EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr M Bell	Wincanton plc

Heard at: **By CVP** **On: 28-30 October 2020**
26 November 2020 (deliberations)

Before: **Employment Judge Davies**
Ms N Downey
Mr K Smith

Appearances
For the Claimant: **In person**
For the Respondent: **Mr C Kelly (counsel)**

RESERVED JUDGMENT

1. The claims of being subjected to detriment for making a protected disclosure and for carrying out activities as a health and safety representative by being singled out to attend training alone on 18 November 2019 are well-founded and succeed.

2. The remaining claims are not well-founded and are dismissed.

REASONS

Technology

1. This hearing was conducted by CVP (V - video). The parties did not object. A face to face hearing was not held because it was not practicable and all the issues could be dealt with by CVP.

Introduction

2. These were claims of being subjected to detriment for making protected disclosures and/or for performing functions as a health and safety representative brought by the Claimant, Mr Bell, against his employer, Wincanton plc. The Claimant represented himself. The Respondent was represented by Mr Kelly, counsel.

3. There was an agreed file of documents and everybody had a copy. On the first day the Respondent asked to add three new documents. The Tribunal admitted one by agreement. We refused to admit evidence in the form of a rota. It was only of peripheral relevance and the Claimant identified other evidence that he would need in order to challenge the accuracy of the rota. We admitted evidence in the form of an unnamed, unsigned and undated note, apparently of reasons for referring the Claimant to a disciplinary hearing. The Claimant said that his only objection was to the lateness of the document and he agreed that he could prepare any questions about it overnight. However, we indicated that very little, if any, weight could be attached to the document. None of the witnesses giving evidence had written the document nor could they give any evidence about who did or in what circumstances.

4. The Tribunal heard evidence from the Claimant and from Mr Spurr (Transport Manager), Mr O'Loughlin (Business Change Lead), Mr Stott (Contract Health and Safety Manager), Ms Breen (Shift Operations Manager) and Ms Reece (People Assistant) for the Respondent.

The Claims and Issues

5. The Claimant brings complaints of health and safety and whistleblowing detriments. They were recorded by EJ Maidment following a preliminary hearing on 19 June 2020. EJ Maidment recorded that the health and safety complaints are reliant on s 44(1)(b) of the Employment Rights Act 1996 only. EJ Maidment recorded the protected disclosures, health and safety activities and detriments alleged by the Claimant in a series of tables, which are annexed to this judgment.

6. The issues for the Tribunal to decide are:

Protected disclosure claims

6.1 What did the Claimant say or write? [See Annex]
6.2 In any or all of these, was information disclosed which in the Claimant's reasonable belief tended to show that:
  6.2.1 a person had failed to comply with a legal obligation to which he was subject;
  6.2.2 the health or safety of any individual had been put at risk; or
  6.2.3 that any of those things were happening or were likely to happen, or that information relating to them had been or was likely to be concealed?
6.3 If so, did the Claimant reasonably believe that the disclosure was made in the public interest?
6.4 If protected disclosures were made, was the Claimant, on the ground of any protected disclosure, subject to detriment by the employer as set out in the attached Annex?

Health and safety claims

6.5 Was the Claimant carrying out the functions of a health and safety representative within s 44(1)(b) of the 1996 Act in his actions set out in the attached Annex?

6.6 If so, was he on the grounds of his performance of functions as a health and safety representative subjected to the detriments set out in the Annex attached?

The Facts

7. The Tribunal made the following findings of fact. The Claimant started working for Wm Morrison Supermarkets plc ("Morrisons") as an HGV Driver in November 2016. In November 2018 there was an election for union officials. One of the Claimant's colleagues, Mr Midgley, was elected as both shop steward and health and safety representative. Rather than Mr Midgley taking up both posts, the Claimant was appointed health and safety representative. There was some dispute about this subsequently, but by June 2019 the union confirmed that the Claimant had been elected at the last election and remained health and safety representative.

8. During 2019, preparations were being made for a transfer of the transport operation in which the Claimant worked from Morrisons to the Respondent, under the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE"). Shortly before that took place, on 30 August 2019, the Claimant sent Mr Spurr an email entitled "The legal requirement." He said that it was a legal requirement for union-appointed health and safety representatives to be consulted before any changes were made to health and safety policies and procedures in the workplace. Their health and safety policies and procedures changed in 4 days' time and no consultations had taken place with the health and safety representatives. Wincanton had held meetings with transport management but not the health and safety representatives. The Claimant asked Mr Spurr to consider this as a stage 1 grievance. The Claimant relies on this email as the first protected disclosure he says he made, Disclosure A.

9. The TUPE transfer took place on 3 September 2019. At that stage, Mr Spurr was the Transport Manager for the J41 site, where the Claimant was based. On any day, there would be two Shift Managers reporting to him, along with a Planning Manager. Ms Breen was one of the Day Shift Managers. Reporting to the Shift Managers were four Team Managers, who dealt with the drivers on a day-to-day basis.

10. Mr Spurr gave evidence that when he received the Claimant's email of 30 August 2019 he spoke to him about it. That was not disputed. Mr Spurr also spoke to Ms Eanor, HR Manager, and they agreed the Claimant should meet Ms Stewardson, the Respondent's Group Health and Safety Manager. Ms Stewardson was at the J41 site on 5 September 2019. When the Claimant got back to the depot from a delivery run on 5 September 2019, Mr Spurr met him at the entrance to the transport office and took him to meet Ms Stewardson. The Claimant had not known about this in advance.

11. Meanwhile, and unknown to the Claimant, two of his colleagues were conducting a petition about his role as health and safety representative. Mr Shaw was a Scheduler working in the Transport Office. Mr Carter worked as a Yard Controller. They were not managers but the Claimant saw them in a supervisory capacity. The petition was a typed document on Union headed paper and said,

"We the Unite The Union members of Transport J41 Wakefield wish to submit a vote of no-confidence of the health + safety rep Mick Bell for days. Here are the names and signatures of the members who want this vote." Mr Shaw and Mr Carter were apparently asking colleagues who were Unite members to sign the document. It appears they were doing this in the transport office. The document was signed by more than 20 people. The Claimant found out about the petition when he left his meeting with Ms Stewardson and walked into the yard. A colleague told him what had been happening.

12. The Claimant's complaint to the Tribunal is that the Respondent organised, facilitated or did not prevent the petition. This is said to be Detriment 1. In his evidence the Claimant said that Mr Shaw organised the petition, but he believed that managers must have known it was happening. Mr Spurr said that he did not know the petition was taking place. He sat in a different area behind a partition wall, and it was pure coincidence that he took the Claimant to meet Ms Stewardson at that time. He said that this was a Union matter and nothing to do with the Respondent. The Tribunal accepted Mr Spurr's evidence that he did not know about the petition at the time.

13. Mr Spurr also gave evidence that he knows the Claimant is someone who takes an interest in health and safety issues and that he was not in the least upset or put out by the Claimant's email of 30 August 2019. He did not change his behaviour to the Claimant as a result of the email. On the contrary, he spoke to the Claimant straightaway and liaised with Ms Eanor, leading to the meeting between the Claimant and Ms Stewardson. There was no dispute that this meeting took place and it was consistent with Mr Spurr's evidence that he was not put out by the Claimant's email, rather he took it seriously. The Tribunal accepted Mr Spurr's evidence that he did not change his behaviour to the Claimant as a result of the 30 August 2019 email and that he did not organise the petition because the Claimant sent the email.

14. The Claimant was very upset when he found out about the petition. That night he emailed Mr Spurr, copied to Mr Crossfield and Ms Eanor. He said that drivers had told him that when they clocked into work that day Mr Shaw and Mr Carter had approached them asking them to sign a petition calling for his removal as health and safety representative. He suggested that Mr Spurr should feel free to ask any driver who had worked that day and to check the CCTV of the office for evidence. He posed the question why were two members of transport office staff "perpetrating such a demeaning act of bullying and harassment against a health and safety rep." He also asked how he was going to be able to work for those two members of the transport office staff in future and how he was going to be able to deal with the embarrassment and hurt the situation had caused. He suggested that Wincanton office staff were organising a petition to remove him in the first week they took over the contract. He asked Mr Spurr to cancel the site health and safety inspection he was due to perform the next day, indicating that it was the last thing he needed.

15. The following day, 6 September 2019, the Claimant emailed Ms Eanor, copied to Mr Spurr and the Union. The email was headed. "Subject access request and GDPR complaint." The subject access request was to obtain a copy of the petition. The GDPR complaint was that the Respondent's employees had given

the Claimant's name and position as health and safety representative to all the drivers who were asked to sign the petition. The Claimant said that this was personal information identifying him was held by the company and was used for malicious purposes. The Claimant also requested that Mr Shaw and Mr Carter were removed from their office duties until the situation was dealt with. The Claimant's complaint to the Tribunal is that the Respondent failed to take this grievance seriously. This is said to be Detriment 2.

16. A Team Manager called Mr Linstead held investigation meetings with Mr Shaw and Mr Carter on 16 and 17 September 2019 respectively. Ms Reece, an HR administrator, was present and took notes. The Tribunal did not have the full notes because in each case the second page (of three) had been destroyed. Ms Reece gave evidence about that. She confirmed that both meetings had taken place, that she had attended, and that she had made the notes. She explained that the Respondent's practice is to scan the paper documents and save the electronic versions to the relevant personnel files. The originals are then destroyed. These documents had been scanned on 10 October 2019. It appeared to Ms Reece that there had been a mistake, in that the notes were double-sided but single-sided scanning had been carried out. The Tribunal accepted that straightforward explanation. We noted that some of the missing information was contained in Mr Linstead's typewritten note of his investigation (see below). That said that Mr Shaw had told Mr Linstead that Mr Midgley was upset about the Claimant being the health and safety representative because there had been no ballot to elect him. Mr Midgley had instructed Mr Shaw to carry out the petition, which was done in the transport office area. Mr Carter also told Mr Linstead that Mr Midgley was upset about the Claimant being the health and safety representative. He was helping Mr Shaw in asking Union colleagues if they would like to sign the petition papers.

17. On 9 October 2019 Mr Linstead interviewed Mr Midgley. Mr Midgley told him that he was not aware anything like this was being done at all. Mr Linstead typed up his conclusions and recommendations the same day. He concluded that Mr Shaw and Mr Carter carried out a Union petition on company time by asking Union colleagues if they would sign a petition to have a new ballot to elect a health and safety representative. Mr Linstead felt this was against company and Union procedures. He recommended that Mr Shaw and Mr Carter should both receive a recorded conversation for carrying out the petition in company time in the transport office. He recommended that further Union business should be carried out in the full knowledge of the Respondent's senior managers and HR personnel.

18. On 10 October 2019 the Claimant emailed Ms Eanor, copied to Mr Spurr and the Union, asking for an update on his subject access request, GDPR complaint and grievance. He said that he had submitted a grievance on 5 September 2019 alleging bullying and harassment. Five weeks later he still had not been interviewed or received an outcome letter. Ms Eanor replied the same day. She referred to an email she had sent on 10 September 2019 telling the Claimant that his grievance about his colleagues' conduct would be investigated fully (the Tribunal did not see a copy of that email, but we did not understand the Claimant to be disputing that it was sent). Ms Eanor said that the investigation had been

concluded and invited the Claimant to an outcome meeting on 14 October 2019 to be conducted by Mr Linstead.

19. Meanwhile, on 7 October 2019, the Claimant had emailed Mr Stott, copying in a number of managers. He asked a specific question about the accident procedure and added "PS Upcoming Wincanton induction… I believe this training involves some H & S SWP procedures training. Please could the safety reps be consulted on this b4 it is trained out." This is said to be Health and Safety Activity D. Mr Stott replied promptly dealing with the initial query and adding, "Yes there is a training programme in place to ensure all drivers know the processes to keep them safe on a daily basis. I am happy for you to see it before the training starts." The Tribunal did not see any reply from the Claimant.

20. On 11 October 2019, the Claimant emailed Mr Stott to say that the petition he had told him about had been accepted by the Union, so he was no longer the health and safety representative. He said that it had been a genuine pleasure meeting Mr Stott and wished him luck with his new job. Mr Stott replied the next day to say that he was really sorry to hear about it and to thank Claimant for his help while doing the role. The Claimant also emailed Mr Spurr, Ms Breen, Mr Linstead and others on 12 October 2019 to tell them that the petition was "a huge success" and that he was no longer the health and safety representative. At that stage there was no written confirmation or notice from the Union to the Respondent that the Claimant was no longer the health and safety representative. The Claimant sent a further email on 19 October 2019 to Ms Eanor, Mr Spurr, Ms Breen, Mr Linstead and others updating the position. He said that until the forthcoming union election he *would* still be the health and safety representative for the day shift.

21. The grievance outcome meeting took place on 14 October 2019. Ms Reece was again in attendance and took notes. Mr Linstead told the Claimant that a full investigation had been carried out and that he believed there was a case to answer about the petition. The grievance had been closed. The Claimant indicated that it was far from ideal that in his role in the transport office Mr Shaw still decided what job the Claimant did. He also said that the five weeks taken to deal with the grievance was excessive. Mr Linstead promised the Claimant an outcome letter. Two weeks later, the Claimant emailed Ms Eanor and Mr Spurr to say that he still had not received a grievance outcome letter, so he was emailing to appeal. He said that his grievances had not been taken seriously. There had been no grievance meeting for him to put his complaint to a manager or tell the company the outcome he wanted. It had taken five weeks to investigate the complaint, despite there only being two people involved both of whom worked in the same office as the grievance manager. He said that the outcome was that nothing had changed: he still worked for two people who had maliciously used his personal information.

22. A stage 1 grievance outcome letter was sent on 29 October 2019. Mr Linstead confirmed his conclusion that there was "a case to answer" and that this would be dealt with via company procedures. Mr Linstead did not give evidence to the Tribunal. However, the Tribunal was not persuaded that Mr Linstead did not take the grievance seriously. We noted that it was not initially described as a grievance by the Claimant. Nonetheless, Mr Linstead was appointed and spoke

formally to the two employees who conducted the petition by 16 and 17 September 2019. They pointed at Mr Midgley as being behind it. Mr Linstead spoke to Mr Midgley about 3 weeks later. A few days after that he met the Claimant. His recommendation was that there was a disciplinary case to answer for the people who conducted the petition. On balance, the Tribunal was satisfied that in the circumstances Mr Linstead took the grievance seriously. There was no evidence before the Tribunal suggesting that Mr Linstead was aware of the Claimant's 30 August 2019 email to Mr Spurr.

23. Mr Spurr was appointed to deal with the grievance at stage 2. He met the Claimant on 1 November 2019. Ms Eanor was also present. The Claimant summarised his complaints about the delays and lack of initial meeting with him. Dealing with the petition itself, he said that it was done in the transport office and that managers in the office "had to know" what was happening. He also objected to his name being on the form. He asked specific questions, including whether Wincanton was informed by the Union that the petition was going to take place and whether Wincanton gave permission for the petition to be completed in the transport office. The Claimant repeated his concern that he was still working for Mr Shaw as scheduler and said that he wanted both Mr Shaw and Mr Carter removing from the transport office. Mr Spurr apologised for the delays to date and said that he would go away and investigate.

24. On 8 November 2019 the Claimant emailed Mr Spurr and Ms Eanor attaching a redacted copy of the petition. In his evidence to the Tribunal Mr Spurr said that he had seen an unredacted copy of the petition. It is not clear where he got it from or when.

25. In mid-November the Claimant saw a notice on the wall in the transport office about the Wincanton induction course for drivers. His evidence to the Tribunal was that he took it that his request to Mr Stott to consult the health and safety representatives before rolling out the induction course had been refused, since induction courses were already being conducted. That is said to be Detriment 6. Further, he said that he was singled out to attend the full day course on his own. Other drivers had attended in groups of 5 to 8. He attended on his own on 18 November 2019. That is said to be Detriment 7.

26. Mr Stott gave evidence about this. He was the Contract Health and Safety Manager. He had only started working for Wincanton on 9 September 2019. He became aware that the Claimant was one of the health and safety representatives at the J41 site and a key contact for him in his role. He arranged to spend time with him "out on the road" on 2 October 2019. When he saw the Claimant's email of 7 October 2019 he replied immediately agreeing that he was happy for the Claimant to see the content of the training programme in advance. He thought that was what the Claimant meant by wanting to be consulted. By that point the training materials had already been created by the Wincanton central training team. This had taken place before Mr Stott started with Wincanton. Mr Stott suggested to Mr Cresswell, the Driver Trainer at J41, that the Claimant should attend the very first session on 22 October 2019. That was done with the health and safety representatives at Wincanton's other Morrisons site and meant that the representatives could feed in their observations before other colleagues were trained on the materials. However, despite this being the

plan, the Claimant did not end up going on the first batch of training sessions. Mr Stott said that the Claimant was invited but it was a while before he was available so he ended up attending on 18 November 2019. In cross-examination Mr Stott confirmed that he had not personally invited the Claimant to attend any session. He had been told by Mr Cresswell that Mr Cresswell had done so. He was told this when he was doing his "mop up" to ensure that everybody had been trained. Mr Stott said that other people had done the training on their own, but the two people identified did it in March 2020, quite some time after the Claimant. Mr Stott confirmed that Mr Cresswell still works for the Respondent. The Respondent had not produced evidence of any invitation to the Claimant to attend the training on 22 October 2019 or any other date, nor any evidence of his availability or non-availability to attend training on particular dates. Mr Cresswell did not give evidence to the Tribunal.

27. The Tribunal accepted Mr Stott's evidence that he did not refuse to comply with the Claimant's request for the safety representatives to be consulted before the training took place. We noted that Mr Stott immediately confirmed that he was happy for the Claimant to see the training and we accepted his evidence that he suggested to Mr Cresswell that the Claimant should attend the first session, as had been done at the other site. We found Mr Stott to be a straightforward and consistent witness. We do not make any findings about what the Respondent's legal obligations to consult were and whether they were complied with, but we could understand in practical terms that if the training had already been created, the most Mr Stott could then do was to allow the Claimant to see it in advance and include him in the first training session so that he could provide feedback before it was rolled out further.

28. Returning to the training itself, the trainer was Mr Cresswell. The Claimant was asked to sign a suite of documents. One of those was the Safe System of Work for reversing. The training document set out the main risks identified from the risk assessment associated with reversing. It summarised the PPE requirements and safety instructions and set out a method. The first two bullet points of the method were:

    - before arriving at store, ALWAYS familiarise yourself with the Store risk assessment. Ensure you are aware of the potential hazards – **remember it may have changed since the last time you were there.**
    - **Always follow the directions of the risk assessment – it is written that way for a reason, if you cannot, report it to the transport office and seek assistance.**

29. At the end of the document the Claimant was asked to sign the employee training declaration to confirm: (1) that he had been shown, trained and understood the safe system of work procedures; (2) that he agreed to follow the safe system of work documented at all times; and (3) that he had been made aware of and understood the risks associated with the task and the consequences if the Safe System of Work was not followed.

30. The Claimant signed but added, "risk assessments not available to drivers." He explained in his evidence to the Tribunal that in his view the drivers did not have risk assessments available to them for the store delivery points. He said that he had spent two years as a health and safety representative trying to warn the company of the risks of not having them and was extremely annoyed that he and

the other drivers were now being asked to, "falsify a health and safety document on behalf of the company." This is said to be Detriment 8. The Claimant raised this concern with the Respondent at a later date (see below). In the meantime, we note that there were "Store Cards" for the stores, which the Respondent said were the relevant risk assessments. The Claimant said that they were little more than maps for getting to the store and disputed that they were suitable and sufficient risk assessments.

31. Mr O'Loughlin, the Contract Manager, said that the Store Cards were the store risk assessments and that they were suitable and sufficient. However, he accepted in cross-examination that in his personal and professional opinion they could be better. That was identified at the due diligence stage. Mr O'Loughlin said that that was one of the reasons Wincanton was brought in. The Cards were fine and fit for purpose but he would like them to be upgraded and better. That was the plan. However, the first priority had been to get all 500 drivers inducted and trained.

32. Mr O'Loughlin also expressed the view that in asking drivers to sign the Safe System of Work, the Respondent was not asking them to confirm that the risk assessments were suitable or sufficient, it was asking them to confirm that they would follow the documented safe system of work at all times. He pointed out that the safe system of work told the drivers that if they could not follow the risk assessment they should contact the transport office and seek advice. The Tribunal agreed with that view. We did not think that by asking him to sign the safe system of work the Respondent was asking the Claimant to falsify a document.

33. On 27 November 2019 Claimant had an accident reversing an HGV at the Ridings store. He reported the accident to Mr Shaw and completed relevant documentation there and then. The Team Manager countersigned it. The Claimant wrote that he was reversing up a steep hill in the rain to get onto the loading bay. The wheels were slipping and there was a problem with the clutch that caused the vehicle to become unpredictable. He reversed it into the blue car. He recorded that he had smashed the back windscreen and damaged the boot of that car.

34. On 29 November 2019 Mr Spurr met the Claimant for the stage 2 grievance outcome meeting (relating to the petition). He said that they had not originally understood the Claimant was raising a grievance about the petition and again apologised for the length of time it had taken to deal with. Mr Spurr said that Wincanton was not aware or informed that the petition was taking place. It was only when the Claimant raised it that they had any information. The Claimant said that managers must have been aware because it was being done out in the open at the counter in the transport office. Mr Spurr said that he was not aware. The Claimant again expressed disbelief that no team managers were aware of what was going on. He said that Mr Spurr could look at the CCTV. Mr Spurr said that the CCTV only looked at the counter not the whole office. The Claimant asked if the two people involved had been asked where they conducted the petition. Mr Spurr said the Claimant had specifically asked if Wincanton was aware, he had confirmed Wincanton was not. The Claimant had now asked about team managers. Mr Spurr said that a full investigation had been

conducted and that any conduct issues would be dealt with, although the individuals involved would not be removed from the office. Towards the end of the meeting Claimant commented on the fact that Wincanton had taken over the contract, and asked if all this was to get him out. Mr Spurr said that it was not and added that the Claimant gave them some great ideas, giving one example that had recently been implemented. Mr Spurr wrote to confirm the outcome on 11 December 2019.

35. The Claimant contends that Mr Spurr failed to take his grievance seriously. Mr Spurr denied that. He was asked in cross-examination about his evidence that a full investigation had been carried out. He confirmed that he did not carry out any investigations himself, but just relied on Mr Linstead's investigation. That meant the only information he had was the brief notes of the investigations with Mr Shaw, Mr Carter and Mr Midgley, together with Mr Linstead's one-page summary document. Mr Spurr was asked whether he had noted when reviewing the investigation that Mr Shaw and Mr Carter were saying the opposite to what Mr Midgley was saying. He said that he had not noticed that at the time. He agreed that he understood that part of the Claimant's grievance was that it was not credible that managers were unaware of the petition: they must have been in the transport office when it was happening. He also understood that the Claimant was suggesting that CCTV should be reviewed to check this. He was asked why he had not reviewed the CCTV and he said that it was because it only pointed at the counter not the whole office. Mr Spurr confirmed that there would have been a manager in the transport office at all times. He was asked if he had found out which manager was in the office on 5 September 2019 and he said that he had not. When asked about the delay in dealing with the grievance Mr Spurr explained that they had had "31 years of being Morrisons." They were very busy dealing with policy and procedure changes. Mr Spurr said that it was "absolutely not" the case that the Claimant's grievance was not taken seriously because of the email he sent on 30 August 2019. The Tribunal found that the Claimant's grievance was not taken seriously, in the sense that it was not properly considered and investigated. However, we accepted Mr Spurr's evidence that this was not linked to the 30 August 2019 email. Instead it seemed to the Tribunal most likely, as reflected in Mr Spurr's witness statement, that this was really regarded as "union business" and an "internal union matter" and that Mr Spurr was conscious that the Respondent could not and should not interfere with a decision of union members about who they wanted as their representative. Of course, that was not quite what the Claimant was complaining about in his grievance, but the Tribunal found that this was really what lay behind Mr Spurr's rather superficial approach to the grievance.

36. The Tribunal noted that Mr Linstead had recommended that Mr Shaw and Mr Carter should receive a recorded conversation. Mr Spurr confirmed in his evidence to the Tribunal that that had taken place although he did not know which Team Manager had held the conversation. The next day in her evidence Ms Breen indicated that she had been told overnight that no recorded conversations had in fact taken place. Mrs Reece had checked the files and there was no record of a recorded conversation. That is plainly not acceptable. However, the Tribunal accepted that Mr Spurr was unaware of this until after he had given his evidence, and that he genuinely believed that a recorded conversation had taken place until that point.

37. On 12 December 2019 the Claimant emailed Mr Linstead asking to see him about some health issues, and referring to stress/anxiety. They met on 13 December 2019.

38. The Claimant appealed against the stage 2 grievance outcome in an email to Ms Eanor on 17 December 2019. He began by saying by way of background that the week before the Respondent took over the operation he had submitted a health and safety "grievance" to complain that the Respondent was about to change health and safety procedures and had not consulted with the health and safety representatives. He said that two days after the transfer, he arrived in the office and was whisked into a meeting with a senior Wincanton health and safety manager "to discuss my grievance." While that was happening upstairs two of the Respondent's office staff were conducting a petition to remove him as health and safety representative downstairs. He then set out his grounds for appeal. The first was that he simply did not accept that in an office of four people a petition could be conducted, with around 50 drivers being asked to sign the petition over a four-hour period, and the two managers in the office knew nothing about it. The second essentially was about the inadequacy of the grievance investigation: the Claimant pointed out that no drivers had been asked where they signed the petition, none of the managers in the office had been asked if they knew it was being conducted, no one had spoken to the Claimant and no one had reviewed the CCTV. He also complained about the delay and the lack of an initial grievance meeting with him.

39. The grievance appeal went on to allege that the Claimant had been subjected to "further detriments" because of his position as a health and safety representative, namely (1) being required to attend the induction training on his own on 18 November 2019; (2) the fact that he and all the other drivers had been asked to sign a document stating that they would look at the "risk assessment" for every store before they delivered to it; and (3) complaints about his treatment by Mr Shaw and other managers. The Claimant labelled the second detriment "falsifying health and safety documents". He said that he had spent nearly 2 years as a health and safety representative asking the company to provide risk assessments and warning of the risks of not doing so. He said that the problem could not be solved by simply asking a driver to sign a "false statement." This was said to be Disclosure B.

40. Mr O'Loughlin was appointed to hear the stage 3 grievance. He wrote to the Claimant on 18 December 2019 inviting him to a meeting to discuss it on 3 January 2019.

41. On 23 December 2019 one of the team managers, Mr Kaye, wrote to the Claimant to say that he was still investigating the Claimant's accident at the Ridings store. As the Tribunal understood it, whenever a driver has an accident one of the Team Managers investigates. They normally decide between themselves who will investigate each accident, but sometimes they will be allocated at a team meeting if there are a number of outstanding investigations, to make sure somebody takes ownership of each one. Mr Kaye explained in his letter that he was still waiting for information and apologised for the delay.

42. On 30 December 2019 the Claimant had another incident. He was carrying out shunting duties. The shunt motor was low on fuel and he did not refuel it, which caused damage to the motor. He wrote a statement the same day in which he said that he had asked on many occasions not to be scheduled to work at 8am. On this occasion he had started at 7:45am, but there was no shunt motor available. By the time he had one, he said, "I was now late to start a job that I have specifically asked not to do." He explained that he noticed there was very little fuel in the shunt motor but thought he would just try and sort the chill yard before he refuelled. He found that the yard was a mess. He accepted that he was "guilty of forgetting to fill the shunt motor up" but said that this was because of the difficult circumstances he described, the fact he had been scheduled to do a job he had asked not to do and his medication.

43. Another of the team managers, Mr Reid, carried out an investigatory interview the same day. Mr Reid asked the Claimant about his comment that he had asked "not to be scheduled at 8am" and the Claimant confirmed that was correct. He said he had told Mr Livesey he would only do it in an emergency. Mr Reid told him this needed to go through a member of management. Mr Reid asked the Claimant how being scheduled for a job he had asked not to do was mitigation. No matter what time he started he needed to fuel up. The Claimant accepted the point but said that he was not an early riser and if he had not been scheduled to work at that time this would not have happened.

44. The stage 3 grievance meeting with Mr O'Loughlin took place on 3 January 2019. He went through the points in the Claimant's appeal with him, but the notes very much suggest that rather than asking the Claimant about them, he was answering the concerns, by reaffirming the stage 1 and 2 outcomes. They also discussed the "detriments" referred to in the Claimant's stage 2 appeal. Mr O'Loughlin said it was not unusual for someone to attend training alone because of rotas. The Claimant said that he had asked to be consulted about the training as the health and safety representative but this had been ignored. Mr O'Loughlin said that the format had been agreed in advance with the Morrisons health and safety and trainer. He said that it had not been deliberately withheld. He said he would make sure the Claimant was consulted in future. Then the Claimant said that the Respondent was expecting drivers to sign a document stating they would look at store risk assessments before attempting delivery when they did not have risk assessments for all stores. He said that they should not be asking drivers to sign the document. This is said to be Disclosure C. Mr O'Loughlin said that he was comfortable with the training. It was two stages: first getting drivers to check the assessments and then making sure they were present and updated. The Claimant asked why nothing had happened in four months. Mr O'Loughlin said that Mr Stott had been in post for four months, but had his learning period and multiple sites and was prioritising major incidents. It was in the 2020 plan to update the risk assessments and Mr O'Loughlin said he saw the Claimant involved in that. He encouraged the Claimant to liaise with Mr Stott.

45. Mr O'Loughlin wrote to the Claimant on 7 January 2020 with his stage 3 grievance outcome. That essentially reiterated what he had said at the meeting. He said that, as covered in the second stage outcome, the Respondent was unaware of the petition at the time it was happening. Mr O'Loughlin said that he was confident that the investigation had been conducted thoroughly. He

expressed the view that the CCTV would have given limited insight. He said that lone participation in a training course was not unusual and, in the Claimant's case, would have been due to shift patterns and trainer availability. The format of the training had been agreed in advance and was not withheld from the Claimant, but they would endeavour to consult with him about any future health and safety changes. Mr O'Loughlin took on board the Claimant's feedback about store risk assessments and reassured him that they would be addressed in the plan for 2020. He said that he appreciated the Claimant's contribution to site health and safety and encouraged him to continue to liaise with Mr Stott to improve the site further as he clearly had a passion for his health and safety duties. Mr O'Loughlin's evidence to the Tribunal was that they treated the Claimant formally or informally as Health and Safety representative until April 2020.

46. Mr O'Loughlin's stage 3 outcome comes across very much as a rubberstamping of the stage 1 and 2 outcomes. In cross-examination he said that he had reviewed the "pack" and spoken to Mr Spurr. It became apparent that the "pack" did not include Mr Linstead's investigation notes. Mr O'Loughlin confirmed that he had not carried out any further investigations of his own. He had reached his conclusions by re-reading the investigation notes (by which he can only have meant the notes of the stage 1 and 2 hearings) and from a conversation with Mr Spurr. He accepted with hindsight that this might give the impression that he had not taken the grievance seriously but he said that he had. He said that he had trusted the investigation and his transport team. Mr O'Loughlin was asked if he had seen the Claimant's email to Mr Spurr on 30 August 2019 and he said that he had seen it at around the time of the grievance, because Mr Spurr had shown it to him. However, he said that he did not link the grievance with it. The burden of proving the reason for any detrimental treatment is on the Respondent. Bearing in mind that burden and the shortcomings in the grievance, the Tribunal was quite satisfied that Mr O'Loughlin's approach to the stage 3 grievance was not in any way influenced by the content of the 30 August 2019 email. He was a straightforward witness in whose evidence the Tribunal had confidence. He was the person responsible for the whole Morrisons contract, working on the TUPE transfer and implementing the "Go Live." That entailed bringing 550 Morrisons employees across to the Respondent, with J41 being the second of three sites to transfer. His approach to the grievance was plainly deficient. However, the Tribunal accepted that this was not because of any concern that the Claimant had raised a concern almost 5 months earlier about whether health and safety representatives had been properly consulted. It was much more likely because he had the whole TUPE transfer and its aftermath to deal with and he wanted to deal with the appeal as quickly as possible so he simply relied on what Mr Spurr told him in those circumstances. The Tribunal found on the balance of probabilities that that was the reason.

47. Mr O'Loughlin was asked whether he had spoken to anybody about the Claimant's concern relating to the Safe System of Work and risk assessment documentation. He said that he had spoken to Mr Stott and they checked the documents. Of course, that part of the grievance had not previously been raised, so Mr O'Loughlin could not rely on Mr Spurr's response at stage 2, but, if he was again going to rely on Mr Spurr, would need to ask him about it. The Tribunal thought that was important for another reason. We noted that Mr O'Loughlin said

that Mr Spurr had shown him the 30 August 2019 email at the time Mr O'Loughlin was dealing with the stage 3 grievance. We asked ourselves whether that suggested that Mr Spurr was more concerned about that email than he admitted. However, we decided that it did not. The obvious explanation was that Mr Spurr was showing Mr O'Loughlin the email because Mr O'Loughlin was asking about the health and safety aspects of the Claimant's grievance appeal, which expressly referred to the content of the email of 30 August 2019. That is why he showed him it in January 2020. That does not cause us to question his evidence that the email played no part in his approach to the stage 2 grievance a month earlier.

48. On 7 January 2020 the Claimant emailed Mr Stott to say that the Union still had not terminated his position as health and safety representative and that he was still the legally appointed health and safety representative for J41. He said that Mr O'Loughlin wanted him to deal directly with Mr Stott on health and safety matters. On 9 January 2020 the Union's Regional Officer wrote to the HR Department at J41 to notify them that Mr Midgley had been elected as Health and Safety representative for the period ending 31 March 2021.

49. On 9 January 2020 when the Claimant arrived at work he checked the shunt rota. He saw that his name had been crossed out for the next two weeks and a colleague told him that he had been asked to carry out the late shunt role for the foreseeable future. The Claimant emailed the four Team Managers to say that he had been performing the role of late shunt for more than 12 months and that it was distressing to be removed from a job like this. He asked what job he would be doing from next week.

50. Ms Breen replied the next morning. She said that she had changed the shunt rota. She said that Claimant had copied her in on some emails during the last couple of weeks. She had picked up on a concern he had raised during a meeting. She said that he had expressed that he did not wish to shunt: "you scheduled me to do a job I have asked not to do." She said that this statement led her to believe that the Claimant no longer wished to be part of the pool of relief shunters and she had made changes accordingly. She added that there was no at a specific role of late shunt. Relief shunters covered all aspects of the shunt operation, encompassing 6:00am, 6:30am, 7:00am, 8:00am and late shunt. She apologised if she had misinterpreted the Claimant's request not to undertake shunt duties and said that if he would like to be added back to the relief shunt to pool she was more than happy to do this with effect from 20 January 2020. The Claimant replied on 11 January 2020. He said that he did not believe it would be possible for Ms Breen to read the minutes of the meeting she had quoted and conclude that he did not want to be included on the shunt rota. He said that the minutes were clearly in regard to a specific 8am shunt job.

51. The two exchanged further emails. Ms Breen continued to apologise and to offer to add the Claimant back into the pool of relief shunters, though noting that she could not guarantee a 9:30am start time. The Claimant continued not to accept her explanation. Eventually Ms Breen suggested that they speak in person.

52. It was the Claimant's case that Ms Breen deliberately removed him from the relief shunt rota and changed his start and finish times because he had

complained in his written stage 3 grievance appeal sent to Ms Eanor on 17 December 2019 and at the meeting with Mr O'Loughlin on 3 January 2020 that the company was falsifying health and safety documents. This was said to be Detriment 3. The claimant accepted in cross-examination that on several occasions since the TUPE transfer he had been scheduled for an 8:00am start. Sometimes he had seen a manager and it had been changed. He had started at 8:00am on a handful of occasions. He would also swap roles so he was not doing the particular shunting job he had been doing when the refuelling incident took place.

53. In her evidence Ms Breen said that the first time she saw the email to Ms Eanor was in preparation for the Tribunal hearing. Further, any concerns the Claimant raised with Mr O'Loughlin on 3 January 2020 were not repeated to her. She might have known that the Claimant was due to attend a meeting with Mr O'Loughlin, because of her role in relation to scheduling drivers, but she would not have known what the nature of the meeting was. The first time she saw the notes of the meeting was in preparation for the Tribunal hearing. She said that she changed the Claimant's duties on 9 January 2020 because she read the accident investigation pack associated with the incident on 30 December 2019 and believed the Claimant no longer wanted to work the relief shunt duty. In cross-examination Ms Breen confirmed that she was unaware of the Claimant's allegation that drivers were being made to falsify health and safety documents at the time she made the changes to the rota. The Tribunal accepted Ms Breen's evidence. There was nothing to suggest she had been aware of the email to Ms Eanor, the notes of the stage 3 grievance meeting or the allegation about falsifying health and safety documents at the time. Mr O'Loughlin's evidence to the Tribunal was that he had no knowledge or input into any change of rota.

54. The Tribunal noted that Ms Breen accepted with hindsight that it would have been better to speak to the Claimant before she changed the rota. In part, the explanation for not doing so was because she was not in work between 30 December 2019 and 6 January 2020. She made the changes somewhere between 6 and 8 January 2020 and the Claimant was not in work on 7 or 8 January 2020. Nonetheless, Ms Breen agreed that it would have been better to wait to speak to the Claimant before making the changes.

55. As well as finding out about the changes to the rota on 9 January 2020, the Claimant also found out that day that he was to face a disciplinary investigation into the accident on 27 November 2019. The Claimant says that instigating these disciplinary proceedings was Detriment 4. The process lasted 5 months, at the end of which no action was taken against the Claimant in respect of 27 November 2019. He says that this was Detriment 5. He says that both of these happened because of his complaints about falsifying health and safety documents on 17 December 2019 (email to Ms Eanor) and 3 January 2020 (meeting with Mr O'Loughlin). The Claimant suggested to Mr O'Loughlin in cross-examination that the whole point of the disciplinary process was to remove somebody who had complained about health and safety. Mr O'Loughlin vehemently disagreed. He said that this would never be done under his stewardship and that it would be immoral.

56. Mr Kaye held a disciplinary investigation meeting with him the following day, 10 January 2020. Mr Midgley accompanied the Claimant and Mrs Reece attended to take notes. At the outset of the meeting Mr Kaye asked the Claimant to clarify what had happened. He said that it was seven weeks ago and asked whether there was a risk assessment for the Ridings store. Mr Kaye said that he would be asking the questions. The notes record Mr Bell asking Mr Kaye not to raise his voice. Mr Kaye asked the Claimant again to clarify what had happened. The Claimant said that his memory was not great, but he had arrived at the store and went down the steep ramp. He was struggling to reverse back due to the steep hill and the rain. The clutch overload warning light came on and as he was reversing the vehicle surged backwards due to the clutch problem. His vehicle hit a car that was parked in the loading area. He then told the store, told transport, filled out an accident card then came back and filled out a defect form for the vehicle and an accident report. He did a drugs test and that was it. Mr Kaye asked detailed questions about the incident, the conditions and the photos taken by the Claimant at the time, to whom he spoke and so on. The Claimant confirmed that he had let Mr Shaw know at J41 within 20 minutes. The vehicle had been "defected off" when he returned to the transport office. Mr Kaye asked the Claimant why he continued with the rest of his jobs with a clutch issue. The Claimant explained that he thought it was safe to use the vehicle for the rest of the jobs. The warning light had gone off and the clutch issue was because of the steep hill at the Ridings store.

57. Mr Kaye then spoke to Mr Shaw on 10 January 2020. Mr Shaw confirmed that he had spoken to the Claimant after the accident. He told him that he would pass it on to a team manager and did so. Mr Kaye asked if the Claimant had said it was a defect or to report it as a defect and Mr Shaw said, "No."

58. The Claimant had some time off work in January 2020. It appears that he returned to work on 30 January 2020 and Mr Kaye conducted a further disciplinary meeting with him. Mr Kaye told the Claimant that he would be forwarding the accident on 27 November 2019 to a disciplinary for gross misconduct. He told him that all the details would be included with the invitation letter. The Claimant also had a meeting with Mr Reid on 30 January 2020. Mr Reid told him that he had concluded his investigation into the incident with the shunt on 30 December 2019. He said that the Claimant was being put forward the disciplinary because this had caused avoidable damage to the shunter and the Claimant had failed in his "statutory" requirement to fuel up. The Tribunal did not see any letter inviting the Claimant to a disciplinary hearing or setting out disciplinary allegations.

59. The Claimant says that Ms Breen instigated the disciplinary proceedings against him. Her evidence was that it was not her job to arrange or recommend this, it was the job of the investigation manager. She was aware of the decisions, but they were made by Mr Kaye and Mr Reid. She agreed with their decisions. In evidence to the Tribunal she said that she understood that on 27 November 2019 the Claimant had taken a vehicle that he believed to have a defect onto the public highway and that this was potentially gross misconduct. She explained that she had had a conversation with Mr Kaye about this shortly before the Claimant was invited to a disciplinary, because Mr Kaye reported to her. Mr Kaye explained the investigation and what had happened. Mr Kaye had decided

that the Claimant had potentially committed gross misconduct and she agreed. The Tribunal accepted Ms Breen's evidence that the decision was Mr Kaye's, but she agreed with it.

60. Mr Spurr was appointed to conduct the disciplinary hearing. It took place on 14 February 2020. Mr Midgley accompanied the Claimant. Mr Spurr started the meeting by telling the Claimant that the allegations he was facing were: failing to follow the correct reporting procedure on 27 November 2019 and failing to conduct his statutory duties, specifically refuelling the shunt motor on 30 December 2019. The Claimant was warned that these things constituted potential gross misconduct and that his continued employment was at risk.

61. The Claimant made an opening statement. He pointed out that Mr Kaye had blamed the delay in progressing the 27 November 2019 incident on the time it took to carry out the investigation, but that the disciplinary pack included only witness statements taken seven weeks after the event and evidence that the vehicles clutch was checked nine weeks after the event. There was no other evidence in the pack that Mr K did not have on 27 November 2019. The claimant said that when he had asked Mr K the Ridings store risk assessment during the investigatory interview, Mr Kaye had raised his voice. He said that he had no explanation of why his conduct was potentially gross misconduct and no explanation of which part of the reporting procedure he had failed to follow. He pointed out that Mr Kaye had not spoken to Mr Hobman, who handled all the relevant paperwork on the claimant's return to site after the accident. The claimant spoke in detail about the events of 27 November 2019. He accepted that he had not filled in the "bump card" correctly. He said that he could not remember to whom he reported the vehicle defect, but pointed out that drivers were not able to complete a defect report themselves. He said that it was possible it had been decided that there was no need to defect the vehicle, because the clutch overload warning sign was not a warning that the vehicle was defective, but a warning that the driver needed to stop doing something. Mr Spurr adjourned the meeting to a later date. He told the claimant that it was the accident reporting procedure in the Safe System of Work that he was said not to have followed and said that he would give the claimant time to look through that. He also said that he needed to go through the claimant's opening statement. He knew that the claimant wanted a conclusion but he said that adjourning was the right thing to do under the circumstances.

62. In the event, the hearing did not restart until 9 March 2020. That was partly because Mr Midgley passed away and partly because the claimant emailed Mr Spurr on 21 February 2020 asking to delay the hearing until the week commencing 9 March 2020 while the Environmental Health officer reviewed the Ridings store (see further below).

63. In the meantime, the claimant emailed Ms Eanor on 16 February 2020 to ask for a copy of any written notification from Unite the Union informing Wincanton that his position as health and safety representative had been terminated. Ms Eanor replied on 21 February 2020 to say that she had not received any written confirmation.

64. As indicated above, the claimant raised his concerns about safety at the Ridings store with the local Environmental Health Officer. He contacted her in late January 2020. She held meetings and reported on 20 February 2020 that she was looking at preventing parking in certain bays and separating pedestrians. The pandemic led to some delay, but in July 2020 the EHO did indeed take action to prevent parking in certain bays.

65. Returning to the chronology, on 24 February 2020 Mr Cresswell asked the claimant to sign a document entitled "Wincanton one day training course" relating to the training he attended on 18 November 2019. The document listed a number of elements said to have been covered by the course, including "nine key principles." The claimant was being asked to sign to acknowledge that he had received a comprehensive induction for Wincanton Morrisons consisting of the things listed. The claimant had not seen a document entitled "nine key principles" and he asked about it. Mr Cresswell showed him a brochure containing the company's nine key principles of health and safety. He asked for a copy but Mr Cresswell would not let him have one because he refused to sign the induction document.

66. The claimant emailed Mr Stott about this on 24 February 2020. He said that he had been denied a copy of the Wincanton brochure i.e. key principles for managing health and safety at work. He asked for a copy and signed off his email as the health and safety representative for days. This was said to be Health and Safety Activity E.

67. Mr Stott replied later that day, having spoken to Mr Cresswell. He said that there was no issue at all with the claimant having a copy of the principles, "however as I understand you have not yet signed to say you have received the one-day induction, I would need you to sign the standalone form that comes with the book to say you have received a copy." He also commented on the claimant's email sign off, asking if he had been officially instated as health and safety representative because Mr Stott had not heard anything. The claimant replied at some length the following day to say that he had updated Mr Stott on 7 January 2020 and that he had not been terminated by a letter from the union as the law required.

68. The claimant sent Mr Stott another email on 26 February 2020. He said that the form Mr Stott wanted him to sign did not just require him to state that he had attended an induction course. It required him to state that he understood at least 20 policies about which he had been instructed three months ago. He said that he had refused to sign two Safe System of Work documents, relating to store risk assessment and store maps. He also took issue with certain of the nine key principles, which he had evidently now seen. Mr Stott replied later that day addressing a number of the points made. He said that they were actively working through missing risk assessments and all the existing ones to renew and update them. Mr Stott also explained that he had been in direct contact with the Unite Sheffield office and had been told that the claimant was not currently the health and safety representative for them. [We note at this stage that Mr Stott emailed Mr Jessop at Unite on 30 March 2020. He said that Ms Eanor had confirmed to him that Wincanton had not yet received a letter confirming the claimant's status in relation to being Health and Safety representative. Mr Stott asked for an

update. Mr Jessop wrote on 2 April 2020 to say that the claimant was no longer a representative of Unite the Union at J41. There had been a re-election and Mr Midgley had been elected as Health and Safety representative. In fact, Mr Midgley had sadly passed away and there was to be a further re-election.]

69. Part of the claimant's complaint is that Mr Stott and Mr Cresswell refused his request for a copy of the nine key principles document. This was said to be Detriment 9. The Claimant said that it was done because of Health and Safety Activity E. The claimant said that he was being required to sign the induction form in order to be provided with the key principles document. In cross-examination he was asked to read Mr Stott's email of 24 February 2020 again. Having done so, he realised that Mr Stott was not asking him to sign the induction form, but was asking him to sign a standalone form that came with the brochure. It was evident to the Tribunal that the claimant had not realised this at the time. Mr Stott told the Tribunal that drivers were asked to sign the form so that the company had a record that it had provided them with the brochure. If they did not sign, he would simply write, "issued such and such date" and that went on the file. The Claimant was provided with a copy of the document.

70. As noted above, the disciplinary hearing with Mr Spurr reconvened on 9 March 2020. Mr Spurr asked the claimant to go through the events of 27 November 2019 as best he could and asked him detailed questions about his actions. He did the same with the shunting incident on 30 December 2019. Mr Spurr then adjourned to consider what had been said and to reach a decision. They agreed to reconvene on 17 March 2020.

71. The Tribunal noted that the claimant raised a grievance on 11 March 2020. That raised a number of the complaints raised in these proceedings. He also complained about the ongoing disciplinary process and said that he was still not clear what he was being accused of and what gross misconduct he was supposed to have committed. The detail of the grievance does not form part of the claim before the Tribunal. We do note that when Mr Kaye was subsequently questioned (with Mr Reid) about his role in investigating the 27 November 2019 accident, he gave an account of his actions and the Claimant's that differed significantly from the documentary evidence that was before the Tribunal, including the notes of the investigatory meeting. This indicated to the Tribunal that Mr Kaye had a negative attitude towards the Claimant. His description of the Claimant's conduct and responses was certainly not a fair reflection of the investigation meeting as recorded in the notes.

72. The disciplinary hearing did not reconvene on 17 March 2020. As the Tribunal understood it the delays were in part because of the pandemic and in part because of absences. The hearing re-convened on 20 April 2020. The claimant and his union representative made a number of points and Mr Spurr then took time to reach his decision. The outcome was that there was no case to answer in respect of 27 November 2019. Mr Spurr concluded that the claimant did indeed contact the transport office as per the Safe System of Work. He reminded him that going forward he must report any incident and wait for further advice from a manager and should not drive a defective vehicle on public highways. In respect of 30 December 2019 Mr Spurr concluded that the claimant did fail to conduct his statutory requirements because he did not refuel the shunt motor as trained.

He issued a verbal warning for 12 months, backdated to 14 February 2020. Mr Spurr confirmed the outcome by letter dated 27 April 2020.

73. In his witness statement, Mr Spurr said that he would have given any driver a verbal warning for failing to refuel. He thought there had been a breakdown in communication on 27 November 2019. Nobody got back to the Claimant. They should have sent a mechanic. Mr Spurr said that the Claimant was not the subject of a "witch hunt". The incident at the Ridings led to someone's car being written off and the incident with the shunter caused significant damage to company equipment. Such things have to be investigated. Mr Spurr accepted that the disciplinary procedure took too long, but he said that there were a number of reasons for that, including Mr Midgley's death and the pandemic and lockdown. It was not deliberately drawn out to make the Claimant suffer. Mr Spurr said in answer to questions from the Tribunal that he became involved with the disciplinary process when it was put forward for a hearing on the basis of potential gross misconduct, in January or February 2020. HR asked him to do it. It was Mr Kaye's decision to go to a disciplinary. Mr Spurr's evidence to the Tribunal was that he did not see the Claimant's email to Ms Eanor on 17 December 2019 until he saw it in the Tribunal file. He knew in January that the Claimant was appealing his stage 2 grievance outcome to Mr O'Loughlin and would have known their meeting was coming up on 3 January 2020. He did not know then that the Claimant was saying he was being asked to falsify health and safety documents. He found out about that subsequently but he did not know when. Mr Spurr said in cross-examination that it was "absolutely not" the case that the Claimant was subjected to a 5 month disciplinary process in relation to the accident on 27 November 2019 to punish him for raising concerns about falsifying health and safety documents (disclosures B and C). The Tribunal accepted Mr Spurr's evidence about the reasons why the disciplinary process was conducted as it was from his perspective. We also accepted his evidence that he did not know about the email to Ms Eanor. He came to know that the Claimant was saying that he was being asked to falsify health and safety documents. Most likely, he must have found out about that, at least in general terms, when discussing the stage 3 grievance with Mr O'Loughlin after 3 January 2020.

74. It was evidently Mr Kaye's decision that the Claimant should be referred for disciplinary proceedings in respect of the accident on 27 November 2019. As noted, the Tribunal had concerns based on what Mr Kaye said about this when he was interviewed for the Claimant's subsequent grievance. That suggested a lack of objectivity in his approach to the matter. That concern was reinforced by a lack of clarity from Mr Kaye about what precisely the alleged gross misconduct was. However, the Claimant's complaint was not about Mr Kaye's role. In any event, there was no evidence before the Tribunal to suggest that Mr Kaye was aware of the email to Ms Eanor, nor what the Claimant said to Mr O'Loughlin on 3 January 2020.

Legal Principles

75. Protected disclosures are dealt with in s 43A to 43L of the Employment Rights Act 1996.

76. By virtue of s 43B of those provisions, a qualifying disclosure means a 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 prescribed matters. Those include, that a person has failed, is failing or is likely to fail to comply with a legal obligation to which he is subject; that the health or safety of any individual has been, is being or is likely to be endangered and that information ending to show either of those things has been or is likely to be deliberately concealed.

77. A qualifying disclosure made to a worker's employer is, by virtue of s 43C and 43A, a protected disclosure.

78. A qualifying disclosure must involve a disclosure of information. That may include the making of an allegation, if that allegation has sufficient factual content and specificity to be capable of tending to show one of the matters listed in s 43B(1): see *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 CA.

79. The worker must reasonably believe that the disclosure tends to show one or more of the prescribed matters. A reasonable belief means that the worker must subjectively hold that belief, but that it must be, in the Tribunal's view, objectively reasonable. A belief that turns out to be wrong may therefore in principle be reasonable: see *Babula v Waltham Forest College* [2007] ICR 1026 CA. The worker must hold the reasonable belief in relation to each disclosure where there is more than one: see *Korashi v Abertawe Bro Morgannwig University Local Health Board* [2012] IRLR 4.

80. Under s 47B Employment Rights Act 1996 a worker has the right not to be subjected to a detriment by any act or deliberate failure to act done by his employer (s 47B(1)) or by a fellow worker (s 47B(1A)) on the ground that he has made a protected disclosure. Something is done "on the ground" that the worker made a protected disclosure if it is a "material factor" in the decision to do the act. That requires an analysis of the mental processes (conscious or subconscious) of the decision maker: see *Reynolds v CLFIS UK Ltd* [2015] ICR 1011 and *Mailk v Cenkos Securities plc* UKEAT/0100/17 (17 January 2018). The decision must be in no sense whatsoever because of the protected disclosure: see e.g. *Fecitt and others v NHS Manchester* [2012] IRLR 64 CA.

81. Under s 48(2) Employment Rights Act 1996, once the worker has shown that there was a protected disclosure, it is for the employer to show the ground on which any act or failure to act was done. This means that the Tribunal *may* uphold the claim if the employer is unable to show the ground on which the act was done. It does not have to do so: see *Kuzel v Roche Products Ltd* [2008] ICR 799, *Serco Ltd v Dahou* [2016] EWCA Civ 832 and *Ibekwe v Sussex Partnership NHS Foundation Trust*]2014] EAT 0072/14.

82. Health and safety detriments are dealt with in s 44 of the Employment Rights Act 1996. Under that section an employee has the right not to be subjected to any detriment by any act or deliberate failure to act, by his employer done on the ground that (among other things) he performs or proposes to perform functions as a health and safety representative. A health and safety representative is, for those purposes, a representative of workers on matters of health and safety

appointed in accordance with arrangements established under any enactment, or by reason of being acknowledged as such by the employer.

83. Pursuant to Regulation 3(3) of the Safety Representatives and Safety Committee Regulations 1977, a person ceases to be a union health and safety representative once the trade union notifies the employer in writing that the appointment was terminated.

84. Under s 48(2) Employment Rights Act 1996, it is again for the employer to show the ground on which any act or deliberate failure to act was done.

Application of the Law to the Facts

85. Applying those principles to the findings of fact, the Tribunal's conclusions on the legal issues were as follows.

Disclosure A

86. The Claimant made a protected disclosure on 30 August 2019 (Disclosure A). The terms of his email to Mr Spurr are set out above. He was disclosing information about the requirements to consult health and safety representatives and the fact that the Respondent had not held meetings with the health and safety representatives (at J41 at least) in advance of the TUPE transfer and the associated policy and procedure changes. Although the Claimant did not express his witness statement in terms of his reasonable belief or the public interest, the Tribunal was quite satisfied that he genuinely believed that this tended to show either the breach or likely breach of a legal obligation (to consult) or a risk or likely risk to health and safety (arising from that failure). The Tribunal does not need to decide whether there was a breach of a legal obligation to consult. The terms of the Health and Safety at Work Act 1974 and the Safety Representatives and Safety Committees Regulations 1997 (referred to by Mr Kelly in his excellent closing submissions) are not crystal clear. The Tribunal was satisfied that it was objectively reasonable for the Claimant to believe that the Respondent was legally obliged to consult all health and safety representative (or at least health and safety representatives at the J41 site specifically). It was also reasonable for him to believe that failure to do so was likely to put health and safety at risk. Further, given that the underlying business of the Respondent was a substantial delivery operation involving HGVs on public roads, the Tribunal was also satisfied that the Claimant believed that the disclosure was in the public interest and that this was reasonable. He did not need to use those words in his evidence. It was palpable from his passionate approach to health and safety in the documents and before us.

87. In writing his email of 30 August 2019 the Claimant was also performing functions as a health and safety representative. The Tribunal does not need to address s 44(1)(b)(i) because we were quite satisfied that at all material times the Claimant fell within s 44(1)(b)(ii) in any event: he was a representative of workers on matters of health and safety at work by reason of being acknowledged as such by the Respondent. The findings of fact include the emails and correspondence about the Claimant's position as elected health and safety representative. The Claimant told the Respondent that he was no longer the representative on 11 October 2019 but corrected that on 19 October 2019.

After that, he continued to be treated as health and safety representative. Mr Stott was not told immediately of the revised position, and he appears to have believed for a period that the Claimant was not the health and safety representative, but that does not mean that the Claimant was not acknowledged as such by the Respondent overall during that period. Mr O'Loughlin said in terms that the Claimant was treated as health and safety representative until April 2020. The email of 30 August 2019 was clearly written in the Claimant's capacity as a health and safety representative.

Detriment 1

88. The Respondent, in the sense of its senior managers at J41, did not organise, facilitate or fail to prevent the petition on 5 September 2019 and, in any event, there was no link between the petition and Disclosure A. For the reasons explained in the findings of fact, the Tribunal accepted that Mr Spurr did not know about the petition until the Claimant told him and that his behaviour towards the Claimant did not change as a result of Disclosure A. There was no evidence before the Tribunal that any other manager was responsible for organising or facilitating the petition or failed to prevent it. The Tribunal could see the Claimant's point of view that whichever manager was in the office on that day must have been aware of what was happening, but that is not quite the same as deliberately acting or failing to act because of Disclosure A, and, in any event, there was nothing to suggest that any other manager was aware of Disclosure A.

89. The evidence was that Mr Shaw and Mr Carter organised the petition, and the Claimant appeared to accept that. If Mr Shaw and Mr Carter had organised the petition on the ground that the Claimant made Disclosure A, the Respondent would have been liable for that. But that was not the Claimant's case and there was no evidence that Mr Shaw or Mr Carter knew about the disclosure.

90. The same reasoning applies if Disclosure A is regarded as a Health and Safety activity rather than a protected disclosure. The complaints relating to Detriment 1 therefore fail.

Detriment 2

91. For the reasons explained in the findings of fact, Mr Linstead did not fail to take the Claimant's grievance about the petition seriously. Mr Spurr and Mr O'Loughlin did. The burden of proof was therefore on the Respondent to prove the reason for that. As explained in detail in the findings of fact, the Tribunal was satisfied in each case that the reason was not Disclosure A (whether as a protected disclosure or as a Health and Safety activity). In Mr Spurr's case, it was really a concern not to interfere in union business. In Mr O'Loughlin's it was that he was busy and wanted to deal with the appeal quickly and relied on Mr Spurr. The complaints relating to Detriment 2 therefore fail.

Disclosures B and C

92. The Claimant did make a protected disclosure when he emailed Ms Eanor on 17 December 2019 (Disclosure B) and when he spoke to Mr O'Loughlin on 3 January 2020 (Disclosure C). The part of the disclosures relating to the allegation of falsifying documents is not an essential part of the protected disclosure. In his email to Ms Eanor the Claimant wrote that the Respondent had

not consulted health and safety representatives before changing health and safety procedures. He said that he had spent 2 years as health and safety representative asking the company to provide risk assessments and warning of the risks of not doing so. That alone was the disclosure of information, which the Tribunal found in the Claimant's reasonable belief tended to show a risk or likely risk to health and safety and was made in the public interest. As before, it was clear that the Claimant believed that a lack of suitable risk assessments tended to show a risk or likely risk to health and safety. The Tribunal found that this belief was objectively reasonable. While insisting that the Store Cards were suitable and sufficient in their evidence, the Respondent's witnesses acknowledged that they needed to be improved. It was Mr O'Loughlin's professional opinion that they "could be better" and he said that it was the intention to improve them. That was why the Respondent was brought in. In those circumstances, the Claimant reasonably believed that his disclosure tended to show a risk or likely risk to health and safety. Further, just as with Disclosure A, he reasonably believed that the disclosure was in the public interest. Disclosure B was therefore a protected disclosure. Much the same is true of Disclosure C. The Claimant discussed the content of Disclosure B, and repeated the same points, at his meeting with Mr O'Loughlin. For the same reasons, this amounted to a protected disclosure.

93. The Claimant was clearly performing functions as a health and safety representative when he made Disclosure B and Disclosure C, so they are also to be regarded as Health and Safety activities.

Detriment 3

94. The Claimant was subjected to a detriment by being removed from the relief shunt rota without warning or consultation on 9 January 2020. That is so regardless of whether this was his usual role or whether he could contractually be required to do different work. He was a regular member of the relief shunt rota, he wanted to do that work and he was removed from it unannounced. That is detrimental treatment.

95. However, for the reasons explained in detail in the findings of fact, and having regard to the fact that the burden of proof is on the Respondent, Ms Breen did not remove the Claimant from the rota on the ground that he had made Disclosure B or Disclosure C (whether as protected disclosures or Health and Safety activities). She was unaware of those matters. The claims relating to Detriment 3 therefore fail.

Detriments 4 and 5

96. Instigating disciplinary proceedings in respect of the 27 November 2019 accident and subjecting the Claimant to a disciplinary process that lasted until 20 April 2020 in respect of that accident, and ended with a finding of no case to answer, was obviously detrimental treatment.

97. However, for the reasons explained in detail in the findings of fact, and having regard to the fact that the burden of proof is on the Respondent, neither the instigation of the disciplinary process, nor the conduct of it by Mr Spurr, was done on the ground that the Claimant made Disclosure B or C (whether as protected disclosures or Health and Safety activities).

98. In respect of Detriment 4, the Claimant's complaint is against Ms Breen. She did not instigate the disciplinary proceedings; Mr Kaye did. Ms Breen agreed with his decision, but that was because she thought the Claimant might have committed gross misconduct by driving a defective vehicle on a public road, not because he had made Disclosure B or C. She was unaware of those matters. Although the complaint is not against Mr Kaye, the Tribunal noted that there was simply no evidence that Mr Kaye knew about the Disclosures. The claims in respect of Detriment 4 therefore fail.

99. In respect of Detriment 5, Mr Spurr did not subject the Claimant to a witch hunt. The disciplinary process was protracted, and there were shortcomings, not least the lack of clarity about what exactly the alleged gross misconduct was. But Mr Spurr was not acting or deliberately failing to act in his conduct of the disciplinary process on the ground that the Claimant made Disclosure B or C or to punish him for making allegations that the Respondent was falsifying documents. Far from it. The lack of clarity in the allegations was the responsibility of Mr Kaye, not Mr Spurr. Mr Spurr took care to clarify them from his perspective at the start of the hearing. He responded to the Claimant's points about this as the disciplinary progressed. There were a number of reasons why the process took so long – Mr Midgley's death, the Claimant's own request so that the EHO could inspect the Ridings and report back, the pandemic, and people's availabilities – but throughout Mr Spurr appears to have been listening conscientiously to what the Claimant said, taking account of his points and trying to deal with the matter fairly. That is reflected in the eventual outcome. He found that there was no case to answer in respect of this accident. Had this been a witch hunt or an attempt to get rid of the Claimant, that would have been a surprising outcome. It is also to be remembered that there was a second disciplinary allegation, about which the Claimant makes no complaint, and in respect of which he was issued with a warning. Even then, Mr Spurr took care to backdate it to the date of the first disciplinary hearing. The Tribunal was quite satisfied that none of Mr Spurr's conduct was done on the ground that the Claimant made Disclosure B or C. The complaints in respect of Detriment 5 therefore fail.

Health and Safety Activity D

100. In emailing Mr Stott on 7 October 2019 asking for the health and safety representatives to be consulted before the health and safety procedures training was rolled out, the Claimant was plainly performing a function as a health and safety representative (Health and Safety Activity D). We noted that this was before he told Mr Stott that he was no longer the health and safety representative.

Detriments 6, 7 and 8

101. For the reasons set out in the findings of fact, the Tribunal found that Mr Stott did not refuse to comply with the Claimant's request. He did all that he practically could at that stage by agreeing that the Claimant could see the training before it took place and suggesting to Mr Cresswell that the Claimant should attend the first session, as the health and safety representatives at the other site had done. The training had already been created and health and safety representatives had been consulted (albeit not the J41 representatives). The Claimant did not reply to say that this was inadequate or was stopping him from performing his

role as health and safety representative. The Tribunal was quite satisfied that, to the extent that Mr Stott did not agree to consult the Claimant or the other health and safety representatives before the training was rolled out, this was not done on the ground that the Claimant was performing or proposing to perform functions as a health and safety representative in Health and Safety Activity D. It was done because the training had already been created centrally and with the involvement of health and safety representatives, and it was now too late to carry out further consultation. The complaint in respect of Detriment 6 therefore fails.

102. The Tribunal was satisfied that the Claimant was subjected to a detriment by being singled out to attend the training on his own on 18 November 2019, instead of in a group. For the November training, nobody else attended alone. The Claimant's colleagues attended in small groups. Nobody spoke to the Claimant about his availability or shifts, or discussed with him when he might attend the training. He simply found out when he saw on the noticeboard that he was the only person scheduled to attend the training on his own in November. That is in the context that Mr Stott had asked Mr Cresswell to include him in the first session on 22 October 2019. The other people who attended alone did so in March, when they had missed the training in October/November for whatever reason. That is not the same as the Claimant, who was the only person to be listed for training on his own at the time it was originally being rolled out. The Tribunal was satisfied that this was detrimental treatment of the Claimant. He perceived that he was being singled out, and that was reasonable in those circumstances.

103. The Respondent did not call Mr Cresswell as a witness, although he still works for them. It did not explain why the Claimant could not attend the first training session on 22 October 2019 and it did not provide any evidence in the form of rotas or otherwise to show why the Claimant could not attend in a group with his colleagues. Nobody had discussed the Claimant's availability with him. The strong suspicion is created that this was because Mr Cresswell did not want the Claimant to make things difficult by questioning the training materials and the lack of consultation about them during the training. The burden of proving the reason why the Claimant had to be trained on his own rests on the Respondent. It has not satisfied that burden. The Tribunal therefore finds that this was done on the ground that the Claimant was performing or proposing to perform functions as a health and safety representative in Health and Safety Activity D. The complaint in respect of Detriment 7 therefore succeeds.

104. For the reasons set out in the findings of fact, the Tribunal found that the Respondent did not expect workers to falsify a health and safety document. Detriment 8 did not take place and this part of the claim does not succeed.

Health and Safety Activity E

105. The Claimant was performing functions as a health and safety representative when he asked for the nine principles document on 24 February 2020 (Health and Safety Activity E).

Detriment 9

106. However, his request was not refused. Mr Cresswell showed him the document when he asked about it, but did not provide a copy because the Claimant would not sign the sheet about induction training. Mr Stott, having spoken to Mr Cresswell, agreed to provide the Claimant with a copy of the document on the same day, but asked him to sign the confirmation that he had that specific document, so that the Respondent had a record that it had been provided to him. The Claimant did not realise that is what he was being asked to sign. In any event, he clearly was provided with a copy of the document because he wrote to Mr Stott about it in detail two days later. The Claimant was not therefore subjected to Detriment 9. In any event, on the evidence before the Tribunal, Mr Cresswell's initial refusal was because the Claimant would not sign the training document that referred to the nine principles document and Mr Stott's only stipulation was that the Claimant should sign the standalone form. The Respondent needs to have records to show that it has trained its employees and the employees are protected by signing to show which specific documents they have been provided with or trained on. Having regard to the burden of proof, and bearing in mind our decision about Detriment 7, the Tribunal was still satisfied that Mr Cresswell's initial refusal was not on the ground that the Claimant carried out Health and Safety Activity E. The emails and Mr Stott's evidence satisfied the Tribunal that this was simply about record keeping. The claim in respect of Detriment 9 therefore fails.

Employment Judge Davies
27 November 2020

Protected disclosures

No	Paragraph	What did C say or write?	Who did he say or write it to?	When?	What type of disclosure was it ERA s43B(a-f)
A	1	C wrote to R to state that R was in breach of legal duty to consult H&S rep.	Richard Spurr Transport manager.	30 August 2019	S43B(b)

Detriment

No	Paragraph	What was said or done.	Who said or did it?	When?	Which disclosure lead to the treatment?
1	2	R organised and facilitated/did not prevent an unlawful petition to be held in office to remove C as a safety rep.	I am as yet unable to discover who specifically arranged this.	3 September 2019	A
2	3	R failed to take the grievance seriously. This was a detriment.	K Linstead Team Manager R Spurr Transport Manager S O'Loughlin Contract Manager.	14 Oct 2019 17 Dec 2019 3 Jan 2020	A

[Detriment 1 is in the alternative said to be on the grounds of the C's health and safety activities as a worker representative in Disclosure A]

Protected Disclosures

No	Paragraph	What did c say or write?	Who did he say or write it to?	When?	What type of disclosure was it ERA s43B(1)(a-f)
B	8	C wrote to R by email to complain that R was falsifying health and safety documents.	HR Manager K Eanor	17 December 2019	Section (d) and (f)

C	**8**	**C met with R and said to R that R was falsifying health and safety documents.**	**Contract manager Scott O'Loughlin**	**3 January 2020**	**Section (d) and (f)**

Detriments

No	Paragraph	What was said or done.	Who said or did it?	When?	Which disclosure lead to the treatment?
3	**9**	**R removed C from his usual job role and changed his start and finish time by 5 hours to punish C for his allegation.**	**Transport Shift Manager Hannah Breen.**	**9 January 2020**	**B and C**
4	**9**	**R instigated disciplinary proceedings for an incident that had happened over 6 weeks previously to punish C for his allegation.**	**Transport Shift Manager Hannah Breen.**	**10 January 2020**	**B and C**
5	**10**	**R subjected C to a 5 month gross misconduct disciplinary procedure that became a witch hunt to punish C for his allegation.**	**Transport manager Richard Spurr.**	**10 January 2020 – 20 April 2020.**	**B and C**

[Detriments 3, 4 and 5 are in the alternative said to be on the grounds of the C's health and safety activities as a worker representative in Disclosures B and C]

Health and safety activities

No	Paragraph	What did C say, do or write?	Who did C say or write it to or what did C do?	When?	Which part of s 44(1) does C say applied.
D	**5**	**C wrote an email to R asking for health and safety reps to be consulted before new health and safety policies and procedures were implemented.**	**Health and Safety Manager Paul Stott**	**7 October 2019**	**44(1)(b). I was the health and safety rep.**

Detriment

No	Paragraph	What was said or done?	Who said or did it?	When?	Which health and safety activity does C say caused the detriment.
6	5	R refused to comply with my request and I was unable to perform my duties as a health and safety rep.	Paul Stott Health and Safety Manager.		D
7	5	R "singled out" C to attend the training on his own instead of in a group.	I am not sure yet who took this decision.	18 November 2019	D
8		R expected C and other workers to falsify a health and safety document regarding risk assessments.	The Respondents / whoever was behind the implementation of this course.	18 November 2019	D

Health and safety activities

No	Paragraph	What did c say do or write?	Who did C say or write it to or what did C do.	When?	Which part of s 44(1) does C say applied.
E		C asked for a copy of a health and safety document.	Paul Stott Health and Safety Manager.	24 February 2020	Section 44(1)(b). I was the health and safety rep.

Detriment

No	Paragraph	What was said or done?	Who said or did it?	When?	Which health and safety activity does C say caused the detriment.

9		**R refused C's request. C was unable to perform his duties as a H&S rep.**	**Paul Stott Health and Safety Manager.** **Peter Cresswell Trainer.**	**24 February 2020**	**E**