EMPLOYMENT TRIBUNALS

Claimant: **Mr N Henry**

Respondent: **Chubb Fire Limited**

Heard at: **East London Hearing Centre**

On: **21, 22, 26, 27 October 2021 and 13 January 2022 (In chambers)**

Before: **Employment Judge Burgher**
Members: **Ms B Leverton**
Mr S Woodhouse

Appearances

For the Claimant: **Mr O Lawrence (Counsel)**
For the Respondent: **Ms M Tutin (Counsel)**

JUDGMENT

1. **The Claimant was unfairly dismissed by the Respondent.**

2. **The Claimant contributed to his dismissal by 20%.**

3. **The Claimant's claim for wrongful dismissal succeeds.**

4. **The Claimant's claim for dismissal by reason of a protected disclosure fail and is dismissed.**

5. **The Claimant's claims that he was subjected to detriment on grounds of protective disclosure fail and are dismissed.**

6. **A remedy hearing to determine outstanding matters is listed for 1 day, on 7 March 2022.**

REASONS

Issues

1. At the outset of the hearing it was agreed that the correct respondent to the proceedings is Chubb Fire Ltd. Chubb Fire and Security Ltd are dismissed as a respondent from the proceedings.

2. The issues in the case were clarified and identified as follows:

A - PROTECTED DISCLOSURE

1. The dates on which the Claimant asserts that he made protected disclosures as follows:

(i) In October 2017 to Greg Frensham and Andrew Kirby;

(ii) 18 October 2018 to Greg Frensham and Andrew Kirby;

(iii) 15 November 2018 to Greg Frensham;

(iv) 16 November 2018 to Greg Frensham and Andrew Kirby;

(v) 29 November 2018 to Greg Frensham and Andrew Kirby;

(vi) 20 February 2019 (approximately) to Greg Frensham;

(vii) 2 August 2019 to Greg Frensham;

(viii) 18 November 2019 to Andrew Kirby.

2. If disclosures were made on the dates set out at paragraph 1 above, did the Claimant disclose information which amounts to a qualifying disclosure in that:

(i) in the reasonable belief of the Claimant, it was made in the public interest and

(ii) in the reasonable belief of the Claimant, it tends to show that:

(a) a person has failed, is failing, or is likely to fail, to comply with any legal obligation to which he is subject (s43(B)(1)(b) Employment Rights Act 1996 (ERA), and/or

(b) the health or safety of any individual at the Queen Elizabeth School has been, is being, or is likely to be endangered (s43B(1)(d) ERA 1996)?

(iii) If so, was the qualifying disclosure made to the Claimant's employer (s43(C)(1)(a) ERA 1996), such that it amounts to a protected disclosure (S43A ERA 1996)?

<u>Subjection to a detriment contrary to s47B ERA 1996</u>

3. If the disclosures amount to a “protected disclosure", did the Respondent subject the Claimant to an unfair disciplinary process because he had made one or more of the protected disclosures such that this act amounts to a detriment within the meaning of s47B(1) ERA 1996?

4. What was the date of the act giving rise to the detriment?

5. Does the Employment Tribunal have jurisdiction within s48(3) ERA 1996 to consider the complaint at paragraph 3 above, in particular, was the complaint presented:

(i) before the end of 3 months beginning with the date of the act to which the complaint relates, or, where that act is part of a series of similar acts or failures, the last of them, or

(ii) 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 3 months.

<u>Dismissal contrary to s 103A ERA 1996</u>

6. It is admitted that the Claimant was dismissed.

7. Was the reason (or if more than one, the principal reason), for the Claimant's dismissal, the fact that the Claimant had made one or more protected disclosures?

B - UNFAIR DISMISSAL

8. If the Claimant was not dismissed contrary to s103A ERA 1996, has the Respondent shown a valid reason for the dismissal, pursuant to s98(1) ERA 1996? The Respondent asserts that the reason was gross misconduct.

9. Did the Respondent have a genuine belief that the Claimant had committed misconduct and reasonable grounds for that belief, and did the Respondent carry out a reasonable investigation?

10. Was the dismissal fair pursuant to s98(4) ERA 1996?

11. If the dismissal was procedurally unfair, what was the chance of the Claimant being fairly dismissed if a fair procedure had been followed?

12. Did the Respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

13. If so, is the Claimant entitled to an uplift of any compensation awarded as a result of such failure?

C. WRONGFUL DISMISSAL

14. It is admitted the Claimant was dismissed without notice. Has the Respondent shown that it was entitled to treat the Claimant's employment contract as terminable without notice by reason of the conduct of the Claimant, pursuant to s86(6) ERA 1996?

D. REMEDY

15. If any of the Claimant's complaints are well founded, what compensation is he entitled to receive in respect of:

a. basic award for unfair dismissal;

b. A compensatory award for unfair dismissal;

c. An award for injury to feelings; and

d. Notice pay.

Evidence

3. The Claimant gave evidence on his own behalf.

4. The Respondent called:

4.1 Christopher Doherty HR business partner for the disciplinary appeal process;

4.2 Gregory Frensham, the Claimant's line manager and investigation officer;

4.3 Andrew Kirby, General Manager and dismissal officer;

4.4 Deborah Franklin, HR business partner during the disciplinary process;

4.5 Paul Butt, Head of Projects and appeal officer.

5. All witnesses gave evidence under oath and were subject to cross examination and questions from the Tribunal. The Tribunal was also referred to relevant pages in an agreed hearing bundle consisting of 613 pages.

6. The hearing was a hybrid hearing and the Respondent's witnesses attended by cloud video platform the parties presented the closing arguments also by cloud video platform. Whilst there were intermittent connection difficulties the Tribunal was able to take the evidence effectively.

Facts

7. The Tribunal has found the following facts from the evidence.

8. The Respondent is a provider of fire safety solutions for businesses in the UK. It is part of a group of companies that employs around 2000 employees across 34 offices across the UK.

9. The Respondent has in place fire alarm servicing checklist which is to ensure its engineers understand and comply with the requirements of the relevant British Standards (BS5839 – 1: 2017); to ensure compliant documentation is issued to customers from completion of an inspection; and to ensure that appropriate information is captured within an inspection certificate.

10. The Respondent's clients could request a periodic or annual fire check visits. It was a requirement that an inspection certificate be completed with a brief description of the work carried out including the loop/zone/areas tested. For the annual inspections to be completed there is also a requirement that the relevant information will be included in the logbook which is kept at the client's site.

11. The Claimant commenced working for the Respondent on 13 November 1989. He was employed as a system fire alarm service engineer. His role involved visiting client sites to carry out periodic inspections of their fire detection systems and visiting their sites in response to specific callouts to investigate any issues reported by them. The Claimant was assigned clients in the London North area of the Respondent.

12. The Claimant reported to Greg Frensham, who in turn reported to Andrew Kirby General Manager. Mr Frensham ceased working for the Respondent in October 2020.

13. The Claimant had very long service of over 30 years with the Respondent and had a clean disciplinary record. There was no indication that the Respondent was unhappy with how the Claimant was undertaking his role prior to the disciplinary matters that form the basis of our considerations.

14. One of the Claimant's clients was the Queen Elizabeth school (the School) in Barnet. The Claimant first visited the school site in October 2016. This School contracted with the Respondent for six monthly visits to take place for in order for their

systems to be checked on both an annual and periodic basis. On his visits to the School the Claimant was required to test systems, identify any problems and bring to the client's attention any matters that could compromise the integrity of the fire alarm system. The Claimant was not required to carry out any remedial or upgrading engineering work himself, this was done by the Respondent's Small Works Team. However, the Claimant was required to complete inspection certificates on his handheld PDA (which was an iPhone with relevant software loaded onto it). If necessary, he would prepare an initial quotation and forward a photo of the paperwork to the job office whilst on site.

Pleaded disclosures

15. In October 2017 the Claimant observed that the School had employed contractors that had tampered with the Respondent's fire system. He stated that when he looked at the main panel he expected to find the Respondent's panel for controlling the fire alarm system at the School but found that the box which held the panel was being used for storage box for contractors and tools another items. He discovered that the contractors had installed some relays and interfaces inside the box, and they had installed their own fire alarm panel and parts in a different location and throwing away parts belonging to the Respondent's main panel.

16. The Claimant asserts that he had a good relationship and worked well with the then previous facilities manager of the School, Mr White and a lot of the issues that occurred with contractors would not have had happened had Mr White remained employed. However, the initial contractor concern in October 2017 took place under Mr White's watch. Mr Wallace assumed the facilities management for the School following Mr White's retirement in 2018.

17. The Claimant visited the School on 18 October 2018 and recorded that there was no feed from a panel that needed looking into. The inspection certificate indicated that there may be compatibility problems between the Respondent's system and the new contractors.

18. On 15 November 2018 the Claimant attended the School following an alarm activation a few days earlier. He highlighted in a work quotation the need for new software and for the School to recommission the fire system to ensure that every item changed or tampered with by the contractors was working. The School would have had to agree to the cost of this. The Claimant maintained that the new contractors had interfered with the Respondent's system.

19. On 16 November 2018 the Claimant was called back to the School following a panel activation. He completed an inspection certificate noting the problems caused by new devices being installed by the contractors. It was noted that both panels of concern were not installed by the Respondent.

20. On 29 November 2018 the Claimant was called to the School because of a fault on the main panel. He completed inspection certificate and stated that the panel had been installed by others and repeated that the alarm system needed to be recommissioned.

21. Generally, the Tribunal accept that the Claimant raised concerns about the School to Mr Frensham about the contractors interfering with the Respondent's fire alarm system by sending messages and photos from his PDA and sending inspection certificates. We also find that the Claimant also spoke to Mr Frensham from time to time about recommissioning the School fire detection system. The Claimant undertook 6 monthly testing at the School and it was his responsibility to record any concerns with about Respondents fire system on inspection certificates and bring it to the attention of the School so that they could get a quote to resolve any concerns about an unsafe fire alarm system.

22. As a matter of process any inspection certificates and information that the Claimant sent on his PDA went to the Respondent's central team and would not necessarily have come to the attention of Mr Frensham or Mr Kirby. Mr Frensham had 8 to 10 engineers who undertook between 5 and 7 site visits per day and unless an engineer specifically brought a problem to his attention, he would not have been aware of what work they did. Mr Frensham accepted that he would have expected his engineers to bring problems to his attention and they could do so by text or phone calls or emails. However, he had no recollection of the Claimant bringing the concerns to his attention.

23. On 6 December 2018 the Claimant undertook a full biannual check at the School. His inspection certificate recorded that he checked 35 call points (although no location was identified), he had checked the control panel and other relevant detection and alarm equipment and there were no faults, they were in accordance with British standards and were in good condition. There was no indication of a clash or incompatibility with systems in this report.

24. On 20 February 2019 the Claimant had a telephone conversation with Mr Frensham regarding the third-party contractors poor wiring affecting access at the School gates.

25. On 15 April 2019 the Claimant undertook a full biannual check at the School. His inspection certificate recorded that he checked 35 call points (although no location was identified), he had checked the control panel and other relevant detection and alarm equipment and there were no faults, they were in accordance with British standards and were in good condition. The summary of works stated '*system was tested and ok but attention needed to programming of links. Device 97.3 has been isolated to prove*.' Recommendations were made to replace old detectors in ground floor of Mayes Building and replace batteries in panel beside the shop.

26. In his oral evidence the Claimant asserted that in early 2019 and in August 2019 he informed the Fire Systems Director, Mr Jim O'Dwyer about the problems and issues he had been raising. These were not pleaded disclosures and Mr O'Dwyer was not called to give evidence. The Claimant's evidence was unspecific about what he actually said to Mr O'Dwyer and the Tribunal do not conclude that the Claimant has established that disclosures of information were made by him to Mr O'Dwyer.

27. The Claimant emailed Mr Frensham on 2 August 2019 stating that the contractors were not pleased when it was discovered that they had a panel problem providing the same signal resulting in them having to 're phase it'.

28. On 18 November 2019, the Claimant submitted his handwritten response to disciplinary issues to Mr Kirby. This included the following paragraphs

> 4. I reported to my line manager three years ago that contractors for the school had removed the Chubb panel which was the main panel and installed their own in a different location without notifying or working with Chubb.
>
> 8. For many years now Chubb have taken over sites and jobs after other non Chubb workers and contractors have adjusted fire alarm systems we are contracted to service. In this case the contractors have always still been working on the system at the school and have been still doing so this year. When they threw out the Chubb panel without advising Chubb and installed their own in a different location they threw away the relays, class changes, resistors, diodes and I/O units. These are the devices responsible for signalling between our Chubb panel and all other buildings. This was pointed out from the first visit that contractors had worked.

Fire alarm testing and reports

29. Exceptionally, the Claimant attended the School's weekly fire alarm tests between April and May 2019. The Claimant observed that there were failed manual call points (MCP). It was the Claimant's responsibility to notify of any failed MCPs. The Claimant maintains that he rang Mr Frensham after each weekly firm alarm test to state he witnessed the testing and confirmed that the system was working properly. The Claimant sent the inspection certificates and the work orders for each of these visits from his PDA for every visit stating that the school had been tested and what the outcome was. The inspection certificates were for these visits were in the bundle.

30. There was no issue before us regarding whether in the weekly fire testing that caused concern to the Respondent or that there were problems with the system which would have needed to be recorded on the inspection certificate of the School logbook.

31. The Claimant attended the School on 16 May 2019. The summary of works on the inspection certificate stated

> INVESTIGATE 4 MCPS NOT WORKING?? QUOTE FOR ADDITIONAL DEVICES (SPEAK TO [FACILITIES MANAGER])
>
> 6 call points tested. Sounders and contacts dissed from zonemaster and from main panel, sounders and fire contacts
> in exam hall and behind
> Call point at Dr westcott room is non Chubb and different key operation
> Call point adjacent Dr wescotts office in corridor is old kac key operation
> All call points are working

32. Recommendations recorded on the inspection certificate were:

> "mr Price's office is being converted into 2 offices.
> additional detector reqd in new room to be created.

program to system as reqd address is given."

33. The Respondent maintained that the reference to 'All call points are working' in this inspection certificate refers to the 35 call points within the school. The Tribunal cannot accept that this is a reasonable conclusion to draw from the inspection certificate which explicitly states that only six call points had been tested during this visit.

34. The Claimant attended the School's firm alarm testing on the 22 May 2019 and recorded that 'call point tested in hall and ok'. This inspection certificate also recorded as an urgent quote:

> "Replace 7 call points in fern building on 2 levels
> Can be done in half term if accepted."

35. The Claimant maintains that he tested the Fern building call points during his annual biannual inspections but there is no specific written reference to this in his inspection reports. The Tribunal accept that the inspection certificate of the 22 May 2019 is evidence that the Claimant tested a call point in the hall of the School, and this was OK. it does not evidence that the Claimant tested call points in the Fern building. Whilst it may have been natural for the Claimant to have tested call points before recommending replacement as part of an urgent quote we accept that the quote was made following a request from Mr Wallace on the basis that the call points in the Fern building had old facias, not that they were not working.

Fire at the School

36. On 4 July 2019 there was a fire in the School's Fern Building. The MCP's in the Fern building did not work to start the fire alarm. The Claimant attended the site that day and recorded in the inspection certificate

> URGENT FIRE ON SITE NOW CAN'T RESET AFTER SMALL FIRE
> all broken glass is replaced in call points not working at the rear of fern
> systems reset and left as normal,
> 2 obsolete core points disconnected 1st floor that are due to be replaced on quote outstanding.

37. The Claimant stated that he disconnected the call points in the Fern Building and did not replace them at that stage so that an engineer could trace and rectify the fault. He maintained that there was no fault with the MCPs in Fern building on 16 May 2019, however they were old and recommended replacement.

38. On the 5 July 2019 the Claimant met with an engineer at the school site at 8:30am. The Claimant showed the engineer the fire system and left it for the engineer to action the repairs. The Claimant recorded in his work order for that day that he met on site to walkthrough a few jobs smo.

39. On 5 July 2019, Mr Frensham was instructed by the Respondent's Managing Director, Mr O'Dwyer to attend the school to investigate why the fire alarm system failed. Mr O'Dwyer also required the Claimant to stay away from the School for the investigation to be carried out.

40. Later that day Mr Frensham visited the school to investigate why the fire alarm system in the Fern building had failed and he subsequently informed the Claimant that he should not go back to the School.

41. Mr Wallace was replaced by Silvia Shann as Facilities Manager at the School on 5 July 2019. Therefore, Mr Wallace seemingly had no input in providing information to the Respondent regarding the background or context of works. Further the School's logbooks were not available for comparison against the inspection certifications completed by the Claimant. The Claimant was not spoken to either before Mr Frensham to made initial observations which he recorded in an email to Mr O'Dwyer on 5 July 2019:

> After a comprehensive meeting with FM manager Silvia Shann (Mr Wallace's replacement effective today) and the site caretakers, I have ascertained the following facts for your retention as requested ...
>
> Firstly in relation to the issue with the non operational core points within the firm building I can confirm that there is indeed no power to all eight units meaning that the initial diagnosis to upgrade the fascia's would have proved pointless and would not have solved the problem.
>
> …
>
> Taking into account that these have been disconnected for some considerable time and that there is no other protection within other areas of the two floors, then the Fern building has no call point cover at all?
>
> *No one at the school can remember if/why these units have been taken out of the system. All the units shown below form part of a deliberate historical disconnection which the school had no record of and was never commissioned by Chubb*

42. On the evidence before us, and in view of Mr Frensham's answers to questions there was not a reasonable basis for him to conclude that the MCPs in the Fern Building had been disconnected for some considerable time. Mr Frensham had either disregarded or overlooked the Claimant's 4 July 2019 inspection certificate which stated that he disconnected them on that day, and Mr Frensham wrongly assumed that the Claimant had disconnected them on 22 May 2019, the date of the urgent quote.

43. Mr Frensham's 5 July 2019 email summarised, amongst other things;

> The panel links were tested with Chubb (& Mr Wallace) in attendance on a Saturday some time ago and no reports of failure were highlighted at that time (Andrew Kirby aware).

44. There was no written confirmation that the panel links were tested in the documentation before us and no specific Saturday could be identified or was identified by Mr Frensham in this regard.

45. Mr Frensham carried out a retrospective technical audit of the School's fire service history on the 15 July 2019. Mr Frensham recorded that, amongst other things, there was no evidence of accurate visit logs indicating where or specifically what had been tested. This was evident from the inspection certificates and this ought to have been obvious to Mr Frensham before undertaking this audit had he reviewed the Claimant's annual and biannual inspection certificates when they were actually

completed. The Tribunal find that they were serious management shortcomings in managing and monitoring the Claimant, in respect of the absence of appraisals or documentary evidence emphasising management expectations of report content and holding the Claimant to account for the paucity of his recording. No performance management process or further training had been identified.

46. Mr Frensham concluded his technical audit by stating

> Due to the seriousness of a situation which has developed on site resulting in a number of call points not operating under genuine fire conditions we are now in the process of undertaking a formal investigation/ potential disciplinary.

47. The Claimant reasonably observes that in order to have undertaken a proper audit or investigation Mr Frensham should have asked him for his comments before concluding. This criticism of Mr Frensham's approach to the audit is compounded in by the absence of any input from Mr Wallace to provide Mr Frensham with the contextual relevant background relating to operational testing. Mr Frensham did not seek to contact with Mr Wallace in this regard.

48. A key underlying issue was whether the Claimant had, as alleged, disconnected the call points in the Fern building without notifying the Respondent or the School about this. The Claimant emphatically denied that this was the case, it would have been an illogical thing to do, especially for someone with his significant experience in fire safety engineering with no previous issues of poor performance or concerns. The Tribunal accept the Claimant's evidence in this regard. We find that the Respondent was unreasonable in concluding that the Claimant randomly disconnected call points without notifying anyone. The Respondent did not critically appraise the situation on the ground at the School or objectively analyse the contemporaneous documentation. This was a serious shortcoming. We agree with the Claimant's concerns that he appeared to be a scapegoat to seek to protect the contract with the School and the reputations of Mr Frensham and Mr Kirby, who could be criticised for not properly holding the Claimant to account for the quality of his reporting or ensuring that inspection reports complying with British Standards were produced. There were clearly lessons to be learned from the failure of the fire alarm to go off in response to fire in the Fern Building, but the conclusions drawn and how they were seized upon in the retrospective audit were not reasonable in the circumstances.

49. A disciplinary process was instituted for the Claimant and he was invited to a disciplinary investigation on the 2 August 2019. The minutes of the notes are disputed, and the handwritten notes are disputed by the Claimant. In the notes stated in bold

> **The school have accepted the certificates with the evidence that there were no failed call points across all 35 within the estate during that four month.**
>
> **GF confirmed with photographic evidence that the inoperative call points within the Fern building had GREEN test stickers on their face which Chubb used approximately four years ago to indicate testing complete for that year. We are currently using Red [stickers] for 2019?**

50. There are misrepresentations in the notes of 2 August 2019, particularly reference to ALL call points being tested on 16 May 2019 (when only 6 MCPs were) and 2 call points tested on 22 May 2019 (when there was only 1 MCP tested in the

hall). Regardless of the misrepresentations, there was obvious confusion in the content a of discussion 2 August 2019. The Claimant did not have his Inspection Certificates to properly assess and explain his position.

51. By letter dated 2 September 2019 Mr Kirby, the general manager, invited the Claimant, to a disciplinary meeting to take place on the 10 September 2019. The letter inviting him to the meeting, states that the issues relation to conduct to be addressed were:

51.1 The Claimant's routine inspection on the 6 December 2018 where 18 call points were tested and passed out over 35 and no failed call points were recorded.

51.2 The Claimant's routine inspection on the 15 April 2019 routine maintenance was carried out 20 call points tested out of 35 and no failed call points recorded.

52. The focus of the disciplinary hearing was therefore going to be the extent to which the Claimant properly tested and recorded the call points in his routine inspections where no call points failed.

53. The Claimant was signed off sick and was unable to attend the disciplinary hearing on the 10 September 2019. The disciplinary hearing was therefore rescheduled once the Claimant returned to work on the 1 November 2019.

54. The disciplinary hearing took place on the 7 November 2019 before Mr Kirby Claimant. The Claimant attended with his employee representative. The relevant inspection certificates being relied on were not provided to the Claimant. There was confusion about inspection certificates content and dates. The Claimant consistently maintained that he had tested all call points as part of the biannual inspections. Mr Kirby wrongly concluded that that the Claimant was referring to testing all call points by erroneous reference to the Claimant's inspection certificate on 16 May 2019. Mr Kirby persistently questioned the Claimant on whether the call points in the Fern building were working or not. The Claimant consistently maintained that the call points in the Fern Building were working.

55. In respect of using the colour stickers to confirm the year check (green instead of red) the Claimant stated that the stickers were old and should have been removed. He was asked why he did not use updated stickers responded that this was a not requirement. He stated that all MCPs were tested. Mr Kirby did not pursue the issue about stickers any further. Confusion remained about what MCP's were tested and when. The disciplinary hearing was adjourned by Mr Kirby for further enquiries.

56. The disciplinary hearing reconvened on 18 November 2019. Discussion ensued about Claimant's inspection certificate on 4 July 2019. It is clear that discussion remained confused. The inspection certificate details of 4 July 2019 were read onto 22 May 2019 certificate relating to disconnected call points. A dispassionate review of the inspection certificate would have demonstrated this. However, Mr Kirby continued on the erroneous basis that the Claimant was aware that the call points in the Fern building were not working from the 22 May 2019. However, there was no

evidence that the call points were not working on 22 May 2019, the Claimant accepted that he disconnected call points on 4 July following fire and this explanation was not properly understood by Mr Kirby.

57. Due to unavailability, the disciplinary hearing was not reconvened until 7 January 2020. The Claimant was summarily dismissed by Mr Kirby. The dismissal letter dated 7 January 2020 framed the allegations for dismissal as follows:

> On 22nd May 2019 you attended a customer site and identified that call points in a building were not working. Your inspection certificates recommended that the call points should be replaced but did not inform the customer that there was not any fire safety protection in place in addition to the inspection certificate not being signed by the customer. A subsequent fire in this building resulted in the customer activating core points which did not work which placed our customer at risk.

58. It is clear that the reason for dismissal did not form the basis of the disciplinary invitation and was not clearly specified as the basis for the allegations the Claimant had to address during the disciplinary meetings. At best the focus was of the disciplinary meetings was confused and at worst there was complete misrepresentation of the background facts.

59. The Claimant appealed his dismissal by letter dated the 9 January 2020. In drafting this the Claimant was working from memory, he had a period of 2 months sickness absence and had not been provided copies of the relevant inspection certificates for which questions in disciplinary hearing were asked, which formed the basis for his dismissal. The Claimant was confused when drafting his appeal grounds and we accept his evidence that every time he mentioned 'May' he meant 'July' when he was referring to disconnecting the call points. He was confused, the Respondent had given him a confusing picture of what had happened and did not give him the paperwork that he was asking for.

60. The appeal hearing took place on the 7 February 2020, Mr Paul Butt, Director of Install Projects Fire Systems dismissed the appeal and upheld the Claimant's dismissal.

Law

Protected disclosure

61. Insofar as is relevant Section 43B Employment Rights Act 1996 ('ERA') defines qualifying disclosures.

> **Section 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—
>
> (a)…
>
> (b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c)…,
>
> (d)that the health or safety of any individual has been, is being or is likely to be endangered,

> (e)…, or
>
> (f)…..
>
> (2)For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
>
> (3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.
>
> (4)A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
>
> (5)In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

62. The starting point is that the disclosure must be a "disclosure of information" made by the employee bringing the claim. That disclosure must have two features. Both are based on the belief of the employee, and in both cases the belief must be a reasonable belief. The first is that at the time of making the disclosure the worker reasonably believed the disclosure tended to show relevant wrongdoing; or deliberate concealment of that wrongdoing. The second is that at the time of making the disclosure, the employee reasonably believed the disclosure was made in the public interest. In Kilraine v London Borough of Wandsworth [2018] ICR 1850 Sales LJ noted that allegations could amount to disclosures of information depending on their content and on the surrounding context. He set out the following test for determining whether the information threshold had been met so as to potentially amount to a qualifying disclosure: the disclosure has to have "*sufficient factual content and specificity such as is capable of tending to show*" one of the five wrongdoings or deliberate concealment of the same. It is a matter "*for the evaluative judgment of the tribunal in the light of all the facts of the case*" (paras 35-36).

63. The belief has to be that the information in the disclosure tends to show the required wrongdoing, not just a belief that there is wrongdoing (Soh v Imperial College of Science, Technology and Medicine EAT 0350/14).

64. The Tribunal needs to assess whether, given the factual context, it is appropriate to analyse a particular communication in isolation or in connection with others. In Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 (EAT), Slade J (at para 22) said that "*an earlier communication can be read together with a later one as embedded in it, rendering the later communication a protected disclosure, even if taken on their own they would not fall within Section 43B(1)(d)*". Whether or not it is correct to do so is a question of fact.

65. In Kilraine, one of the alleged protected disclosures was made using these words: "*There have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented*". In itself, this lacked sufficient factual content and specificity. The oblique reference to other documented instances did not incorporate other documents by reference.

66. What is reasonable within Section 43B involves an objective standard and its application to the personal circumstances of the discloser. A whistle-blower must exercise some judgment on his own part consistent with the evidence and the resources available to him (Darnton v University of Surrey [2003] IRLR 615, EAT. However, the disclosure may still be a qualifying disclosure even if the information is incorrect, in that a belief may be a reasonable belief even if it is wrong: Babula v Waltham Forest College [2007] ICR 1026.

67. In relation to the type of wrongdoing, there is a potential past, present or future dimension. For instance, in relation to breach of a legal obligation, the reasonable belief must be that the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation. So far as future wrongdoing is concerned the phrase "*is likely to*" has been interpreted as meaning more than a mere possibility. In Kraus v Penna [2004] IRLR 260 the EAT held that to be a qualifying disclosure, the information disclosed should tend to show, in the claimant's reasonable belief, that failure to comply with a legal obligation was "*probable or more probable than not*".

68. So far as breaches of a legal obligation under Section 43B(1)(b) are concerned, any legal obligation potentially suffices. Unless the legal obligation is obvious, Tribunals must specify the particular obligation that the Claimant believes has been breached, the source of the obligation should be identified and capable of verification by reference to statute or regulation: Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] ICR 747 (EAT) at paragraph 98. An employee's belief that a legal obligation has been breached need not be formed by reference to a detailed or precise legal duty, though it must amount to more than simply a belief that the impugned conduct is wrong Eiger Securities LLP v Korshunova [2017] ICR 561 (EAT), per Slade J at paragraph 46. It is not necessary that the disclosure identify the specific legal obligation that is said to have been breached: Twist DX Limited v Armes (UKEAT/0030/20) at paragraph 84.

69. In Kilraine v London Borough of Wandsworth [2018] ICR 1850, the disclosure in issue related to an occasion when the worker had raised a child safeguarding issue and claimed to have received an inadequate response. The tribunal held that this did not tend to show breach of a legal obligation, and this was upheld in the Court of Appeal. As the Court of Appeal noted, nothing in the particulars of claim or the witness statement indicated that the claimant had a particular legal obligation in mind. It was only later that her representative suggested a potential breach of the Children Act 2004 and the Education Act 2002.

70. Section 43B(1) also requires a claimant to have a reasonable belief that the disclosure was in the public interest. This requirement has two components, first a subjective belief, at the time, that that the disclosure was in the public interest; and secondly, that the belief was a reasonable one.

71. What amounts to a reasonable belief that disclosure was in the public interest element was considered by the Court of Appeal in Chesterton Global Limited v Nurmohamed [2018] ICR 731. The Court of Appeal considered that a disclosure could be in the public interest even if the motivation for the disclosure was to advance the worker's own interests. Motive was irrelevant. What was required was that the worker

reasonably believed disclosure was in the public interest in additional to his own personal interest. So long as workers genuinely believed that disclosures were in the public interest when making the disclosure, they could support the reasonableness of the public interest element by reference to factors that they did not have in mind at the time.

Qualifying protected disclosures

72. A qualifying disclosure is a protected disclosure if it is made to the claimant's employer (sections 43A and 43C Employment Rights Act 1996). In this case, all of the alleged disclosures were made to the Respondent. Therefore, if the alleged disclosures were qualifying disclosures, they were also protected disclosures.

Detriment and causation

73. Section 47B ERA states:

Section 47B Protected disclosures

(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.

(1B)Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C)For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D)In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a)from doing that thing, or

(b)from doing anything of that description.

(1E)A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a)the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b)it is reasonable for the worker or agent to rely on the statement.
But this does not prevent the employer from being liable by reason of subsection (1B).

(2)**F3** . . . This section does not apply where—

(a)the worker is an employee, and

(b)the detriment in question amounts to dismissal (within the meaning of Part X).

> (3)For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K.

74. The concept of 'detriment' in relation to protected disclosures was summarised by Sir Patrick Elias in Jesudason v Alder Hey Children's Hospital [2020] EWCA 73 at paragraphs 27-28 in the following terms

> "the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment … an unjustified sense of grievance does not amount to a detriment … Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective."

75. The effect of these sections is that it is for the worker to prove, on the balance of probabilities, that there was a protected disclosure, that there was a detriment and the employer subjected the claimant to the detriment. If so, then the burden shifts to the employer to show the ground on which the detrimental act was done: Section 48(2) ERA.

76. If a Tribunal rejects the reason advanced by the employer, then it is not bound to accept the reason advanced by the worker, namely that it was on the ground of a protected disclosure: it is open to the Tribunal to find that the real reason for the detriment was a third reason.

77. The Tribunal must consider what, consciously or unconsciously, was the employer's motivation for the detrimental treatment. Causation will be established unless the protected disclosure played no part whatsoever in its acts or omissions: Fecitt v NHS Manchester [2012] ICR 372, CA. The result is that there will be a sufficient causal connection if a protected disclosure was one of several reasons for the detriment, even if it was not the predominant reason. It is enough if it was a material influence, in the sense of being more than a trivial influence.

Automatic unfair dismissal

78. Section 103A ERA 1996 provides:

> **Dismissal - 103A Protected disclosure.**
>
> 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

79. In contrast to a claim of protected disclosure detriment, a claim of unfair dismissal for making a protected disclosure requires the Tribunal to determine the principal reason for the dismissal. It is not sufficient if the Tribunal decides that the dismissal was materially influenced by protected disclosures, it is necessary for the principal reason for the dismissal to be the protected disclosures.

Unfair dismissal

80. Section 94 ERA provides employees with the right not to be unfairly dismissed. Section 98 ERA states:

> General
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a)the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2)A reason falls within this subsection if it—
>
> (a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b)relates to the conduct of the employee,
>
> (3)…
>
> (4)Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b)shall be determined in accordance with equity and the substantial merits of the case.

81. In the longstanding case of BHS v Burchell [1980] ICR 303 it was held that in the context of conduct dismissals the Tribunal should consider whether:

(i) the employer reasonably believed misconduct occurred;
(ii) it had reasonable grounds to support this belief; and
(iii) (iii) the employer had carried out a reasonable amount of investigations prior to reaching this conclusion.
(iv) Whether dismissal was in the band of reasonable responses.

Wrongful dismissal

82. In a claim for wrongful dismissal, where the claimant has not been paid for their notice period, the claimant is seeking to recover an amount equivalent to the pay that ought to have been paid during the notice period. The notice period on this matter is the statutory maximum of 12 weeks pay.

83. An employer is contractually obliged to pay the salary due in the notice period, except where the employee is in fundamental breach of their employment contract.

Conclusions

84. The Tribunal were assisted by the helpful submissions made by both Counsel. In view of our findings of fact, the law and having considered the parties submissions our conclusions are as follows.

Protected disclosures

85. The Claimant relies on protected disclosures that are alleged to be made on inspection certificates and by telephone calls to his line managers. As a general observation the Claimant was recording in hi inspection certificates and during telephone conversations tasks that needed to be carried out to maintain the integrity of the Schools fire detection system and it was his responsibility to identify any failings so that they could be rectified. The corollary of this is if he failed to highlight relevant concerns, he would have been negligent in undertaking his role. Having said that:

85.1 We do not conclude that the disclosure in October 2017 amounted to a protected disclosure. The Claimant observed that the School had employed contractors that had tampered with the Respondent's fire system. He stated that when he looked at the main panel he expected to find the Respondent's panel for controlling the fire alarm system at the School but found that the box which held the panel was being used for storage box for contractors and tools another items. He discovered that the contractors had installed some relays and interfaces inside the box, and they had installed their own fire alarm panel and parts in a different location and throwing away parts belonging to the Respondent's main panel. This was conveying operational concerns about other contractors and on its own did not indicate that the fire system was unlikely to function or that the health and safety of any individual was likely to be endangered.

85.2 On 18 October 2018 the Claimant recorded that there was no feed from a panel that needed looking into. The inspection certificate indicated that there may be compatibility problems between the Respondent's system and the new contractors. Whilst this was delphic and even when combined with telephone conversations with Mr Frensham, that indicated that there could be a problem with the School's fire system if the problem was not resolved. It was indicating that it was possible that the School's fire alarm system may fail as result of contractor interference, not that it was probable that it would do so. Even, taking a purposive construction to the relevant legislation the Tribunal do not conclude that this amounted to a protected disclosure.

85.3 On 15 November 2018 the Claimant attended the School following an alarm activation a few days earlier. He highlighted in a work quotation the need for new software and for the School to recommission the fire system to ensure that every item changed or tampered with by the contractors was working. The Claimant maintained that the new contractors had interfered with the Respondent's system. In the context of an alarm activation, reiteration of contractor concerns and combined with telephone conversations we conclude that this amounted to a protected disclosure

that the School's fire system was unlikely to function properly, in breach of the legal obligations, and consequently the health of individuals within the School was likely to be endangered in the event of a fire. We therefore conclude that this amounted to a protected disclosure.

85.4 The disclosure on 16 November 2018 was a continuation of the Claimant's underlying concerns. He was called back to the School following a panel activation and an inspection certificate noting the problems caused by new devices being installed by the contractors. It was noted that both panels of concern were not installed by the Respondent. In the context of what went before and alongside discussions with Mr Frensham we conclude that this amounted to a protected disclosure that the School's fire system was unlikely to function properly, in breach of the legal obligations, and consequently the health of individuals within the School was likely to be endangered in the event of a fire. We therefore conclude that this amounted to a protected disclosure.

85.5 The disclosure on 29 November 2018 was made following the Claimant being called to the School because of a fault on the main panel. He completed inspection certificate and stated that the panel had been installed by others and repeated that the alarm system needed to be recommissioned. In the context of what went before we conclude this was a repetition of the Claimant's concerns and amounted to a protected disclosure.

85.6 On 20 February 2019 the Claimant had a telephone conversation with Mr Frensham regarding the third-party contractors poor wiring affecting access at the School gates. We do not conclude that this amounted to a protected disclosure that the Respondent's fire alarm system would be unlikely to function nor that the health of any individual was likely to be endangered.

85.7 The Claimant emailed Mr Frensham on 2 August 2019 stating that the contractors were not pleased when it was discovered that they had a panel problem providing the same signal resulting in them having to 're phase it'. To the extent that this was referring to what the Claimant had mentioned to Mr Frensham in November 2018 we conclude that it was a repetition of the Claimant's previous concerns and amounted to a protected disclosure.

85.8 On 18 November 2019, the Claimant submitted his handwritten response to disciplinary issues to Mr Kirby referring to the concerns he had raised in November 2018 and we conclude that it amounted to a protected disclosure.

86. When considering whether there was a reasonable belief of the Claimant and whether it was made in the public interest, the Claimant has established this. Whilst he could undoubtedly have done more to escalate his concerns by using the Respondent's anonymous reporting system, that does not mean that he did not have

a reasonable belief in his relevant concerns when they were raised. It is self-evident that raising fire safety shortcomings in a School is in the public interest.

87. When considering whether the disclosures that we have found were actually qualifying protected disclosures we conclude that, although Mr Frensham denies receiving the inspection certificates, they were been sent to the employer system to amount to being sent to the employer. Further, as far as Mr Frensham is concerned, we have found that the disclosures were made to him as part of separate telephone discussions with him. We therefore conclude that the Claimant made qualifying protected disclosures.

Detriment

88. The Tribunal can easily conclude that subjecting the Claimant to an unfair disciplinary process that resulted in his dismissal can amount to detriment. The question for the Tribunal is what the employer's motivation for the detrimental treatment was. Causation will be established unless the protected disclosure played no part whatsoever in its acts or omissions.

89. We do not conclude that the Claimant has established that the reason for disciplinary process was any protected disclosures he made. Specifically;

89.1 It was the Claimant's role to identify problems with the fire alarm system for them to be rectified. We do not conclude he was subjected to detriment for doing what he was specifically paid to do;

89.2 There was no detrimental treatment to the Claimant immediately following his protected disclosures in November 2018, the investigation into his conduct in July 2019 predated the Claimant's later disclosures;

89.3 The Claimant was not maintaining that there were compatibility problems with the fire alarm system due to other contractors work in his biannual inspection certificates in December 2018 and April 2019;

90. We therefore do not conclude that there is a sufficient causal connection between the Claimant's protected disclosures and the disciplinary process. We agree with the Claimant's concerns that he appeared to be a scapegoat to seek to protect the contract with the School following the fire on 4 July 2019 and for Mr Frensham and Mr Kirby to sidestep criticism for not properly holding the Claimant to account for the quality of his reporting or ensuring that inspection reports complying with British Standards were produced. It was the fire at the School, not protected disclosures, that set the train in motion. The Respondent realised that there was not an acceptable paper trail of inspection reporting at the School to properly identify inspection checks.

91. The Claimant's claim for protected disclosure detriment therefore fails and is dismissed.

Protected disclosure dismissal

92. The Claimant was dismissed due to his conduct following a misunderstanding of what his 22 May 2019 inspection certificate meant. The Respondent concluded that the Claimant confirmed that MCPs in the Fern Building school were not working when on a reasonable, unconfused enquiry, having provided the Claimant with his contemporaneous inspection certificates, it would have been clear that the inspection certificate only referred to testing a MCP in the hall on that date and that was OK.

93. Whilst the Respondent was unreasonable in coming to its conclusion regarding the Claimant's conduct, we conclude the fire at the school on the 4th of July resulted into a blinkered approach towards the Claimant's culpability that subsequently resulted in his dismissal. the protected disclosures we're not the reason for his dismissal. The Claimant's claim for protected disclosure dismissal therefore fails and is dismissed.

Unfair dismissal

94. The Tribunal conclude that the Respondent has established a potentially fair reason for dismissal, namely conduct. In summary, it has established that it dismissed the Claimant for inadequate paperwork at the School that subsequently resulted in a fire in the building and placed the School at risk.

95. When considering whether the dismissal was fair and reasonable in all the circumstances the Tribunal conclude that there were serious elements of unfairness in this matter. Specifically:

95.1 The Respondent did not put the specific allegation that the Claimant was dismissed for to him during the disciplinary process. The Claimant only became aware of this in the dismissal letter of 7 January 2020. for prior to receiving the dismissal outcome;

95.2 There was insufficient relevant documentation provided to the Claimant for him to properly respond to what was being asked of him, this was even more necessary given the time that had elapsed and the fact that he had an intervening period of long term sickness absence;

95.3 There was no proper investigation of the Claimant's position. Had this been done the conclusion drawn in the dismissal letter, that there was not any fire protection in place from 22 May 2019, could have been properly responded to and understood by referring the Respondent to the Claimant's other inspection certificates;

95.4 Given the Claimant's very long service and unblemished work record, concluding that he would have placed the School at risk without actually putting it to him in those terms was wholly unreasonable and unsustainable. Indeed, in evidence before us Mr Frensham when questioned on the content of the Claimant's contemporaneous inspection certificates accepted that his view was the Claimant was innocent of the allegation that formed the basis for his dismissal.

95.5 The appeal held by Mr Butt did not correct the serious shortcomings.

96. In view of the serious shortcomings we conclude that the Respondent unfairly dismissed the Claimant. The Claimant's claim for unfair dismissal therefore succeeds.

Polkey

97. When considering *Polkey,* the Tribunal conclude that the disciplinary process and the dismissal was so flawed and conclude that it is unlikely that had a fair procedure been followed the Claimant would have been dismissed at all. No reduction for compensation is made in this regard.

Conduct

98. It is evident that there were shortcomings in the Claimant's inspection certificate records that were not compliant with British Standards. Whilst the Respondent did not address these shortcomings with the Claimant, the fire at the School highlighted the deficiencies in reporting. The potential liability of the Respondent in the event of a fire would be minimised with proper records and heightened without them.

99. The Claimant's poor standard of records also contributed to the misunderstanding and confusion of what his inspection certificates meant. This would not have occurred had the Claimant produced compliant records.

100. In these circumstances we conclude that the Claimant was blameworthy in respect of contributing to his dismissal and we assess this at 20%. A 20% reduction will apply to both the basic and compensatory award.

Wrongful dismissal

101. We do not conclude that, objectively assessed, the Claimant by his inadequate paperwork at the School resulted in a fire in the building and placed the School at risk. The contemporaneous inspection certificates do not establish the Respondent's position.

102. Further, we do not conclude that the Claimant's shortcomings in record keeping amounted to a fundamental breach of his employment contract entitling the Respondent to dismiss him without notice.

103. The Claimant was dismissed without notice and as such his claim for wrongful dismissal succeed. The Claimant is entitled to 12 weeks' notice.

ACAS adjustment, mitigation and remedy hearing

104. If remedy is not otherwise resolved, a remedy hearing will take place for 1 day on 7 March 2022. Consideration of mitigation as well as any adjustment to compensation in respect of a failure by a party to comply with the ACAS process will take place.

105. The Claimant is ordered to send an updated schedule of loss and further remedy documentation, and if so advised, any additional witness to paragraphs 168 – 180 of his initial statement. This must be sent to the Respondent by 11 February 2022.

106. The Respondent is ordered to send a counter schedule of loss and documentation relevant to remedy to the Claimant, as well as witness evidence in response by 25 February 2022.

107. The parties are to agree a remedy hearing bundle for use at the remedy hearing by 4 March 2022. The Respondent is ordered to bring four copies of the remedy hearing bundle and witness evidence to the remedy hearing.

Employment Judge Burgher
Dated: 25 January 2022