EMPLOYMENT TRIBUNALS

Claimant: Mr M Best

Respondent: GlaxoSmithKline Services Unlimited

Heard at: Bury St Edmunds Employment Tribunal (hybrid via CVP)

On: 24, 25, 26, 27 and 28 October 2022 and 4, 5, 6 and 7 December 2023 (19 March 2023, 8 and 18 December 2023 in Chambers)

Before: Employment Judge K Welch
Ms S Limerick
Mr D Hart

Representation

Claimant: In person, supported by his fiancée Miss Suckling
Respondent: Miss L Bell, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

Detriment for making protected disclosures

1. The complaint of being subjected to detriment for making protected disclosures is not well-founded and is dismissed.

Automatic Unfair Dismissal

2. The complaint of automatic unfair dismissal for making protected disclosures is not well-founded and is dismissed.

Unfair Dismissal

3. The complaint of unfair dismissal is not well-founded and is dismissed.

RESERVED REASONS

The Proceedings

1. The Claimant brought claims for unfair dismissal, automatic unfair dismissal and detriment on the ground of having made protected disclosures.
2. The claim form was presented on 1 July 2020, following a period of early conciliation from 5 May 2020 to 19 June 2020.
3. The hearing was a hybrid public hearing, whereby the parties and representatives attended in person and some of the witnesses attended remotely using the cloud video platform (CVP). The parties consented to this and the Tribunal considered it was just and equitable to conduct the hearing in this way.
4. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing by attending the hearing in Bury St Edmunds.
5. From a technical perspective, for the parts of the hearing where witnesses attended remotely, there were no difficulties. The Tribunal ensured that the witnesses had a copy of their witness statements and we were satisfied that the witnesses were not being influenced by external matters whilst giving evidence.
6. Prior to the hearing, the parties had indicated that the listing of five days was not sufficient to deal with the case, since the respondent had nine witnesses and the claimant had seven witnesses, although not all of the witnesses were attending the hearing to give sworn evidence. The application to relist the case for a longer hearing had been refused by Regional Employment Judge Foxwell, who considered that the case should proceed due to the significant delay which would be caused by any postponement.

First day of the hearing

7. There were outstanding applications to deal with at the start of the hearing. The claimant had made an application to strike out the respondent's response, but there were no discernible grounds under rule 37, and having given both parties an opportunity to address the panel, this application was refused, and reasons were provided during the hearing.
8. The Tribunal was provided with agreed bundles of documents of almost 3,000 pages and references within this Judgment to page numbers refer to page numbers within those agreed main bundles.
9. Additionally, there were seven other lever arch files of documents which the claimant wanted before the Tribunal, but which the respondent did not consider relevant to the case. The parties were told that in order to deal with this case proportionately, we would read the pleadings, the witness statements and any Case Management Orders/ Judgments before starting to hear evidence and that the parties would need to take us to relevant documents during the evidence. We were not taken to any of the documents within the claimant's seven lever arch files during the hearing and they will not therefore be referred to in this Judgment.
10. The claimant attended the hearing with incomplete bundles. Complete bundles had been provided to the claimant in April 2022 in readiness for an earlier full merits hearing in May 2022, which had unfortunately not gone ahead due to lack of Judicial resource. He brought those bundles with him, along with packs of documents which had been sent by the respondent to the claimant. These packs of additional documents were sent to the claimant in August 2022 and provided better copies of the agreed bundles, following a complaint from the claimant that some of the copies were not clear. In addition, the respondent had sent additional

documents to be added to the original bundles. These packs had been sent to the claimant by email with an updated index and also by hard copy. The claimant had not opened the packs sent to him and proceeded to do so during the start of the hearing. He requested a postponement in light of his incomplete bundles and also as he wished to send to the Tribunal a memory stick with over 38,000 documents on it. These documents had been provided to the claimant by the respondent following a subject access request. We refused to see those additional documents, since it was disproportionate, and it was unclear whether any of the additional documents had any relevance to the claimant's case. Having heard representations from both parties, we decided that it was not in accordance with the overriding objective to postpone the hearing, since we were not convinced that giving additional time would enable the bundles to be finalised. Everyone had attended to start the hearing, and, whilst it was likely to go part heard in light of the number of witnesses, we considered it better to start the hearing. We, therefore, arranged to commence hearing evidence on the second day so that the claimant had the opportunity to organise his bundles so that they mirrored the ones the Tribunal had. The respondent's counsel provided assistance to the claimant in doing so.

11. The claimant also asked to adduce further documents, for which there was no objection from the respondent, and therefore an additional small folder of documents was provided to the Tribunal on the second day of the hearing. References in this Judgment to documents within that bundle are referred to as [C*].

12. The Tribunal was provided with witness statements from 17 individuals, although some of the claimant's statements were either emails or screenshots of text/

Whatsapp messages. The respondent accepted the evidence of four of the claimant's witnesses and had no questions for them in cross examination, and therefore there was no need for the claimant to call those witnesses. Some of the claimant's and the respondent's other witnesses who had provided statements did not attend the Tribunal to give sworn evidence, and therefore the Tribunal gave such weight to their evidence as it considered appropriate in light of this.

13. Both parties wished to call a witness whose statement had not been exchanged in accordance with the case management orders. Therefore, both requested leave to adduce this evidence. We heard from both parties and granted leave for both witnesses to give their evidence.

14. The Tribunal therefore heard from the following witnesses on behalf of the respondent:

    14.1. Mr Jon Weir, Senior Engineer/ Acting Engineer Manager;

    14.2. Mr Stuart Morrison, Senior Engineer/ Acting Engineer Manager;

    14.3. Mr Guy Wingate, Vice President of Ethics & Compliance in the Manufacturing and Supply Unit;

    14.4. Mr Liam Thompson, UK HR Director, Employee Relations;

    14.5. Mr Iain Lees, Site Strategy Director;

    14.6. Ms Mandy Wright, HR business partner;

    14.7. Ms Sarah Bolhuis, Director, Human Resources at ATS Automation;

    14.8. Mr Mark Jay, Environmental Health and Safety Advisor; and

    14.9. Mr Jason Lord, Corporate Security &Investigations, Global Ethics & Compliance.

15. The Tribunal heard from the following witnesses on behalf of the claimant:

    15.1. The claimant himself;

15.2. Mr Parjit Lally, the claimant's former line manager; and

15.3. Mr Robert Burton, one of the claimant's former trade union representatives.

16. The claimant contended before the resumed hearing in December 2023 that some of the respondent's witnesses had committed perjury and that their evidence was untrue. We carefully considered the evidence of the witnesses and the documentary evidence provided during the hearing. We found all witnesses to be honest and credible.

17. So far as they were relevant, we also took into account the witness statements of the following of the claimant's witnesses for whom the respondent had no questions and who were not, therefore, required to give oral evidence:

17.1. Charles Bunton;

17.2. Sally Page;

17.3. Clive Elliston;

17.4. Steve Glennon; and

17.5. Georgia Suckling, the claimant's fiancée and former employee of ERIKS UK.

18. The Tribunal ensured that the witnesses attending remotely, who were in different locations, had access to the relevant written materials, which were unmarked. The Tribunal was satisfied that the witnesses were not being coached in their separate locations.

19. Prior to the hearing, there had been two preliminary hearings. The first, on 19 April 2021, was a case management hearing before Employment Judge Warren, which identified the list of issues to be decided in this case. The second, before myself,

on 24 November 2022, finalised those list of issues which were agreed at the start of the hearing as:

Issues

Whistleblowing – Protected Disclosures: Section 43B ERA 1996

20. The Claimant relies upon the following as amounting to protected disclosures:

Disclosure 1: verbally on two occasions to his Manager Collette Cochrane in April 2018, subsequently confirmed in a text message to Collette Cochrane dated 10 April 2018 and then by emails dated 11 May 2018 and 22 May 2018, that his fiancée who worked on the same site was being harassed.

Disclosure 2: the same disclosure subsequently made, on 6 November 2018, by a typed report on the Respondent's Intranet in accordance with its 'Speaking Up' Policy.

Disclosure 3: on 17, 22 and 24 January 2019 to the Respondent's HR Director Sarah Denman and the third party appointed to investigate the Claimant's complaints independently, CMP, that the Respondent had not followed correct process in respect of his disclosures.

Disclosure 4: to the Respondent's Senior Vice President of Global Compliance, Mr Nick Hiron, dated 9 May 2019, that the Claimant's fiancée had been harassed and that CMP and the Respondent had not followed correct process.

21. In respect of each disclosure, the Tribunal will have to consider:

21.1. Whether the same amounted to a disclosure of information;

21.2. Which in the reasonable belief of the Claimant was in the public interest; and

21.3. Which in the reasonable belief of the Claimant tended to show that a person has failed, is failing or is likely to fail, to comply with a legal obligation.

Whistleblowing – Detriment: Section 47B ERA 1996

22. Did the Respondent subject the Claimant to the detriments he alleges as set out below:

22.1. Ms Cochrane seeking to close the Claimant's job role and moving him to the Late Earlies Night Shift (LENS) on 10 May 2019;

22.2. Ms Cochrane arranging for her manager Mr Jon Weir to bully and harass the Claimant by forcefully demanding he had to do the LENS role at a meeting on 11 June 2019;

22.3. Mr Jon Weir instructing Shift Managers to force the Claimant to cover Production on 3 July 2019;

22.4. Ms Cochrane sending the Claimant an aggressive email on 17 July 2019 indicating that the Claimant was under formal attendance management;

22.5. Terminating the Claimant's access to emails during a period of absence at the invitation of the Respondent, contrary to an assurance from Mel Backhouse that it would not do so, in November 2019;

22.6. Mr Iain Lees being aggressive toward the Claimant at a meeting in early December 2019 regarding why he needed to be on site to print off information for use by the investigation;

22.7. Cancelling the Claimant's access pass on 23 December 2019;

22.8. Depriving the Claimant of the assistance made available to others under threat of redundancy, including: Outplacement Support, Peer Conversations, Finance Advice, direct access to Human Resources for

advice on pensions, training sessions and access to other job roles from November 2019 until 13 February 2020;

22.9. Ms Cochrane and the Management Team blocking the Claimant's Application for NEBOSH training between July and August 2019;

22.10. In late January 2020, not inviting the Claimant to an 'away day' at Duxford Airfield and Ms Kim Herd and Ms Mandy Wright attempting to prevent the Claimant from entering when he attended anyway;

22.11. Between 1 November 2019 and 20 July 2020, the Respondent intercepting and redirecting the Claimant's emails to Mr Jason Lord and a specific panel;

22.12. Blocking the Claimant's Application to the contractor ATS who were taking over his role in or around September 2019; and

22.13. Ms Cochrane saying to CMP that she did not know what the Claimant did all day on 24 February 2020.

23. In so far as any of the detriments are upheld by the Tribunal, the question will be whether such detriment was done on the ground that the Claimant had made one or more of the protected disclosures?

Unfair Dismissal: Sections 98, 103A ERA 1996

24. What was the reason or principal reason for dismissal?

25. Was the reason or principal reason for dismissal that the Claimant made one or more of the alleged protected disclosures? If so, the dismissal will be automatically unfair (s. 103A of the Employment Rights Act 1996 ("ERA")?

26. If the reason or principal reason for dismissal was not because of a disclosure, was the reason or principal reason for dismissal a potentially fair one in accordance with Sections 98(1) and 98(2) of the Employment Rights Act 1996 ("ERA")? The

Respondent asserts that the reason or principal reason for dismissal was redundancy, or alternatively, some other substantial reason.

27. Was there a redundancy situation?

28. If there was not a redundancy situation, do the circumstances giving rise to the Claimant's dismissal amount to a substantial reason of a kind such as to justify the Claimant's dismissal, namely a business reorganisation carried out in the interests of economy and efficiency, such that the dismissal was potentially fair for some other substantial reason?

29. Was the reason or principal reason for the Claimant's dismissal redundancy or some other substantial reason?

30. If the dismissal was for redundancy or some other substantial reason, was it fair or unfair in accordance with ERA s.98(4) and in particular, was the decision to dismiss within the range of reasonable responses?

31. In considering whether a decision to dismiss for redundancy was within the band of reasonable responses and the test of s.98(4), a Tribunal will usually consider whether:

    31.1. There was adequate warning and consultation;

    31.2. Whether selection criteria were objectively chosen and fairly applied; and

    31.3. Whether alternative work was considered.

Jurisdiction: Time

32. Have all the complaints been brought within the three month time limit prescribed by the ERA?

33. If not, in so far as any of the detriments may be upheld by the Tribunal and if the latest such detriment is in time, did any earlier detriment amount to a series of similar acts or failures to act such as to bring them in time?

34. If not, was it not reasonably practicable for the claim to have been presented in time and, if so, was it presented within such further period as the Tribunal considers reasonable?

Remedy

35. The Claimant seeks compensation. The first question for the Tribunal will be what financial loss the Claimant has sustained as a consequence of his dismissal and / or any detriment upheld?
36. Has the Claimant mitigated his loss? (The burden of proof is on the Respondent, not the Claimant).
37. Should there be any adjustment to take into account the possibility that the Claimant might have been fairly dismissed, or otherwise left his employment, had a fair procedure been followed?
38. Should there be any uplift in compensation by reason of the Respondent's failure to comply with the ACAS Code of Practice, or should there be any reduction because of the Claimant's failure to do so?
39. If any of the detriments are upheld, should the Claimant receive damages for injury to feelings and if so, in what amount?
40. At the start of the hearing, the respondent confirmed that it accepted that the claimant had made the four disclosures referred to above and that these amounted to protected disclosures. Therefore, it was unnecessary for us to consider issues at paragraph number 21 of the list of issues referred to above.

Second day of the hearing

41. The claimant mentioned an additional witness whose statement had not been included in the bundle, namely Steve Glennon. The claimant said the witness statement, which consisted of a short email, had been provided to the Respondent

previously. Leave was given for the claimant to adduce his evidence, although the respondent subsequently confirmed that it had not any questions for him and therefore, we were able to accept his evidence without him being called as a witness.

Third day of the hearing

42. The claimant sought leave to adduce video evidence. This related to a training video by Mr Hirons, Senior Vice President, Global Ethics & compliance and purported to show that he wanted the respondent's staff to share good and bad stories on Workplace. We did not consider it appropriate, or relevant to watch this video, since questions about the use of Workplace could be put to the respondent's witnesses.

Fourth day of the hearing

43. The claimant made an application to adduce further documents; namely documents provided by a third party company, ATS, following the claimant's subject access request. The claimant wanted to adduce these documents as these differed from the documents from ATS which were contained in the agreed bundle. The respondent objected to that application, and we considered whether they should be allowed to be adduced. They did not appear relevant, as they related to ATS' alleged failure to comply with the claimant's subject access request, and not about the claimant's claim. Also, the claimant had had the documents since 6 or 7 January 2022, and had not sought to include them in the bundle either prior to the hearing, or when he adduced additional documents on the second day of the hearing. Some of the respondent's witnesses had already given evidence and had been released, and therefore we felt there would be prejudice against the

respondent in allowing them in. Having heard from both parties, we did not allow the documents to be adduced.

44. Also, on the fourth day of the hearing, the claimant made an application for the case to be halted and then restarted once the bundles had been fully agreed and the witness statements amended to remove references to matters which were not relevant to the issues in the case, particularly in Miss Suckling's statement. This was strongly opposed by the respondent. Having heard from both parties, and taken time to deliberate on this, we decided that it was not in accordance with the overriding objective for the case to be halted, and/or restarted. There were no grounds on which to stay or to abort the proceedings. The witness statements themselves were not inappropriate. The bundles, including the additional documents provided by the claimant on the first day of the hearing, were before the Tribunal. There would be considerable prejudice caused to the respondent, having heard from half of their witnesses already, and this being the fourth day of the hearing. We considered there to be little prejudice to the claimant. It was clear that the claimant had been involved in other litigation linked to the Tribunal proceedings, and on which Miss Suckling confirmed that their resources had been spent.

45. On the same day, the claimant made an application for two witness orders; one for Mr Fox, whose statement had been included in the respondent's witness bundle, but who no longer worked for the respondent and resided in Sweden. The respondent had confirmed that they had themselves considered obtaining a witness order for Mr Fox, but knew that this was not possible as he resided outside the jurisdiction. Mr Best did not pursue this application. However, he did pursue his request for a witness order for Mr Richards of CMP, an external company to the

respondent, who had investigated the claimant's grievances. We heard from both parties and then deliberated on this overnight, since it would not affect the running of the hearing.

Fifth day of the hearing

46. We refused the claimant's application for a witness order for Mr Richards on the morning of the fifth day of the hearing and gave oral reasons. In brief, these were that we were not satisfied that the evidence was sufficiently relevant to the case, and that there was no evidence that Mr Best had attempted to ask Mr Richards to attend voluntarily.

47. The claimant made a further application. Having spoken with Miss Suckling's father, they had considered the list of issues, and wished to amend them to include a further detriment for his whistleblowing claim. Namely, the failure of the respondent to deal with his grievances. This was treated as an application to amend his claim, and we heard from both parties. The respondent objected to this amendment. We went out to deliberate on the application, and then gave oral reasons for our decision to not allow the amendment. The respondent requested written reasons for our decision, which were as follows:

48. We considered the balance of injustice in allowing or refusing the claimant's application to amend. We took into account the leading case of Selkent Bus Co Limited v Moore in coming to our decision. We understand that the claimant, as a litigation in person, did not have formal legal advice at the time of presenting his claim, but he was supported and received advice from his trade union, who were involved and provided at least initial advice. We accept that the claimant suffers injustice if he is not able to bring what he now believes is his case relating to the alleged detriment in not having his grievances dealt with appropriately. However,

we consider that the injustice to the respondent, in having defended the case on its current basis, attended this hearing and had a number of its witnesses released, would suffer the greater prejudice at this time. The claimant could have obtained legal advice at an earlier stage should he have wished to do so. The application to amend was made very late, since the list of issues were agreed at a preliminary hearing on 19 April 2021, with the orders being sent on 4 May 2021. This confirmed that the list of issues was drawn up from speaking with the claimant, at length, and from the further information he himself had provided. This was then covered again in a case management hearing before me on 24 November 2021. The Case Management Order dated 24 November 2021 [P67-77] made clear that, unless the parties contacted the Tribunal, the list of issues was taken to be final unless the Tribunal ordered otherwise. We were on the fifth day of what should have been a five day hearing. Therefore, the decision was to refuse the application due to the significant prejudice caused to the respondent outweighing that caused to the claimant.

Part-heard hearing and correspondence during the postponement

49. The hearing was unable to be completed within the initial five day listing. It was therefore adjourned part-heard and, prior to leaving on the fifth day, the parties agreed that it would resume on 20, 21, 22 and 23 March 2023. The panel also attended Tribunal on 19 March 2023, which was spent as a reading day in preparation for the postponed hearing. Unfortunately, the claimant was ill on Monday 19 March and contacted the Tribunal to say that he was unable to attend the hearing. He subsequently provided medical evidence supporting this. The hearing was then postponed until 4 to 7 December 2023, being the first date that the parties, the representatives and the panel could all attend.

50. The claimant sent in correspondence on 3 April, 7 April, 11 May, 12 May, 15 May, 26 May and 21 July 2023. The case number was incorrect on some of the correspondence and these were not forwarded to Judge Welch until 4 August 2023. A response was sent to the parties on 11 August 2023.

51. In the correspondence the claimant complained about the Tribunal process, particularly that the respondent's witnesses, and indeed its solicitor, were guilty of perjury. He requested that the hearing be restarted or, alternatively, postponed whilst this was considered. Information was provided to the claimant about the complaints' process. The response from the Tribunal confirmed that it was not appropriate to restart the proceedings and confirmed that the postponed hearing would resume on 4 to 7 December 2023.

52. Many of the claimant's concerns related to the respondent's witnesses' evidence allegedly differing from documents provided during a subject access request and whether this constituted perjury. The parties were informed that the panel would assess all relevant evidence given by the witnesses and make findings of fact on those matters. The parties were further informed that they would be given an opportunity to make submissions at the end of the evidence, and that the claimant would be able to refer to any differences in evidence during his submissions if relevant to the issues the Tribunal had to decide. The parties were informed that any application to amend the claim must be set out in writing and would be considered at the commencement of the part-heard hearing.

53. The claimant sent in an email on 3 October 2023 which had not been referred to the panel prior to the hearing resuming on 4 December 2023. This requested a further amendment to the claimant's claim, namely that the respondent had subjected him to further detriments in preventing him obtaining alternative

employment since the proceedings were commenced, and that four additional respondent companies should be joined to the proceedings. Namely "*CMP Resolutions, ERIKS U.K. LTD, EMCOR U.K. LTD and SERCO U.K*". However, the claimant confirmed in the hearing on 4 December that the latter company should have been Sodexo.

54. Additionally, the claimant had sent in five further emails over the weekend of 2 and 3 December 2023, immediately prior to the hearing resuming. Most of these related to the claimant's complaint that the respondent's witnesses had committed perjury, but one (dated 3 December 2023 and sent at 1.49am) requested a further amendment to his claim to bring a claim for disability discrimination due to the personal injury he had been subjected to, which, in his view, had been caused by the respondent's actions.

Sixth day of the hearing

55. The claimant's applications for amendment of his claim set out at paragraphs 53 and 54 were considered separately. We heard from both parties. The applications were refused, and reasons were given orally for the decisions. In brief, Selkent was again considered and our decision focussed on the respective prejudices caused to the parties, which we believed were significantly weighted against allowing the amendment. Both amendments appeared to be new claims, made after the respondent had presented all of its evidence. The claimant, in any event, could claim damages for personal injury should his detriment claim succeed, which was the reason for wishing to add a disability discrimination claim to the proceedings. The claimant said that he was happy with the decisions reached and we then continued to hear his evidence.

Seventh day of the hearing

56. The claimant attended the hearing, with an extract from a document that he wished to adduce. He provided the respondent's representative with a copy of the document he had brought with him, and it was agreed that it had been taken from his grievance outcome. Whilst the grievance outcome letter was not contained within the agreed bundle, an email [P2058] dated 7 August 2020 attached a full copy of the grievance outcome from Laura Hillier. This appeared at pages 2058 to 2069 of the agreed bundle. The claimant confirmed that this was indeed the document that he was referring to, and that the extract had come from allegation nine in the outcome letter which had been partially upheld.

Eighth day of the hearing

57. The claimant's witnesses who were attending to give oral evidence, gave their evidence remotely. We agreed a timetable to do this, which enabled the witnesses to attend.

Ninth day of the hearing

58. Submissions were heard from both parties as referred to below. The parties thanked the panel for their time.

Findings of fact

59. The claimant was employed by the respondent from 14 April 1998 to 13 February 2020 as a Senior Engineering Technician ("SET") at the respondent's Ware site.

60. The claimant had a long, unblemished work record and was considered by the respondent to be a good employee and a skilled engineer.

61. The respondent had two levels of engineer on site, SETs and engineer technicians. The claimant suggested that there was a further level of engineer, namely a '*technician plus*' role. However, there was no clear evidence of this distinction,

and, in light of this, we are satisfied that there were two levels of engineer and that, at all material times, the claimant was employed as a SET.

62. On the Ware site, there were approximately 35 SETs, who had a generic job title and job description. Although it was clear that these individuals focussed on different elements of their generic job description in their day to day roles.

63. The claimant's evidence was that he worked in a separate department with approximately six other engineers, namely the Compliance and Packing Department. He stated that he worked for Thomas Smith in this department, whose LinkedIn posts provided that between June 2014 and April 2015 he was a "*Compliance Engineer*" for the respondent at the Ware site [page C2] and a "*CI Engineer*" from February 2016 until November 2018 [page C3]. When Mr Smith left, the claimant was managed by Stuart Morrison, who at that point was Acting Engineering Manager. Stuart Morrison reported into Jon Weir, Engineering Manager, who had taken over this role from Parjit Lally, who attended to give evidence at the hearing.

64. The respondent's evidence was that Compliance and Packing was not a separate department, and that the individuals working with the claimant were still SETs, but who had been asked to concentrate on particular elements of their job description, namely compliance and packing.

65. We accept that there was a separate team, including the claimant, working as SETs focusing on compliance and packing. We accept this from the OrgPlus Enterprise Chart showing an organagram [P217]. This clearly showed the claimant and others to be working in '*packing compliance'*. We note that the respondent had not, as far as it was aware, set up, or indeed intended to set up, a separate department for these particular employees, but we accept that this team had

developed over time and that they were concentrating on compliance and packing as part of their SET roles. However, their job description stayed the same.

66. The respondent operated a shift pattern for its engineer technicians. The majority worked on a late / early / night shift rotating pattern referred to in the hearing as 'LENS'. Seven engineer technicians did not work on the LENS pattern, including the claimant. These individuals worked on a double day shift, which was a combination of earlies and lates, and were the same individuals who concentrated on packing compliance, working as a team as referred to above. There were several reasons for these individuals not working on the LENS pattern; some had agreed flexible working arrangements and others had adjustments made to their working hours due to health conditions. The claimant had never worked on the LENS pattern and had in fact only worked double days, although he had not made a flexible working request, nor had he made any request for adjustments due to any health conditions.
67. The respondent had at least two of its contractors working on the Ware site. This included ERIKS UK and Sodexo.
68. Miss Suckling was employed by ERIKS UK, one of the respondent's third party contractors, as Contracts Manager. She was employed to work on the Ware site although was not employed by the respondent.
69. In early 2018, the claimant was working with Miss Suckling, his now fiancée, on a project to assist the respondent's business.

Harassment of Miss Suckling

70. In March/ early April 2018, Miss Suckling complained that she had been subjected to sexual harassment by an employee of Sodexo, who was also working on the

respondent's Ware site. This had a profound and long-term effect on both the claimant and Miss Suckling.

71. Miss Suckling's employer was unable to remove the alleged harasser from site. As the alleged harasser was not removed from site, the claimant complained about Miss Suckling's treatment to his own employer, the respondent.

72. Ultimately, following the claimant's complaints, Miss Suckling was informed on 30 October 2019 that the employee of Sodexo, who she had alleged harassed her, would no longer work at the Ware site.

Drink and drugs test

73. On Monday 9 April 2018 the claimant was subjected to a drink and drugs test following an anonymous call to the respondent. This call had been received on 6 April 2018. Ms Cochrane had been contacted over the weekend and had instructed that a drink and drugs test should be carried out on the claimant. The results were negative and there was no further action taken.

The claimant's protected disclosures

74. The claimant verbally raised the issue of the harassment of Miss Suckling with his senior manager, Ms Cochrane, in April 2018. He texted her on 10 May 2018 and then emailed her on 11 May 2018 [P249 being a forwarded copy of this] and 22 May 2018 [P250]. It was accepted by the respondent that these amounted to protected disclosures.

75. The claimant contended that Ms Cochrane had failed to act upon his complaints and had failed to follow the respondent's own policies. However, this is not part of the claimant's complaint, and we therefore make no findings of fact on this.

76. On or around 5 November 2018, the claimant submitted a complaint online in accordance with the respondent's Speak Up policy [P266-267]. The respondent accepted that this was a protected disclosure.
77. Ms Carswell was appointed to investigate the claimant's complaint. An outcome was provided on 16 January 2019 [P297-298].
78. The claimant was dissatisfied with the outcome and sent further emails during January 2019, requesting a review [P292, 295-297 and 301-302]. It was accepted by the respondent that the emails dated 17, 22 and 24 January 2019 were protected disclosures.
79. A review of the outcome was undertaken by Ms Denman, Human Resources Director of the respondent. The outcome of this review was given to the claimant on 20 February 2019 [P308-310].
80. The claimant had viewed a video posted by Nick Hirons, Senior VP Global Ethics and Compliance of the respondent on or around 7 May 2019 [P340]. The claimant's evidence was that this video urged employees to speak up about good things in the workplace and also to inform the respondent of any wrongdoings.
81. The claimant made two comments on Mr Hiron's posts on 9 May 2019 [P345-6] and sent a personal email to Nick Hirons on the same day [P347-348] referring to Miss Suckling being sexually harassed on the respondent's Ware site and the failure of management to follow its procedures. It was again accepted by the respondent that this amounted to a protected disclosure.
82. Mr Hirons arranged for Mr Wingate to look into the complaint, and he emailed the claimant on 15 May 2019 [P356-7] to confirm that a review would be undertaken. He arranged for an external company, CMP, to undertake the review. Ms Brennan, Regional Employment Relations Lead, drafted terms of reference for CMP to carry

out the review [P362-363]. An outcome into this review was given to the claimant verbally on 19 July 2019 and confirmed in writing [P527]. It states in the document that, *"[the claimant] acknowledged that [Ms Brennan] had done as much as [she] could, and [the claimant] agreed that the matter could be closed*."

83. From the time of submitting his complaint until the termination of his employment, the claimant's own evidence was that he was not focussed on carrying out his role. He was focussed on ensuring that the respondent upheld its own policies and procedures and dealt appropriately with his complaint.

Change of shift pattern

84. The respondent decided that it wanted all of its engineer technicians to work on the LENS pattern to provide better support to production, which was in operation 24 hours a day. Therefore, in early May 2019, Mr Weir, Engineering Manager, arranged a meeting for the seven engineer technicians working on double days. This included the claimant, although, the claimant was on holiday at the time of the meeting and was therefore not present when the initial discussions took place.

85. On the claimant's return from holiday on 10 May 2019, he met with Mr Morrison, his line manager, and was given a letter dated 9 May 2019 purporting to give notice of a shift change from double days to the LENS pattern [P2690-2692]. The other double day shift engineers had also been given similar notices of their change in shift pattern.

86. The claimant's case was that Ms Cochrane sought to close the claimant's job role and move him to the LENS pattern of working, which should have followed the respondent's procedures and have resulted in his role being made redundant. We do not accept that to be the case. We consider that the respondent wanted to

utilise its engineers to support production, which meant having more of them working on the LENS pattern in the production area.

87. The claimant complained about the change of shift pattern on 13 May 2019 [P352-353]. He confirmed that he did not accept the change of shifts in light of the errors in the respondent's notice letter. The notice letter was defective as it did not accord with the respondent's Ways of Working Handbook [P2573-2655].

88. The claimant had an informal meeting with Mr Weir to discuss the proposed changes. An updated notice of shift change dated 10 May 2019 [P2692], was given to the claimant on 14 May 2019. The claimant complained that this letter was again defective. A further letter giving notice of shift change was provided to the claimant on 14 May 2019. [P349]. This provided the claimant with eight weeks' notice of the change of his shifts to the LENS pattern, in accordance with the respondent's Ways of Working Handbook. The change of shifts was due to take effect on 15 July 2019.

89. The claimant was informed on more than one occasion that he was able to submit a flexible working application, and Mr Weir provided him with a copy of the flexible working policy. The claimant was also informed that if there were medical reasons preventing him from working these shifts, then reasonable adjustments could be considered.

90. The claimant's line manager, Stuart Morrison, completed a referral form to occupational health ('OH') on 15 May 2019. [P358-9]. This was discussed with the claimant. The claimant requested that Dr Coutinho, a specialist registrar in occupational medicine, provide the OH report as he was known to him.

91. The OH report dated 21 May 2019 [P360-361] provided that the claimant was fit to work the LENS pattern of shifts, but that reduced hours should be worked for the first three weeks as the claimant had been prescribed new medication.
92. The claimant never completed a flexible working request, but acknowledged that he had been given the forms with which to do so. We are satisfied that the respondent tried to assist the claimant in making an application to continue working double day shifts on grounds of either flexible working or reasonable adjustments. Mr Weir had in fact offered to help the claimant in completing a flexible working application, but the claimant never followed this up.
93. On 3 June 2019, Mr Weir requested that the claimant, along with three other engineer technicians, relocate from their usual office to the production area to provide greater support to the production lines. The claimant refused this request. The other engineer technicians agreed to relocate. The claimant's reasons for his refusal were that he needed to take private telephone calls relating to his Speak Up complaints concerning the treatment of Miss Suckling. He would not have been able to take personal calls in the production area. The claimant also stated that he was concerned about his mental health being adversely affected by any such move.
94. Mr Robert Burton, the claimant's union representative, requested a meeting with Mr Weir and the claimant to discuss the proposed change in shift patterns. The meeting was arranged on 11 June 2019. The claimant wanted Ms Cochrane, Mr Weir's line manager, to attend this meeting, but she did not do so.
95. At the meeting, the business case for the change in shift pattern was discussed and Mr Weir confirmed the options previously discussed with the claimant, namely

to either work the LENS pattern, make a flexible working request or provide medical evidence supporting his request to continue working double day shifts.

96. The claimant's evidence was that Mr Weir was aggressive with the claimant during this meeting. However, Mr Weir denied this, and Mr Burton could not recall Mr Weir punching the desk as alleged by the claimant. Mr Burton's evidence, which we accept, was that Mr Weir got frustrated and flustered with the claimant. We do not accept that Mr Weir was aggressive, nor that he punched the desk during the meeting.

97. Following the meeting, there was evidence within the bundle [P438] that Mr Burton considered Mr Weir's approach to be positive. This was accepted by Mr Burton in cross-examination. We therefore do not find that Mr Weir was aggressive to the claimant in the meeting on 11 June 2019, nor that he forcefully demanded that the claimant had to do the LENS pattern of working.

98. The claimant contended that Ms Cochrane had arranged for Mr Weir to bully and harass the claimant by forcefully demanding he had to do the LENS pattern at the meeting on 11 June 2019. There was no evidence of this before the Tribunal. Mr Weir denied this and we do not accept this to be the case. This may well be the claimant's suspicion, but there was no evidence suggesting this to the Tribunal. We find that Mr Weir tried to assist the claimant in putting forward a reasonable case to remain working on the double day shift.

Application for NEBOSH training

99. On 12 June 2019, Mr Jay, the respondent's Environmental Health and Safety Adviser, sent an email to a number of individuals including the claimant [P415 – 417], asking for employees to apply for NEBOSH training, commencing in September 2019. The email clearly identified that there were only 16 places

available on the course, which was set to run for one day a week over a 10 week period. It also made clear that the training was intended principally for particular types of employee, which did not include the claimant's role. The email confirmed that an applicant's line manager would need to approve the application.

100. Mr Jay and Mr Gold considered the 42 applications which had been received for the 16 places on the training course. A scoring exercise was undertaken [P2860 – 2861]. The claimant was unsuccessful and was informed of this on 19 July 2019. [P420]. The claimant requested feedback and chased this when it wasn't immediately received. Feedback was provided, but the claimant challenged the feedback on two occasions. He was, however, informed that he could re-apply next time.

101. We are satisfied from the evidence of Mr Jay that only four employees working in similar roles/ teams to the claimant were successful due to the high number of applicants. We accept the clear evidence of Mr Jay that managers' approval for applicants was not sought until after the applicants had been successful.

102. The claimant stated in cross-examination, although this did not appear in his witness statement, that Mr Morrison had told him that he had blocked the claimant's application because of the claimant's mental health. The claimant did not put this to Mr Morrison when he was giving evidence. We do not accept that Mr Morrison blocked the claimant's application, as alleged. Nor do we accept that Ms Cochrane had any part in blocking the claimant's application for the NEBOSH training.

Request to cover the production area

103. On 3 July 2019, the claimant was told by Ms Mills, a shift manager of the respondent, that when the notice of his shift change expired on 15 July, he would need to work in the production area instead of attending MERPS training, as his training had been moved to the end of the month. The claimant made allegations against Ms Mills in regards to her alleged treatment towards his son, who also worked for the respondent, but as this is not relevant to the decision we have to make, we make no findings of fact in that regard.

104. The claimant complained about Ms Mills' request, and it was agreed by Mr Weir that he could continue working on a project (the EP08 project) away from the production area. We, therefore, do not accept that the claimant was moved into the production area on 3 July 2019 as set out in the list of issues.

105. On 15 July 2019, the date that the notice of change of shift expired, the claimant continued working outside of the production area and continued on his double day shifts.

Informal attendance management

106. On 17 July 2019, the claimant complained to Ms Cochrane that the Workday organogram had been amended to show the claimant as working on the LENS pattern [P429]. Ms Cochrane emailed back to the claimant on the same day [P428] to confirm what had been agreed by Mr Weir, namely that the claimant would stay on double day shifts until further investigation had been carried out as to whether there was a good reason for the claimant not to work on the LENS shift pattern.

107. This email was felt by the claimant to be aggressive and he believed that it indicated that the claimant was under formal attendance management. We do

not find the email to be aggressive in its nature, contents or tone. The email reminded the claimant that he had been placed on informal attendance management. In evidence, the claimant suggested that he should have been placed on formal attendance management due to the significant amounts of absence he had had. We therefore consider the placing of the claimant on informal absence management to have been a reasonable response in light of the claimant's level of absence at that time. The claimant had in fact already been told that he was being placed on informal absence management by Mr Morrison on 17 June 2019 during his return to work interview.

108. The respondent referred the claimant to OH again on 18 July 2019 [P418-9]. This was considered by Dr Coutinho in his report dated 24 July 2019 [P2705], which confirmed that the claimant was fit to undertake the LENS shift pattern. The OH report, however, was not immediately disclosed to the respondent, as the claimant refused his consent. An amended version of the report, which also confirmed that the claimant was able to carry out the LENS shift pattern was finally released to the respondent on 4 October 2019. [Page 680].

109. The claimant, Mr Burton (his union representative), Ms Cochrane, Mr Weir, Mr Morrison and Ms Hayward (HR) met on 23 July 2019 to discuss the claimant's proposed move to the LENS shift pattern. An email confirming what had been discussed was sent the next day by Mr Weir [P439]. We were satisfied that the respondent attempted in this meeting, and confirmed this in a follow-up email, that support would be given to the claimant in order for him to be able to continue working double days, either by virtue of a flexible working request, an adjustment for medical reasons or by trying to find alternative work for him on other projects or in other areas.

Redundancy

110. Whilst the claimant was on annual leave in September 2019, an announcement was made by the respondent to commence consultations regarding proposed redundancies at the Ware site. A redundancy consultation meeting went ahead on 17 September 2019, at which all employees within the engineering function were placed at risk of redundancy, including the claimant. The claimant had been called a day prior to the consultation meeting, but as he was on annual leave, he did not answer the call.

111. It was clear that the claimant heard about the proposed redundancies from his colleagues prior to returning to work. One of the claimant's colleagues, Mr Bunton, forwarded the consultation slides to the claimant. These appeared at pages 560 – 599 and 605 of the agreed bundle.

112. Whilst we accept Mr Burton's evidence that the enhanced redundancy package on offer may not have been attractive to all employees, we are satisfied that it would have been attractive to the claimant due to his long service and the significant enhancement to his redundancy pay and pension. There was evidence within the bundle to show that the claimant saw it as such and that his colleagues considered it an enticing offer for the claimant.

113. All of the 35 SETs were placed within the pool for redundancy. It was proposed that 14 of the SETs would be made redundant out of 35. This included three proposed redundancies of SETs within the packing department where the claimant worked. All of the individuals who had been working on the double day shift together with those working on the LENS shift pattern were placed at risk of redundancy.

114. This information was contained within the slides which had been forwarded on to the claimant, but also Mr Weir met with the claimant on 19 September 2019 [P607], to go through this with the claimant. It was further explained that there were vacancies, which the claimant, and others at risk of redundancy could apply for, for which there would be an assessment and selection process, together with a consultation exercise.

115. The claimant's consultation focused on questions regarding a potential leave date, the package on offer and the enhancement on his pension. Notably, all correspondence from the claimant related to him leaving the respondent's employment by reason of redundancy, including his email to Mark Hudson [P772] where he expressed his view that he hoped everyone making a preference for redundancy would get it and said, "*I just want to go now. There is plenty out there*". The claimant suggested in evidence that many of the queries he put forward were made on behalf of others, as he had formerly been a trade union representative and a number of employees viewed him as a spokesperson for them. We accept that some of his questions may well have related to other individuals, but we also note that the claimant's emphasis was on him leaving the respondent's employment with an enhanced redundancy package.

116. This is confirmed by the consultation meeting which took place with Mr Morrison on 27 September 2019, and the subsequent forms completed by the claimant. The claimant did not wish to apply for any of the alternative roles available. He confirmed in form D [P620] that his preference was to leave the respondent by reason of redundancy.

117. The claimant's evidence was that he was keeping his options open by completing the forms in this way. This was not supported by the emails with his

colleagues in the Bundle, the forms themselves, or indeed the claimant's actions at the time. Therefore, we consider that the claimant wanted to leave the respondent's employment for reason of redundancy with an enhanced redundancy package.

118. The claimant's evidence was that as soon as the redundancy was announced, he knew that he would be made redundant as he had not been focussing on his job following the harassment of Miss Suckling, and he knew that he would be scored down as a result of this.

119. The claimant provided no additional evidence to the respondent to support any applications for the new, available roles. Mr Morrison and Mr Weir independently scored all the engineers for the new posts, taking into account any additional evidence provided by the employees at risk of redundancy [P704-711].

120. We were satisfied that the scoring process was reasonable in the circumstances, and that both Mr Morrison and Mr Weir approached the scoring in a fair and proper way. A calibration process was undertaken when Mr Morrison and Mr Weir met on 14 November 2019 to discuss the scores of the individuals in the selection pool, and the claimant's initial scores were increased. He still scored the lowest for one of the alternate roles and second lowest for the other, but this is not surprising given the claimant's own admissions on his failure to work properly for at least 18 months prior to the redundancy selection process and his failure to provide additional evidence in support of his application for the alternate roles.

121. The claimant accepted in his evidence that he had not engaged in the redundancy process. It was clear to us that there had been consultation over the claimant's proposed redundancy, and that support had been offered to the

claimant in the same way that it was offered to others at risk of redundancy. Unfortunately, the claimant did not wish to engage with this. There was evidence of Ms Heard, HR Advisor/Manager contacting the claimant and offering to go through the support available with him.

122. The claimant suggested whilst giving evidence that Ms Backhouse had agreed that he did not have to engage in the redundancy process until his grievance had been dealt with. There was no evidence to suggest this in the emails between the claimant and Ms Backhouse, other than confirming that if the claimant wished to appeal the decision to make him redundant, this could be included in the grievance process. There was no evidence that the claimant had been officially told that his redundancy would be halted until his grievance/speak up complaints had been resolved.

Application for employment with ATS Automation ('ATS')

123. On 7 October 2019, the claimant applied for a role with ATS and attended a remote meeting with Mr Rosales, Technical Recruiter for ATS the following day. The claimant believes that the respondent blocked his application for this role, which he stated was based at the respondent's Ware site. There was no evidence before us of how his application had been blocked, and, save for the claimant's evidence, that this role was at the respondent's Ware site. The evidence from Ms Bolhuis of ATS, which we accept, was that the claimant's application was not progressed due to the recruitment effort in the UK being halted.

124. The claimant considered that the respondent had blocked him from other companies working as its contractors, but, whilst we accept that the claimant

genuinely believes this to be the case, there is no evidence to support this other than his suspicions.

Agreed paid leave

125. On 25 October 2019, the claimant was asked to attend a meeting with Mr Morrison and Mr Weir. This was to discuss support options available to the claimant. He initially refused saying that he didn't trust the respondent, so a one-to-one meeting was arranged with Mr Morrison and the claimant. [Mr Morrison's notes of the meeting were at page 791].

126. Having initially declined an offer of paid leave, following the informal discussion with Mr Morrison, the claimant agreed to take two weeks off work as paid leave commencing on 28 October 2019. The respondent's case was that this was to support him as his mental health was clearly deteriorating and he was showing signs of stress. The claimant's evidence was that he agreed to this provided that his email access continued. The claimant's paid leave continued from this date and he did not return to work.

127. There was a period of IT disruption in the period 30 October to 4 November 2019. On 30 October 2019, the claimant emailed Ms Backhouse about his IT access being removed or blocked [P828]. He was told to contact the IT helpdesk, but following further correspondence, Ms Backhouse confirmed that his IT issues would be investigated.

128. Following correspondence between the claimant and Mr Robbins, Director of CISR (Forensic IT Team), the claimant was informed that there was no block on his Outlook or Skype accounts and that a service issue had affected almost 100 people [P922]. His access was restored by 4 November 2019.

129. The claimant did not accept that this was a problem affecting others, as, by this time, he did not trust the respondent. The claimant referred the panel to emails/ feedback that individuals normally received when a problem had been resolved by IT. The lack of any such email/ feedback on this occasion, together with a code after his email, in his view, supported his suspicions. We do not accept that there was any purposeful removal of the claimant's IT access during this period. We understand that the claimant was suspicious of everything that the respondent did, as he did not trust them, but accept that there was a genuine IT issue and this affected more than just the claimant.

130. A further referral was made to OH on 1 November 2019 [P845, 905]. The report was sent to the claimant on 15 November 2019, but was never released to the respondent, as the claimant did not provide consent. There was therefore no copy of the OH report in the agreed bundle.

Outcome of redundancy

131. The claimant's redundancy was confirmed by letter dated 21 November 2019 [P979-985] together with a redundancy pack of information and forms. Mr Weir, on behalf of the respondent, had attempted to contact the claimant by Skype, telephone and email prior to this letter being sent, but the claimant had not responded. The letter confirmed that the claimant was dismissed for reason of redundancy, and provided information on registering for job alerts together with information on the professional support and independent financial guidance available. It also confirmed that the claimant had 10 days in which to appeal against the decision. This was delivered and signed for on 22 November 2019 [P991]. The claimant never appealed the decision to make him redundant.

132. We accept that redundancy was the true reason for the claimant's dismissal. Mr Burton also confirmed in his evidence that he believed that redundancy was the reason for the claimant's dismissal. The letter provided notice of his redundancy which meant that his employment would end on 13 February 2020.

133. The claimant contended that he had not received the redundancy letter and pack, something denied by the respondent. We do not accept that the claimant did not receive these. He may have chosen to ignore them, as he was in his own words, 'disengaged' from the process.

134. The claimant did not complete the forms to access the financial advice or request for external support in obtaining alternative employment. Ms Heard, the respondent's HR Advisor/Manager, wrote to the claimant on 7 January 2020 to inform him of the support that was available [P1139-1140].

135. We do not find that the period of IT disruption (30 October to 4 November 2019) affected the claimant's ability to access any support offered since this pre-dated the notice of redundancy sent on 21 November 2019. Whilst there was also a short period during which emails from the respondent to the claimant's personal account were blocked in error by the IT department, we do not accept that the claimant failed to receive the notice letter and package outlining the support available.

136. The claimant could have raised the issue of available support with someone within the respondent's organisation, including Ms Backhouse. Ms Heard, in any event, contacted the claimant to confirm the support available to him.

137. We consider that it was not appropriate for the redundancy process to be paused whilst the claimant's complaints were investigated.

Following notification of redundancy

138. The claimant's complaints about the respondent's failure to follow its processes and appropriately deal with the harassment of Miss Suckling were still being investigated by the respondent, who had contacted third parties for their input. Throughout this period the claimant sent numerous emails which he addressed to a growing number of senior executives within the respondent's organisation. These emails included Mr Hiron amongst others. The tone and nature of the claimant's emails became increasingly agitated.

139. As a result of this, the claimant was told to contact Mr Wingate and not keep contacting Mr Hiron and senior executives, but the claimant ignored this request. He continued to copy in more and more senior executives within the respondent's organisation, who were unrelated to his case, which was undoubtedly intended to provoke a response. He requested read receipts and once his emails had been blocked, his evidence was that he watched to see when individuals were online so that he could cut and paste his email into a message to send to them.

140. It was clear that a number of executives asked the claimant to refrain from copying them in on a number of occasions, but the claimant did not do so.

141. When the respondent started to redirect all emails from the claimant's personal email addresses to Mr Lord, the claimant used other email addresses to contact the respondent's executives.

142. The claimant's evidence was that his behaviour had amounted to misconduct and that the respondent should have disciplined him for his actions,

but that he had no regrets as he considered that the respondent had failed to follow its own policies and procedures.

IT access

143. On 8 January 2020, Mr Wingate requested that IT redirect the claimant's emails sent to the corporate executive team of the respondent to Mr Wingate, so that he could review them. The claimant was not informed of this, but he became aware of it as a result of getting out of office messages from people he had not emailed. The became effective on 10 January 2020.

144. Unfortunately, due to an IT error, the respondent blocked outgoing emails to the claimant's personal email account, which was only found out when the respondent investigated the claimant's complaints about his emails being blocked. We accept that this was an error by the IT team as supported by the contemporaneous documentary evidence [P1483-1487].

Cancellation of the claimant's access pass on 23 December 2019

145. During the claimant's paid leave, the claimant was asked to meet with the person investigating the claimant's complaints, Mr Richards. The claimant asked for Mr Bunton to assist him with documents in addition to his trade union representative. This was agreed, and Ms Backhouse arranged for Mr Lees to meet the claimant to give support.

146. The claimant met with Mr Richards on 26 November, 11 and 12 December 2019. The claimant was on paid leave during this period, having agreed to an extension of this with Ms Backhouse.

147. On 11 December 2019, the claimant complained that Mr Lees had "*seemed somewhat upset that [the claimant] had come into site after [their] meeting*". On 13 December 2019, the claimant emailed Mr Thompson that Mr Lees had been

disrespectful and had been aggressive and harassed him [P1079]. Mr Burton, the claimant's representative said that he did not witness any such behaviour when he was interviewed as part of the investigation carried out by CMP. In evidence, Mr Burton said that Mr Lees had been abrupt, but cordial towards the claimant, which we accept. However, we do not accept that Mr Lees was aggressive towards him.

148. On 23 December 2019, the claimant attended the Ware site, having requested to do so. At this time, he was on extended paid leave, which had been agreed between the parties. The claimant wished to review, amend and print some documents and needed access to do so. On attending site, when the claimant tried to access the toilets, he realised that his pass had been deactivated. This had been deactivated on 19 December 2019 on the authority of Mr James Fox, who did not attend to give evidence to the Tribunal.

149. Mr Fox had previously sent an email to HR on 29 October 2019 which asked what was "*the master plan?"* about the claimant [P820]. His unsworn statement referred to this being about planning to mitigate any threats to the respondent that the claimant posed, as he was concerned about his behaviours and worried about the safety of the site, including possible product adulteration. We accept that explanation.

150. The claimant had attended site whilst on paid leave at unusual times, and we accept that the respondent was concerned over allowing the claimant unlimited access whilst on paid leave, due to his behaviour, and as he was suffering with his mental health at the time, something acknowledged by the claimant. However, the respondent did not inform the claimant of this reason for his paid leave and the removal of his pass, but instead packaged his paid leave as a supportive measure to assist him to prepare for his grievances and Speak Up complaints. It is

understandable that the claimant felt upset by the removal of his access without any prior discussion with him. The pass was reactivated on 7 January 2020. We accept that no other employees on sickness leave or at risk of redundancy, or working their notice, had their passes deactivated during this time.

Away day on 27 January 2020

151. The respondent held an event at the Imperial War Museum, Duxford and invited staff to attend. The claimant was not initially invited because he was "*currently off sick (on leave)*" [P1228]. He found out about it from his son. The claimant was eventually informed of the event by Ms Heard, HR Advisor/Manager on 24 January 2020. The claimant attended the event, but it is clear that his union representative, Mr Burton, and Ms Wright were concerned over whether he was well enough to attend. He was allowed entry to the event but was chaperoned during the day.

Statement by Ms Cochrane during the investigation of the claimant's grievances/ Speak Up

152. CMP carried out an investigation of the claimant's complaints. During this investigation, Ms Cochrane stated to the investigator on 24 February 2020 that "*even when he was on site and not off sick, she had no idea what [the claimant] was doing*" [P2460]. We believe that this was said because the claimant was focussing his working time on his complaints and not on carrying out work for the respondent, something which the claimant admitted in evidence.

153. The claimant's employment ended on 13 February 2020. He received an enhanced redundancy payment of £81,192.55, pro-rated bonus and holiday pay, £1,000 towards career support, a leaving gift up to £700 and enhancement to his pension of £90,210.80.

154. The claimant contended that his role had been readvertised after he had left, but accepted during evidence that this was not the case.

Submissions

155. The respondent provided written submissions totalling 50 pages and was given the opportunity to address the panel orally. The claimant addressed us orally on his case.

156. In brief, the Respondent contended that it is not sufficient merely to show detriment has occurred, but that this was caused by some act or deliberate failure to act on the part of the employer. It was necessary to consider whether there was a reason for any detriments which was "*properly separable*" from the protected disclosures. The employer bears the burden of proving on the balance of probabilities that the act, or deliberate failure, was not on the grounds that the employee had done the protected act, meaning that the protected act did not materially influence the employer's treatment of the claimant.

157. For the automatic unfair dismissal case to succeed, the protected disclosure must have been the reason or principal reason for the dismissal (rather than being a material factor as for the detriment claim). It relied upon the case of Kuzel v Roche Products Limited [2008] IRLR 530, for the proper approach to the burden of proof.

158. For the ordinary unfair dismissal case, we were referred to Williams v Compair Maxam Limited [1982] IRLR 83, where the EAT set out guidance for determining whether a dismissal for redundancy was fair under section 98(4) ERA 1996.

159. The claimant's submissions in brief were that the sexual harassment of Miss Suckling formed a large part of the background to this case. He had a very

good and long work record with the respondent prior to this and had worked in almost every department. This showed the effect of the sexual harassment on him since, prior to this, the respondent would not have wanted to let him go. Redundancy was not an attractive option to him as it only equated to approximately one year's pay with overtime. The respondent owed a duty of care to Miss Suckling and had failed them.

160. The respondent had not followed its own procedures, Ms Cochrane (who had not attended to give evidence and he had not had the opportunity to question her) had consistently failed to act. Senior executives, including Mr Wingate, had lied to him.

161. The claimant also went through some of the detriments to emphasise what had happened to him. He confirmed that he had no faith in the respondent and that his life had been ruined.

LAW

Detriment for making a protected disclosure

162. Section 47B of the Employment Rights Act says that: "*A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*"

163. The test for whether a detriment was done '*on the ground that*' the worker has made a protected disclosure is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistleblower. This is a different test to the test for automatic unfair dismissal because of a protected disclosure (referred to below), where the focus is on the reason or the principal reason for dismissal.

164. In a complaint of detriment, section 48(2) ERA provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. Where the claimant can show that there was a protected disclosure, and a detriment to which he was subjected by the respondent, the burden will shift to the respondent to show that the detriment was not done on the ground that the claimant had made a protected disclosure.

165. A 'detriment' arises in the employment law context where, by reason of the act(s) complained of, a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL.

166. The concept of 'detriment' is very wide, and a detriment can exist if a reasonable worker would or might take the view that the action of the employer was, in all the circumstances, to his detriment. 'Detriment' can include general unfavourable treatment and there is no test of severity that the Tribunal must apply.

167. However, there must be a causal link between the detriment and the fact that the worker made a protected disclosure.

168. Tribunals can draw inferences as to the motivation of the person subjecting the worker to a detriment.

Automatic unfair dismissal for making a protected disclosure (section 103A ERA)

169. A dismissal is 'automatically' unfair if the reason or principal reason is that the person dismissed has made a protected disclosure (s103A).

170. Section 103A of the ERA provides that "*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."

171. A Tribunal can draw an inference as to the real reason for the dismissal in coming to its decision.

Unfair dismissal

172. It is for the employer to show the reason for the dismissal and that it is either for a reason falling with section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee. The respondent asserts that the claimant was dismissed for reason of redundancy.

173. Redundancy is a potentially fair reason falling within section 98(2) ERA. Section 139(1)(b)(i) ERA provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

174. Section 139 ERA asks two questions of fact. The first is whether there exists one or more of the various states of affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have diminished or ceased. The second question is of causation: whether the dismissal is wholly or mainly attributable to that state of affairs.

175. Where the employer has shown a potentially fair reason for the dismissal, section 98(4) ERA states that the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with the equity and substantial merits of the case.

176. In Williams v Compair Maxam Ltd [1982] ICR 156, the Employment Appeal Tribunal laid down matters which a reasonable employer might be expected to consider in making redundancy dismissals:

176.1. Whether the selection criteria were objectively chosen and fairly applied;

176.2. Whether employees were given as much warning as possible and consulted about the redundancy;

176.3. Whether, if there was a union, the union's view was sought;

176.4. Whether any alternative work was available.

177. However, when determining the employer's reasonableness, the Tribunal should not impose its own standards and decide whether the employer should have behaved differently. Instead, the question is whether the decision of the employer to dismiss lay within the range of conduct which a reasonable employer could have adopted. The Tribunal should also keep in mind that the matters outlined in Compair Maxam are not a strict checklist and that a failure of the employer to act in accordance with one or more of these principles does not necessarily lead to the conclusion that the dismissal was unfair. The Tribunal must look at the circumstances of the case in the round.

178. Employers have a great deal of flexibility in defining the pool from which they will select employees for dismissal. Employers need only show that they have applied their minds to the problem and acted from genuine motives. Provided the employer has genuinely applied its mind to who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it. Where the issue of alternative employment is raised, it

must be for the employee to say what job, or what kind of job, they believe was available and give evidence to the effect that he would have taken such a job as this is something that is within their primary knowledge.

Conclusion

179. In reaching our conclusions we have considered carefully the evidence before us, the legal principles set out above, and the written and oral submissions made by the parties. The following conclusions are made unanimously.

180. In light of our findings of fact as set out above, we find that the claimant was subjected to the following detriments as outlined in the agreed list of issues:

180.1. He was given notice to move onto the LENS shift pattern on or around 10 May 2019;

180.2. His email access was removed from 30 October 2019 until 4 November 2019;

180.3. His access pass was removed on 23 December 2019 to 7 January 2020;

180.4. He was not initially invited to the Duxford away day;

180.5. His emails were intercepted and redirected between 1 November 2019 and 20 July 2020;

180.6. Ms Cochrane said that "*even when he was on site and not off sick, she had no idea what [the claimant] was doing*" on 24 February 2020.

181. We do not find that the claimant was subjected to the other detriments relied upon by him for his whistleblowing detriment complaints.

182. There was no evidence that Ms Cochrane sought to close the claimant's job role, nor that she orchestrated the claimant's move to the LENS shift pattern. We accept that it was intended that all engineers were being moved onto LENS in

order to better support production, something that the respondent wished to focus on.

183. There was again no evidence that Ms Cochrane arranged for Mr Weir to bully and harass the claimant by "*forcefully demanding he had to do the LENS role at a meeting on 11 June 2019*". This was denied by Mr Weir, and we accept his evidence. In any event, the claimant's recollection that Mr Weir punched the table, was not witnessed by Mr Burton, who said that Mr Weir appeared flustered.

184. We found no evidence that Mr Weir had instructed shift managers (namely Charlie Mills) to force the claimant to cover production on 3 July 2019. Whilst we note that Ms Mills informed the claimant that on 15 July, when his notice of shift change kicked in, the claimant should go to production and not training on MERPS, we do not find that Mr Weir instructed her to tell the claimant this. We accept that the claimant believes that they were working together to get him to do this, as they had attended the same university and were friends. However, we found no evidence that there had been any sort of collusion between the two to ensure that the claimant worked in the production area. We find that the managers were trying to ensure that engineers were generally working in the production area and that this was common to all engineers within the claimant's department.

185. The email from Ms Cochrane to the claimant dated 17 July 2019 was not aggressive. It did not indicate that the claimant was under formal attendance management, but explained that the claimant was on informal attendance management. In light of the claimant's considerable sickness absence, and that he had already been told that he was on informal attendance management in his return to work interview with his line manager, we do not consider that this was a detriment. Anyone with this level of attendance would have been subjected to at

least informal attendance management. Even if this was a detriment, we consider this to have been unrelated to the claimant's protected disclosures. Rather, this was a reasonable management response to the amount of absence the claimant had had.

186. We do not find that Mr Lees was aggressive towards the claimant at a meeting in early December 2019. We accept that Mr Lees was frustrated, as Mr Burton's evidence made clear, and that Mr Lees queried the claimant's need to be on site. However, Mr Burton did not witness aggression, and this was denied by Mr Lees. Mr Burton said that Mr Lees was abrupt but cordial and this is supported by the investigation carried out by CMP. Even if the querying of the claimant's attendance on site amounted to a detriment, we find that there was no causal link between this and the claimant's protected disclosures.

187. It was clear that the claimant had been provided with details of the assistance available to him when at risk of redundancy and/or once working his notice. The fact that the claimant failed to engage in this support does not mean that he was deprived of it. It was open to the claimant to obtain the support on offer. Even if the IT issues experienced during the redundancy process affected his ability to directly take part, which we do not accept to be the case, we are satisfied that the claimant was aware of the existence of this support and could have accessed this or requested further support at the time.

188. The claimant was unsuccessful in his application for NEBOSH training, but we do not find that this was due to any blocking of his application by Ms Cochrane or his line managers. We accept the evidence of Mr Jay that there was a fair process undertaken to decide who to offer the limited places to which was not aimed at those in the claimant's team. We also accept his evidence that line

managers were not asked for consent until the applicants had successfully been selected.

189. There was no evidence that the respondent blocked the claimant's application to work at ATS Automation in or around September 2019. We accept the evidence that recruitment was placed on hold in the UK and there was no evidence on which to base the allegation that the claimant had been denied work for this contractor because the respondent had asked them to block him.

190. In any event, had any of the above amounted to detriments, which we do not accept, this was not in any way influenced by the claimant's protected disclosures.

191. Whilst we accept that the claimant was subjected to the detriments set out in paragraph 180 above, we have to consider the reason for the act or deliberate failure to act on the part of the employer and whether this was materially influenced by the fact that the claimant had made protected disclosures. Dealing with each in turn:

192. The respondent gave notice to the claimant that he was required to work on the LENS shift pattern on 10 May 2019. This notice was given to all engineers within the claimant's team who did not work on the LENS shift. There were some exceptions to this, for those with a flexible working request which had been granted, or as reasonable adjustments for employees with health conditions. The claimant was given every opportunity to make an application for flexible working and was even offered assistance to do so. Further, he was referred to OH to obtain medical evidence on whether he could work on the LENS shift pattern and was requested to provide such evidence from his GP. He failed to do so. Whilst we accept that he was given notice to work on LENS pattern, we accept that he never

actually did so, having been given project work by his managers which prevented him from ever working on the LENS pattern of shifts. In any event, for completeness, we do not accept that the reason for the request to work on the LENS pattern was influenced in any way by the protected disclosures the claimant made.

193. The claimant's IT access had been disrupted between 30 October and 4 November. We accept that this was part of a wider disruption suffered by a number of the respondent's employees. We do not find that this was linked in any way to the claimant's protected disclosures.

194. The cancellation of the claimant's access pass between 19 December 2019 and 7 January 2020 amounted to a detriment. No other employees who had been given notice of termination of redundancy had their passes cancelled. However, when considering the reason for the cancelling of his access pass, we accept that the respondent was concerned over the claimant's behaviour during the redundancy process, including him attending site at unusual times. Also, that the claimant was on paid leave from work. We therefore accept that the respondent has proved on the balance of probabilities that the reason for the cancellation of the claimant's access pass was not influenced in any way by the claimant's protected disclosures.

195. Whilst the claimant was not initially invited to attend the respondent's away day in January 2020, he did ultimately attend and was not blocked from attending. We accept that the failure to initially invite him and the chaperoning of him around the site, were detriments to which he was subject. However, we do not find this was in any way linked to his protected disclosures. This treatment was because of concern about the claimant's behaviour in recent months and his mental health

at the time. The latter was clearly shared by his union representative who queried whether he was well enough to attend. Therefore, this was not on grounds that the claimant had made protected disclosures.

196. The claimant's incoming emails were redirected by the respondent, which amounts to a detriment. The respondent has shown that the reason for this action was because of the claimant's increasing tendency to copy in senior executives not related to the claimant's employment. The claimant accepted in his evidence that his behaviour was wrong, and that he should have been disciplined. We therefore find that the reason for the redirection was not in any way linked to the claimant's protected disclosures, but his behaviour, which we find was properly separable from his protected disclosures.

197. We accept that, as part of the investigation carried out by CMP, Ms Cochrane did say at P2460 that "*even when [the claimant] was on site and not off sick, she had no idea what he was doing*". We find that this was a statement of fact, since at the time, the claimant's own evidence was that he was not focussing on work, or indeed carrying out his role. Instead, he was focussing on his Speak Up and other complaints to the respondent. Therefore, we accept that there were legitimate grounds for Ms Cochrane stating this to CMP, and that this statement was not influenced in any way by the claimant's protected disclosures.

198. Therefore the claimant's claim for detriment for having made protected disclosures fails and is dismissed.

199. Turning to the claimant's dismissal, we have to consider what the reason or principal reason for the claimant's dismissal was. We find that the respondent has proved that the reason for the claimant's dismissal was redundancy. This is

evidenced by the fact that all engineers were placed at risk of redundancy and there was a reduction in the number of engineers required at the respondent's site.

200. We do not accept that the reason or the principal reason (if more than one) for the respondent's dismissal and/or selection for redundancy was because he made protected disclosures. There was a genuine redundancy situation which affected all engineers at the respondent's Ware site. The claimant did not apply for alternative posts, nor provide additional information to increase his scores for the available posts in the selection exercise. He had even confirmed that his preference was to be made redundant. On his own evidence, he had not performed his role properly for over a year before the redundancy was announced, following the treatment of his fiancée, Miss Suckling. We find that there was no causal link between the protected disclosures and the claimant's dismissal.

201. We considered carefully the claimant's belief that Ms Cochrane had orchestrated his redundancy in light of his protected disclosures, and that she was behind the detriments that happened to the claimant. However, we found no evidence to support this. The evidence we heard and saw proved on the balance of probabilities the reason for the claimant's dismissal and treatment, which were not related to, and were properly severable from, his protected disclosures. Therefore, his automatic unfair dismissal claim also fails and is dismissed.

202. Finally, we considered whether the claimant's dismissal was generally unfair. Having found that the genuine reason for dismissal was redundancy, which is a potentially fair reason, we have to consider whether the decision to dismiss was reasonable in all the circumstances in accordance with section 98(4) ERA.

203. We note that the respondent consulted with the claimant and warned him of the need to make redundancies. The pool for selection was reasonable in the

circumstances, since it included all of the Senior Engineer Technicians working at the respondent's Ware site.

204. The claimant indicated a preference to leave by reason of redundancy, which he did not seek to withdraw prior to the selection having been carried out.

205. The selection of who obtained the available alternative employment, carried out by means of a scoring process, was also appropriate in the circumstances and was fairly carried out by Mr Morrison and Mr Smith. The scores were independently carried out, calibrated at a meeting and, in the case of the claimant, were slightly increased, although the claimant was still one of the lowest scorers and so was made redundant.

206. Alternative employment was considered, but the claimant did not apply for any alternatives which were available and provided no information to support any such application.

207. We consider that a fair redundancy procedure was followed.

208. We find that dismissal was within the range of reasonable responses in this case and that the dismissal for reason of redundancy was fair and reasonable in these circumstances.

209. It was clear to us that the claimant clearly feels very strongly about the way he has been treated by the respondent, and genuinely believes that he was subjected to detriments for raising the fact that his fiancée was sexually harassed, and that this also led to his redundancy. We acknowledge that the claimant appeared to be an honest witness, who has been substantially affected by the harassment of his fiancée, and his perceived failure by the respondent to act in accordance with its policies and procedures.

210. We can understand the claimant's mistrust of the respondent, since there were some occasions when actions were legitimately put in place for reasons unrelated to the claimant's protected disclosures, but for which the respondent failed to inform the claimant. For example, when they cancelled the claimant's access pass or redirected his emails. This failure to inform him has fuelled the claimant's impression that the respondent is untrustworthy and that the reasons for his treatment were related to his protected disclosures. We do not find that to be the case, but an open dialogue may well have avoided some of the claimant's concerns about the trustworthiness of the respondent.

211. The claimant's actions in raising his complaints has in any event resulted in a change to the respondent's policies in dealing with allegations by non-employees working on site against employees of other organisations also working on the respondent's sites. This is an achievement, and whilst it does not affect his claim, will hopefully ensure that there will not be such a delay in the future in removing an alleged perpetrator from site.

212. As a result of our findings, all of the claimant's claims are dismissed and therefore, the case management hearing listed in respect of remedy on 29 April 2024 has been vacated.

Employment Judge Welch
Date: 1 February 2024

JUDGMENT SENT TO THE PARTIES ON

..1 February 2024.....

FOR THE TRIBUNAL OFFICE

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