to occupational health, the accuracy of meeting notes, the fact that Mr Holliday attended two of the three meetings by telephone and the failure to resolve his concerns about out of hours calls. There was in our view no causal link between the claimant's alleged protected disclosure and the respondent's said conduct towards him during the absence welfare process.

139. The claimant resigned shortly after receiving his grievance outcome from Mr Roberts. Mr Roberts was aware that there had been an alleged protected disclosure because that was set out in the claimant's grievance letter of 25 July 2018. Mr Roberts applied his mind to whether matters should proceed under the respondent's grievance procedure or their whistleblowing policy. Having decided to proceed under the grievance procedure, Mr Roberts looked at each of the 8 elements he identified within the claimant's grievance, investigated these and came to conclusions. He did so not because the claimant had made a whistleblowing disclosure but because he considered that was the appropriate way to deal with the grievance. Again we could find no causal link between the claimant's alleged whistleblowing disclosure and the respondent's conduct towards him during the grievance process.

140. We next considered whether the claimant had been dismissed by the respondent. Neither of his unfair dismissal claims (under sections 94 and 103A ERA) could succeed unless we found that the claimant had been dismissed in terms of section 95(1)(c) ERA. There could only be a dismissal under that provision if the claimant had been entitled to terminate his employment by reason of the respondent's conduct.

141. We reminded ourselves that the test is contractual – ***Western Excavating***. There had to be (a) a breach of contract by the respondent (b) which was material, ie going to the root of the contract, (c) in response to which the

claimant resigned (d) without waiting too long. There could be a *"last straw"* which did not itself necessarily require to be a breach of contract – ***Omilaju***.

142. Applying that to the present case and unfortunately for the claimant, we found that he fell at the first hurdle. The breach of contract contended for was in respect of the respondent's obligation of trust and confidence. As expressed in ***Malik*** (per Lord Steyn) – "*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".*

143. We found no conduct on the part of the respondent which could be so described. We could appreciate that Mr Holliday telling the claimant that sending Mr Mallaby to Arla Lockerbie would not look good for him and could damage his promotion prospects would upset the claimant. However, our view was that Mr Holliday was simply stating the facts as he saw them. Telling an employee something they might not want to hear is part of a line manager's job and is not, absent some inappropriate motive or bad faith, a breach of trust and confidence. We found no evidence of inappropriate motive or bad faith on the part of Mr Holliday.

144. The claimant may not have liked having to spend three days a week at Arla Lockerbie but requiring him to do so was not in our view a breach of contract. His role as Contracts Manager included visiting and spending time at the sites within his "*patch"* and being instructed by his line manager as to how much time he should devote to a particular site was not in our view a breach of trust and confidence.

145. The claimant may have felt stressed by how he perceived he was being treated by Mr Holliday but when he identified his stressors (in his email of 19 February 2018 – 261) he did not mention this. Indeed it was apparent that the out of hours issue became the one of greatest concern to the claimant. Given that there was an expectation that managers would be contactable out of hours and no evidence that this had been an issue for the claimant for most

of the time he had worked as a Contracts Manager, we could find no breach of trust and confidence by the respondent in relation to this.

146. The delay in arranging the claimant's first occupational health appointment was regrettable but did not in our view constitute conduct on the part of the respondent amounting to a breach of contract, let alone a breach going to the root of the contact. It appeared more a matter of disorganisation as between Mr Holliday and Ms McShannon, for which an apology at the time would have been appropriate.

147. We did not consider there was any element of breach of trust and confidence in Mr Roberts' conduct of the claimant's grievance. We have already commented on the timescale. The decision to follow the grievance procedure rather than the whistleblowing policy was in our view open to Mr Roberts having regard to the wording in the whistleblowing policy quoted at paragraph 57 above. Mr Roberts took a reasonable approach in identifying the various elements of the claimant's grievance and addressing these with the claimant at the grievance hearing and in his grievance outcome.

148. Thereafter Mr Roberts conducted a reasonable investigation and came to conclusions which in our view were open to him based on the material available to him. The claimant's decision to resign shortly after he received Mr Roberts' grievance outcome was not easy to understand. We did not believe the grievance outcome could on any reasonable basis be regarded as a "*last straw*". It seemed to us that the claimant might have been influenced by (a) the respondent's failure to offer him a "*soft exit",* (b) the fact that he was about to run out of company sick pay and (c) the availability of his "*Plan B"* having incorporated his own company in September 2018.

149. We found that there had been no conduct by the respondent which entitled the claimant to terminate his employment. Accordingly the terms of section 95(1)(c) were not engaged and the claimant's employment came to an end by reason of his resignation and not by reason of constructive dismissal.

150. We turned finally to the unlawful deduction of wages claim. The facts were not in dispute. There had been holiday pay due to the claimant on termination of his employment. The respondent had paid the claimant more by way of company sick pay than he was entitled to. The latter amount exceeded the former and so nothing was paid on termination of employment.

151. There had been no representation by the respondent to the claimant that he was entitled to more than his contractual entitlement to company sick pay and so the case of ***Avon County Council*** was not on all fours with the present case.

152. Mr Grant-Hutchison's argument that the point was covered by section 14(1) ERA was in our view correct. The non-payment of holiday pay to which the claimant was otherwise entitled was because the respondent was recovering an overpayment of company sick pay which was an emolument referable to the claimant's employment, and so within the definition of *"wages"* in section 27(1) ERA.

153. For the foregoing reasons the claimant's claims do not succeed and are dismissed.

Employment Judge : W A Meiklejohn
Date of Judgment : 30 January 2020
Date sent to parties : 03 February 2020

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