# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Langenhoven

**First Respondent:** Shropshire Council

**Second Respondent:** Mr S Brown

**Third Respondent:** Mr A Morgan

**Fourth Respondent:** Mr A McKie

**Fifth Respondent:** Mr M Seddon

**Sixth Respondent:** Mr M Barrow

**Heard at:** Birmingham Employment Tribunal (by CVP)

**On:** 10 May 2021 – 21 May 2021

**Before:** Employment Judge Mark Butler
Mr D Faulconbridge
Mrs L Evans

**Representation**
Claimant: In person
Respondent: Mr M Davies (Solicitor)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V. A face to face hearing was not held because of the ongoing pandemic and all issues could be determined in a remote hearing.

# JUDGMENT

The claimant's claims of detriments on the grounds of having made a protected disclosure are ill-founded and dismissed as against the First, Second, Third, Fourth, Fifth and Sixth Respondent.

# REASONS

Introduction

1. The claims in this case arise following the presentation of a claim form on 17 January 2020. The claimant brought a number of different complaints against a number of named respondents.

2. This claim was considered by Employment Judge Hindmarch at a Preliminary Hearing, that took place on 19 June 2020. The claim was recorded as being a claim by the claimant for having been subjected to detriments on the grounds that he had made protected disclosures.

3. There appeared to be some failings in respect of an agreed bundle of evidence. We place no blame on either party in this respect as we have not been privy to what caused these failings. The tribunal was not concerned with who was at fault at this moment in time. Both parties and the tribunal had access to the bundle produced by the respondent and that produced by the claimant. And there were no objections to their use by anybody involved. In essence the tribunal had access to two bundles of documents (with significant overlap between the two). The first bundle was one produced by the respondent, and contained circa 850 pages. The second bundle was sent by the claimant and contained some 923 pages.

4. The claimant gave evidence on his own behalf and called no further witnesses.

5. We heard evidence from respondents 2-6.

6. The hearing was impacted upon by some technical difficulties during it. Most notably was the difficulty in Mr Brown connecting to the CVP room, such that he could both hear and be heard when present on the hearing. There were other occasions where technical difficulties delayed matters. In all, the tribunal lost circa three quarters of a day due to technical difficulties.

7. We were mindful of a number of matters throughout this hearing. And took account of the Equal Treatment Bench Book in ensuring that all participants could engage in the process. Most notably was that this was a lengthy hearing being conducted remotely, the claimant is a litigant in person, and that Mr Davies made the tribunal aware of a physical impairment. Adjustments were made during the hearing accordingly.

The issues

8. The list of issues was recorded by EJ Hindmarch at the Preliminary Hearing of 19 June 2020. The issues were recorded as follows:

    a. Were the claims brought in time? And if not, should time be extended to give the tribunal jurisdiction over the claim?

b. The respondents accepted that the claimant had made a number of protected disclosures as detailed in his particulars of claim, and so this was not in dispute.
c. Did the respondents subject the claimant to detriments on the grounds that he made one or more protected disclosures. The detriments relied on by the claimant were:
    i. Failure of the first respondent to instigate its whistleblowing policy;
    ii. Exclusion of the claimant from internal meetings and emails.
    iii. Removal of duties from the claimant.
    iv. Terminating the engagement of the claimant.
    v. Not considering redeployment opportunities

9. These issues were confirmed as being the issues to be determined by the Employment Tribunal when the case was considered at a further Preliminary Hearing, this time before Employment Judge Hughes on 18 March 2021.

10. The claimant on a couple of occasions during this hearing expressed that EJ Hughes at the Preliminary Hearing of 18 March 2021 had explained that time limits were no longer an issue in this case, and that the respondents had accepted that his case was brought in time. It was explained to the claimant, having considered the record of that Preliminary Hearing that that was not the case. And that what EJ Hughes had indicated was that the respondents had accepted that the claim had been brought in time with reference to the final pleaded detriment, but that time issues remained live insofar as some of the other allegations were concerned. And this is clearly expressed by EJ Hughes at paragraph 1 of that record:

> set out in his Claim Form. The respondents accept the case was presented in time but argues that some of the five detriment allegations set out in the Order were not presented in time. That question will be determined after evidence is heard. It i

11. At paragraph 35 of the claimant's Particulars of Claim (see pp. A24-25), the claimant's pleaded case in terms of against whom each detriment was being brought was presented:

> a. First Respondent- the termination of his assignment, removal of the whistleblowing protection and loss of opportunity. At all material times, there were no issues regarding the performance of the Claimant. The Claimant carried out his duties effectively, professionally and diligently.
> b. Second Respondent, Steven Brown- the decision to terminate his assignment and exclusion from meetings relating to the commercial functions. Therefore, the Claimant suffered exclusion and loss of opportunity from this Respondent.

c. Third Respondent, Alun Morgan- Alun chaired the weekly commercial meetings on Mondays. On one occasion, Alun cancelled this meeting due to the Claimants attendance and then rearranged this meeting without informing the Claimant of the new venue. Alun also instructed the Council's IT department to deny the Claimant access to the Council's IT system to prevent download of incriminating information on the final day of assignment (30/09/2019). The Claimant suffered from exclusion from this Respondent. This Respondent also caused the Claimant loss of opportunity by insisting on his earliest termination.

d. Fourth Respondent, Andrew McKie- failure to include the Claimant in commercial discussions about the contractor claim and other commercial issues. Therefore, the Claimant suffered from exclusion from this Respondent.

e. Fifth Respondent. Mark Seddon- The Claimant made disclosures from May 2019 but was not protected by this Respondent as per council whistle blowing policy. This Respondent also failed to demonstrate how disclosures made by him was being dealt with by the Council.

f. Sixth Respondent, Mark Barrow- Mark set up a team to look at the best way to process payments and deal with disclosures made to the Head of Audit, but he excluded the Claimant from this team and associated meetings. Therefore, the Claimant suffered from exclusion and loss of opportunity from this Respondent.

12. It is with this pleaded case, and that as recorded by EJ Hindmarch on 19 June 2020 as being the list of issues, that this case proceeded.

13. We do note here that the case is not entirely clear on the pleaded case, or after consideration at the Preliminary Hearings. It is unclear in what way the claimant says the First Respondent failed in relation to its whistleblowing policy. It is unclear which meetings or emails the claimant says he had been excluded from. It is unclear what duties the claimant says were removed from him. And it is unclear what redeployment opportunities he says he was not considered for. These matters were thus a primary focus of the tribunal when reading into the case, especially with respect the claimant's witness evidence.

14. However, the claimant's witness evidence in this case provide little to no further details in these respects. The claimant's witness statement provides little evidence on the specific matters which he alleges were detriments he had been subjected to on the grounds of having made a protected disclosure.

The Law

15. Under section 47B ERA:

> "(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

16. Section 47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the

employer's treatment of the whistleblower": see **Fecitt v. NHS Manchester [2012] IRLR 64**.

17. The meaning of detriment for the purposes of public interest disclosure claims, although undefined in the Employment Rights Act 1996, closely mirrors that adopted under Equality legislation. A detriment thus will be taken to exist if a reasonable worker would or might take the view that the action or inaction of their employer was in all the circumstances to his detriment: **Ministry of Defence v Jeremiah 1980 ICR 13**, CA and **Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337, HL.

18. Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done".

Presentation of case by the claimant

19. There appears to have been a misunderstanding on the part of the claimant in relation to two key matters in this case. We address each in turn.

20. The first relates to the case that the tribunal had to determine. The tribunal was presented with the issues that it needed to determine. Yet the claimant sought to introduce evidence and cross examine on matters that were not within the scope of his case. On occasion, the tribunal was left with the impression that the claimant considered that this hearing was an appropriate forum where he could raise any wrongdoing on the part of the respondents. Whereas this would only be permitted insofar as the issues that were live in his case were concerned. This included in terms of the specific details of the disclosures he made (which were not a live issue), about decisions made by others that did not form part of this case, about the process of trying to fill the permanent roles, about the use of WSP (a contracting firm) contractors, about pay and terms of appointment of others, about settlement discussions, amongst other things. This led to a number of interjections from the tribunal, with the claimant invited to explain the relevance of such questions to the claim he had brought. And where questions were not relevant, he was asked to move onto other matters. This did also lead the tribunal, on numerous occasions, to break down and explain the claims that were brought by the claimant, to try to help the claimant understand what the relevant issues in the case were and to encourage him to focus questions on relevant matters.

21. The second misunderstanding relates to the claimant's witness statement. It is clear on the face of the Record of Preliminary Hearing of 19 June 2020 that the witness statement needed to contain all of the evidence that the claimant intended to give at this hearing. It was important that all relevant evidence was contained in the claimant's witness statement. However, the claimant, which was accepted under cross examination, mostly cut and paste his statement from his particulars of claim, with a few

minor alterations. This did not produce the necessary detail expected of a witness statement. This is further explained with reference to specific respondents below.

22. In relation to Mr Brown, there is nothing in the claimant's witness statement that explains which meetings Mr Brown excluded him from, nor in terms of what opportunities Mr Brown excluded him from. At its height, in relation to these matters, the claimant includes the following at paragraph 44a:

> First Respondent- the termination of his assignment, removal of whistleblower protection and loss of opportunity. At all material times, there were no issues regarding my performance. I carried out my duties effectively, professionally and diligently.

23. In relation to Mr Morgan, there is nothing in the claimant's witness statement that explains the specifics around the meeting that the claimant says Mr Morgan excluded him from, nor in terms of details around Mr Morgan denying the claimant access to the Council's IT system, or exclusion, or loss of opportunity by insisting on early termination. Again, at its height, the claimant includes the following at paragraph 44b:

> c. Third Respondent, Alun Morgan- Alun chaired the weekly commercial meetings on Mondays. On one occasion, Alun cancelled this meeting due to my attendance and then rearranged this meeting without informing me of the new venue. This respondent also instructed the Council IT department to deny my access to the Council IT system.
>
> Therefore, I suffered from exclusion from this Respondent. This Respondent was also made aware of irregularities relating to a payment illegally authorised by the Confirm systems administrator/Manager. He failed to take necessary action and did not instigate the councils whistleblowing policy. This respondent also caused me loss of opportunity by insisting on his earliest termination. (Volume 2 Page 107)

24. In relation to Mr McKie, there is only mention of Mr McKie in four paragraphs of the claimant's witness statement. None of which explain how Mr McKie allegedly excluded the claimant from commercial discussions. The extent of the claimant's evidence against Mr McKie is therefore the following:

> 18. As the Council officers were forced to authorise payments, despite not receiving adequate proof of delivery, I continued to raise my concerns at weekly meetings with the management team. By this time, Kier had raised a spurious claim of £7.5million which had put additional pressure on senior management team. I prepared a rebuttal of this claim which was subsequently supported by legal and professional opinion. However, Steven proceeded to act against legal opinion to seek settlement of the claim with an offer which is described by me as a gift to the contractor. The settlement was advised and supported by Andy Wilde, Andy McKie and Alun Morgan. This was seemingly done to protect the relationship with Kier, which I considered to be improper. Evidence is available in this respect (Vol 2 Page 9; Vol 3 Page 30; Vol 5 Page 1,7 & 8; Vol 6 Page 9,20,31,35,55,58,71,73,88,119,120,144,146 &148; Vol 7 Page 98 &100)

28. Hugh was subsequently suspended, and I was summoned to a meeting to extend my role and take over Hugh's functions. I sent an email to Alun, requesting clarification of my altered and enhanced role which seems to have been that of Interim Service Manager. This was immediately denied and withdrawn by Alun who advised that I step back and that Andrew McKie take on the full role of Service Manager. This was again to protect the relationship with Kier, the contractor, which I claim to be improper. Evidence is available in this respect (Volume 2 Page 62)

30. On 16 September 2019, I issued a draft payment certificate to Steven and Andrew, where I made certain statements regarding the payments to Kier. The draft payment certificate was prepared by me from information drawn from the ConfirmOnDemand system. The certificate would generally be prepared and signed off by the Service Manager but in absence the of Hugh Dannat, the responsibility of preparing the certificate was assigned to me who had best knowledge of the contract. I noted in the covering email to Andy McKie that he is at liberty to make changes but had to adhere to Council Financial regulations in doing so. Evidence is available in this respect (Volume 2 Page 142; Volume Page 35; Volume 4 Page 19; Volume 6 Page 160; Volume 7 Page 12 & 43)

31. It was my view that Andy McKie was not sufficiently informed of council financial regulations and the payment process and hence not best placed to prepare the certificate on his own. The payment certificate as issued by Andy McKie, The Fourth Respondent's certificate was substantially more than the draft certificate and had not been backed up properly. Evidence is available in this respect (Volume 7 page 43)

25. In terms of evidence contained in the claimant's witness statement insofar as it relates to Mr Seddon, there are again, only three paragraphs where there appears to be anything relevant to this part of the claim:

23. My concerns (disclosures) were acknowledged by the auditors and subsequently the Fifth Respondent, Mark Seddon (hereinafter known as Mark S) was appointed to deal with these issues. I was asked by Mark to forward all information to him. I proceeded to do this regularly. A far-reaching Audit report had emanated from these disclosures. Evidence is available in this respect (Volume 2 Page 149; Volume 3 Page 3,4,6,9,22 & 30)

24. The report seemingly notes irregularities, but no official has been accused of wrongdoing or impropriety in this regard. I believe that the Council had chosen to protect officials responsible for the irregularities and take no punitive action. It is my belief that the Council opted to protect long-serving senior staff members from accusations of impropriety by terminating my engagement.

d. Fifth Respondent. Mark Seddon- I made disclosures from May 2019 but was not protected by this Respondent as per council whistle blowing policy. This Respondent also failed to demonstrate how disclosures made by me was being dealt with by the Council.

26. And, with reference to Mr Barrow, there is little in terms of evidence in the claimant's witness statement to support the claim brought. Insofar as the claimant's evidence relates to Mr Barrow, the following paragraphs, refence Mr Barrow:

33. On the same day, I emailed Mark Seddon, raising my concerns. A significantly higher amount was later certified by Andrew against the instructions provided by Alun and the Audit department. This may have subsequently been approved by the Sixth Respondent, Mark Barrow, (hereinafter known as Mark B) all knowingly in contravention of financial regulation. Evidence is available in this respect (Volume 7 page 23)

34. On 19 September 2019, I made Mark Barrow aware that I had sent the same e-mail to the audit office as per the Council's whistleblowing policy and that I would be sending it to the office of the Chief Executive as per the policy. Evidence is available in this respect (Volume 4 Page 4)

38. On 24 September 2019, I emailed James Walton (Director of Finance, Governance and Assurance, a copy of his email to Mark. This email was acknowledged by James and confirmation was provided that all allegations would be looked into. Evidence is available in this respect (Volume 4 Page 4)

39. On 26 September 2019, Mark B responded back to me confirming that the matter was being dealt with under the Council's whistleblowing policy and that he would share the contents of the email with the necessary people.

e. Sixth Respondent, Mark Barrow- Mark set up a team to look at the best way to process payments and deal with disclosures made to the Head of Audit, but he excluded me from this team and any associated discussion. Therefore, I suffered from exclusion, diminishment of role and loss of opportunity from this Respondent. This respondent also failed to instigate the Councils whistleblowing policy

27. Given the claimant's status as a litigant in person, some leeway was given to him in the answers he provided under cross examination, and in terms of questions he asked of the respondents when he was cross examining, but only insofar as there was some connection to the evidence that he had brought. It was explained to the claimant that the tribunal had to ensure fairness to all parties in the case, and that with this in mind he would not be permitted to put forward a positive case or ask questions of matters that were too disconnected from the matters that he had raised in his witness evidence. Although, the tribunal did adopt a broad interpretation of the claimant's evidence to allow him to cross examine on matters that did fall within the case that he had brought.

28. Where the tribunal considered it appropriate, and where the claimant had not understood that there were some key issues that he had to ask questions about, then the tribunal put some questions to the respondents on his behalf. However, we were mindful of not stepping into the arena and effectively presenting the case for the claimant.

29. Against these circumstances, the tribunal does not consider that the claimant has acted vexatiously or unreasonably in the way that he has brought or conducted this hearing.

Closing submissions

30. We heard oral closing submissions from Mr Davies, on behalf of all 6 respondents, before hearing from the claimant.

31. We do not repeat the closing submissions in their entirety here. However, their full content have been considered.

32. In short, on behalf of the respondents, it was submitted that other than the first respondent and the fifth respondent, none of the other respondents had knowledge that the claimant had made protected disclosures in advance of any of the treatments which the claimant alleges are detriments on the grounds of whistleblowing. And therefore could not have been the cause of any such treatments. And further, that none of the alleged detriments were detriments in any event, and were no more than unjustified grievances by the claimant.

33. The claimant's closing submissions were similar to his cross-examination approach and appeared to focus on matters not always relevant to his case, which did require some interjection. However, the claimant did submit that his involvement with the Auditing Department must have given persons knowledge about his whistleblowing, before focussing on particular actions against him which he submitted were due to his status as a whistle-blower.

Findings of Fact

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

Protected Disclosures

34. The protected disclosures relevant to this case are those made in or around May 2019, and presented in paragraph 18 of the claimant's particulars of claim. Which was repeated to Mark Barrow on 19 September 2019 (paragraph 29 of the particulars of claim), to Mr Brown on 24 September 2019 and to Mr Walton on 24 September 2019. The claimant made reference throughout the hearing to making protected disclosures throughout his engagement. However, we reach this conclusion on the basis of how the particulars of claim are presented. He was legally represented when he produced his particulars of claim. It is only in reference to events contained in paragraph 18 that the particulars of claim make reference to a protected disclosure having taken place, with specific reference to the legal test. Other discussions, for example in paragraph 21 of the particulars of claim, do not include the same detailed legal analysis of there being a protected disclosure being made. This was therefore a deliberate choice as to what was pleaded as a protected disclosure. And further, there is a distinction made in paragraph 37 between those events in or around May 2019 which are labelled as a protected disclosure, and other situations that are not described as such but labelled as the raising of concerns:

> 37. Furthermore, the decision to terminate his assignment was also a major detriment and loss of opportunity suffered by the Claimant. The reason or the principal reason for the Claimant's assignment being terminated was that he had made a protected disclosure to the auditors from around May 2019 and regularly raised concerns about impropriety with senior council officials. The Claimant was not protected as per the Council's whistle blowing policy in this respect.

35. There is reference in the particulars of claim and in the claimant's witness statement to the claimant informing managers of issues in relation to the Kier contract (see paragraphs 25 and 27 of the claimant's witness statement). It was part of the claimant's role to raise governance and contractual issues with his line management. These events were simply the claimant carrying out his role. This was accepted by the claimant under cross examination. This further supports, in addition to that recorded above, that these were not protected disclosures in themselves.

36. Another example of the claimant raising matters of concern to senior management as part of his role was by the email on 18 July 2018 (see B372). This is something that the claimant did regularly during his engagement.

<u>Knowledge of the claimant having made a protected disclosure</u>

37. The First Respondent had knowledge of the claimant's protected disclosure on the 24 May 2019 when the claimant sent an email to Ms Woolley, raising concerns around contractual payments to Kier (see pp B199-207).

38. Mr Brown's first knowledge that the claimant had made a protected disclosure was 18 September 2019. This is the clear evidence of Mr Brown at para 14 of his witness statement, which the claimant appears to accept. He does not challenge this in cross examination, nor does he adduce any evidence to the contrary. And when cross examined himself, the claimant gave evidence that the Audit Department had not disclosed his identity to any of the other officers of the First Respondent, and that it was in the meeting of 18 September 2019 that Mr Brown discovered that the claimant had 'blown the whistle', as he informed him.

39. Mr Morgan had no knowledge of the claimant having made a protected disclosure until these proceedings were brought by the claimant, with him named as a respondent. This is the clear evidence of Mr Morgan, and which was not really challenged by the claimant. There is nothing that supports a finding other than this.

40. Mr Mckie had no knowledge of the claimant having made a protected disclosure until these proceedings were brought by the claimant, with him named as a respondent. This is the clear evidence of Mr McKie, and which

was not really challenged by the claimant. There is nothing that supports a finding other than this.

41. Mr Seddon had knowledge of the claimant having made a protected disclosure shortly after 29 May 2019, and quite likely before 03 June 2019. It is not entirely clear when Mr Seddon became aware of the claimant being the source of the protected disclosures. However, he was tasked with undertaking the audit. Mr Seddon references at paragraph 3 of his witness statement that he had knowledge of the claimant having made disclosures, and that he was treating his under the informal whistle-blowing process. The emails referred to by Mr Seddon in support of this paragraph suggests that all of this was in motion by 03 June 2019. And therefore this is a logical conclusion based on the narrative presented in paragraph 3 of Mr Seddon's witness statement and the supporting documents.

42. Mr Barrow's first knew that the claimant had made a protected disclosure on 19 September 2019. This was when the claimant sent an email direct to Mr Barrow, which attached the claimant's protected disclosure that was sent to the Audit Department.

Detriments as against the First Respondent

43. The claimant was given the opportunity to apply for a permanent role as a Senior Quantity Surveyor with the First Respondent, but refused this opportunity. This was on the basis that he would have to take a pay cut. This is noted in fuller form below.

44. There were no redeployment opportunities available to the claimant at the time of termination of his contract. No positions, save for those four roles advertised, were available.

45. There was no obligation on the First Respondent to offer the claimant alternative roles. This is a plausible solution given that the claimant was engaged through an agency, and throughout his engagement both parties considered the relationship to be a short term solution whilst permanent positions were filled.

Detriments as against the Second Respondent

46. At the relevant times, Mr Brown was employed by the First Respondent as the Interim Assistant Director of Infrastructure and Communities. This role included responsibility for highways and transport function.

47. The First Respondent awarded a Highways and Environmental Team Services Contract to Kier. This contract commenced in April 2018.

48. During 2018 and 2019, there were a number of administrative issues at the Council due to long term absences and low staffing levels, which led the Council to had undergo a restructure, of the relevant Department of

the Council. This was to ensure that sufficient management of the Kier contract was in place.

49. Mr Brown was aware that an Audit was brought forward on the Kier account, but not until after June 2019. There is no reference to the Audit being brought forward as a result of a protected disclosure in the report.

(i) Termination of contract

50. In late 2017/early 2018, it was identified that there was a need for additional posts within the Highways and Environmental team. In total there were 4 roles needed. These were approved through a business plan. In preparation of the business plan, the required roles were graded, which in turn determined the salary range for the roles.

51. Decisions on appointments to this team rested with Mr Brown, including the appointment of the claimant.

52. The claimant was engaged on an agency basis to fill a short-term temporary role as a Senior Quantity Surveyor, within the Highways function of the Council. This engagement commenced at the beginning of February 2019. The claimant knew that this role was temporary, and expected that his engagement would come to an end either at the end of the contractual term or once the permanent Senior Quantity Surveyor role was filled. He was aware that his engagement could be concluded by the giving of 7 days' notice.

53. Part of the claimant's role was to work on some of the operational aspects of the Kier contract to maintain compliance with the terms of the contract, and to ensure that it was conducted in accordance with both internal and external financial policies and rules. The job spec for this role is at Volume 2, pp.189-190.

54. At the time of his engagement, the claimant was aware that the First Respondent was seeking to employ a Senior Quantity Surveyor. The claimant was also aware that there also a more junior post being recruited to. The claimant accepted this.

55. The claimant was initially engaged on a contract that concluded at the end of May 2019.

56. On 15 March 2019, the first respondent advertised four posts. One of which was a Band 13, Senior Quantity Surveyor, based at Shirehall and Longden Road Depot (see pages B20 and B21).

57. Mr Brown discussed the permanent role with the claimant. However, he indicated that he was not interested in applying for the permanent role based on the impact that taking such a role, if offered, would have on his pay.

58. During May 2019, the claimant's contract was extended until the end of July 2019 (see B264).

59. The claimant's contract was extended again. There was some confusion during July 2019 as to how long the claimant's contract was being extended for. Mr Brown made the decision to extend the claimant's contract until the end of September 2019.

60. On 27 August 2019, the claimant met with Mr Brown. A number of issues were discussed, including the covering of roles, in the context of Mr Dannatt having been suspended. Mr Brown, more likely than not, told the claimant that his assignment could last a few more months, however, that that would depend on appointments. There was no commitment to an extension. There is consistency on this in the claimant's witness evidence at para 29 and in the oral evidence of Mr Brown. And this must be against the backdrop of the roles, including the Senior Quantity Surveyor role, that had yet been filled. The lack of a firm commitment is supported by the fact that on previous occasions where the claimant's contract was being extended, there is agreement between the parties.

61. On the 18 September 2019, Mr Brown met with the claimant. During this meeting Mr Brown informed the claimant that they had made an appointment to the Senior Quantity Surveyor role and that as a result his contract was being terminated at the end of the month, that being 30 September 2019. This was because there was no longer a need for him to be engaged to cover the role of Senior Quantity Surveyor.

62. The claimant emailed Mr Brown for written confirmation that his contract was being brought to an end on both 19 and 20 September 2019 (C bundle, volume 04, page 20).

63. Mr Brown was not involved in the appointment of Mr Beddows to the role of Senior Quantity Surveyor.

64. Mr John Beddows commenced his employment as Senior Quantity Surveyor from 21 October 2019.

(ii) Reduction of role

65. Before the appointment of Mr McKie, the claimant would cover part of Mr Dannatt's role when he was absent with illness. This was in addition to the role that the claimant was contracted to undertake.

66. Mr Brown engaged the service of Mr McKie during April 2019. This was as Mr Brown considered that the Highways Team needed additional support due to Mr Dannatt's long-term and recurring illness. Mr Brown considered that there was a need to cover the Service Manager role, that was not at that time being covered. There was a need for both a Senior Quantity Surveyor and a Service Manager.

67. Mr Brown was working to fill roles that were vacant on the Strategic Highways Staffing Structure (see p.B560).

68. At the meeting of 30 April 2019, with Mr Brown, Mr McKie and the claimant present, the claimant raised the CEQ (see pp B169-170), dated 23 April 2019. In response to this, Mr Brown tasked Mr McKie with preparing the first response to CE001. This was due to his involvement with the initial procurement exercise and understanding of the contract. This conclusion is supported by Mr Brown's oral evidence, which is consistent with Mr McKie's witness evidence (see para 12), and was unchallenged by the claimant.

69. The claimant prepared a draft response, despite this being tasked to Mr McKie. This was produced on 03 May 2019 (see pp B182-183).

70. Mr McKie produced a draft of CE001 on 06 May 2019.

71. It was part of the claimant's role to present the CE001 to the Service Manager for a decision. Mr Morgan explained this in his oral evidence, and which appears plausible given the sequence of events that then followed, see below.

72. Following review of the document, which included by the claimant, the claimant produced a final draft on 10 May 2019 (see pp. B190-191). This was not challenged by the claimant.

73. The version of CE001 that was sent to Kier is that at D1-D2. There is little change to this document from that version of 10 May 2019. This was signed off as Mr Brown.

(iii) Exclusion from meetings relating to the commercial function

74. The claimant was not invited to meetings involving discussion and negotiation toward settlement of the contractual dispute with Kier. These discussions were at a level of decision making that was not within the claimant's level of responsibility. And it was to maintain confidentiality of negotiations. This is the unchallenged evidence of Mr Brown.

75. A negotiating team had been established, made up of senior managers to try to resolve the dispute. The claimant was not part of that negotiating team, due to the role that he occupied with the First Respondent. It is these meetings that the claimant were not involved in.

76. The claimant was involved in a number of discussions/emails and receiving documents/commercial information concerning the operation of the Kier contract and the contractual dispute (CE001) up until the conclusion of his contract. This included:

a. Being asked by Mr Brown on 18 June 2019 to prepare a number of important documents (see pp B273-274)
b. Being sent a copy of the notes of the meeting held on 10 June 2019 between Mr McKie, Mr Andy Wilde and representatives of Kier (see p. B272);
c. Being invited to a meeting with the Council's legal representatives to discuss the dispute further (see p.B272).
d. Continuing to attend the Monday Commercial meetings, including meetings throughout July and August 2019, which was accepted under cross examination by the claimant;
e. Email discussion on 17 July 2019 (see p B364)
f. Email discussion on 21 August 2019 (see p. B399-400)
g. Email discussion on 4/5 September 2019 (see p D33-34)
h. Email discussion on 9 September 2019 (see p. D36)
i. Email discussions on 17/18 September 2019 (see D55-D73)

Detriments as against the Third Respondent

77. Following interview, Mr Morgan was appointed to the post of Interim Highway, Transport and Environmental Maintenance and Commissioning Manager with the First Respondent from 01 July 2019. He had no involvement with the First Respondent before this date. Mr Morgan was essentially appointed to cover the role that was previously occupied by Mr Brown. Part of Mr Morgan's role was to work on appointing individuals into the four roles advertised with the First Respondent from 15 March 2019, noted above. A further part of Mr Morgan's role concerned resolving issues pertaining to CE001.

78. At the beginning of July 2019, Mr Morgan met with the claimant. During which the claimant was openly critical of procedures within the Council. The claimant showed Mr Morgan a screen which contained information on payments. Although Mr Morgan in his evidence says he does not recall what he was shown, he does recall the claimant showing him his screen. It is more likely than not that the claimant did show him the information contained on the screenshots at Volume 2 pp 182, 184 and 185.

79. During this meeting with Mr Morgan, the claimant did not inform Mr Morgan that he had made protected disclosures, nor did he provide any information that would suggest that he did. There was no mention by the claimant that he had raised a complaint to the Audit Department. Although he did inform Mr Morgan that he was considering raising issues with the Audit Department.

80. In terms of meetings to resolve the dispute between the Council and Kier, Mr Morgan was not involved in deciding who would attend or not.

81. Mr Morgan was not aware of the auditing of the Kier contract until the report was produced. We accept this evidence by Mr Morgan. He anchors his recollection to a previous experience, where he suggests that he had

not enjoyed his previous experience of a contract being audited. The claimant adduces no evidence to the contrary.

82. Mr Morgan had no involvement in the decision to terminate the claimant's contract. However, he was tasked with the practical matters relating to the ending of the claimant's contract as Mr Brown was away on holiday at that time.

83. Mr Morgan gave instruction to Ms Horton that the claimant was leaving on the Friday (27 September 2019), but that he would continue to be paid until 30 September 2019. This was with a view to helping the claimant as it would remove a need on him to travel up for the purposes of attending the office for one day that week. The evidence given by Mr Morgan on this matter was plausible, and appears consistent with the evidence at D74 and D75.

84. Mr Morgan had no responsibility in relation to access to IT systems, and did not give any instruction for the claimant's access to IT systems be ended.

85. There was an undated meeting arranged to take place between members of the First Respondent, including the claimant and Mr Morgan, and representatives of Kier. In advance of this meeting, as was the norm, there was a brief pre-meeting. Within this meeting, the claimant raised a comment in relation to the suspension of Mr Dannatt. This included specific comments in relation to the reasons behind Mr Dannatt's suspension. In light of this, Mr Morgan brought the meeting to an end, as it was considered by Mr Morgan to be inappropriate and could be damaging to the First Respondent's position in the dispute with Kier. Mr Morgan accepted that this took place under cross examination. The only dispute was in relation to whether the term fraud was used; however, determining this is not relevant to these proceedings.

86. Mr Morgan rearranged this meeting. On balance, we consider that the claimant was not invited to this re-scheduled meeting. Mr Morgan cannot recall whether the claimant was invited or not. The claimant recalls that he was not. Given the reaction of Mr Morgan to the comments made by the claimant in the pre-meeting, it is unlikely that Mr Morgan would have invited the claimant.

87. The reason why the claimant was not invited to the re-scheduled meeting was due to the nature of the comments made in relation to Mr Dannatt, in a forum where such comment was considered inappropriate.

<u>Detriments as against the Fourth Respondent</u>

88. During Summer 2016, Mr Mckie was involved in providing advice to Council, and preparing tender documents, in relation to the re-procurement of its Highways and Environmental Term Services Contract.

89. In February 2019, Mr Mckie was contacted by Mr Pete Wilde, The WSP Regional Manager, with a view to ascertaining whether he had any capacity to support the Council. This was due to a recurring illness of Mr Hugh Dannatt.

90. Following discussion and agreement, Mr Mckie agreed to provide between 1-1.5 days service to the Council. This commenced on 30 April 2019.

91. Mr McKie reported to Mr Brown, and was engaged to provide support to the Council whilst Mr Dannatt was absent with illness. During this period, Mr McKie was fulfilling some of the roles that a Service Manager would undertake, given that was Mr Dannatt's role on the Kier contract.

92. Against the backdrop of a live Compensation Event Notice (CEN) and Compensation Event Quotation (CEQ), see pp B169-170, submitted by Kier, Mr McKie met with 3 employees of Kier on 30 April 2019. This meeting was on the instruction of Mr Brown, and was with a view to gathering the views of the compensation claim from Kier. The claimant was not present at this meeting. There was no reason for the claimant to attend at this meeting. In this meeting, information concerning an issue with Street Scene was raised with Mr McKie by those employees of Kier. Unchallenged evidence of McKie, para 19.

93. On 28 May 2019, Mr McKie and Mr Andy Wilde attended a meeting with Kier to discuss the claim as it related to Street Scene. This again was on the instruction of Mr Brown. This meeting was held on a 'without prejudice' basis. This meeting did not include discussion of matters within the claimant's remit as a Quantity Surveyor. (unchallenged evidence of McKie para 21).

94. A meeting took place between Mr McKie, Mr Andy Wilde, and two representatives from Kier on 10 June 2019. This meeting was with a view to trying to negotiate and resolve the Street Scene issue, as per the instruction of Mr Brown. There was no Quantity Surveyor issue discussed at this meeting.

95. The claimant attended at all scheduled Commercial Meetings, which took place on a Monday, namely 15 July, 22 July, 29 July, 12 August and 02 September 2019. Unchallenged evidence of McKie, para 24, and appeared to be accepted by the claimant when under cross examination.

96. Mr Mckie attended a meeting with Kier on 19 August 2019. This was a further 'without prejudice' meeting. Again with the view to resolve the dispute concerning Street Scene. The decision as to who attended this meeting lay with senior members of the Council, likely Mr Brown, and not Mr McKie.

97. Mr Mckie, following a request from Mr Morgan, attended a further meeting with a Kier representative, that being Mr Solanki, on 04 September 2019. This meeting was arranged by Kier. No discussion took place during this meeting which would necessitate the involvement of the claimant.

98. On 09 September 2019, it had been arranged for Kier to demonstrate a new SharePoint system that they were seeking to implement for the exchange of contractual communications between itself and the Council. The claimant was made aware of this demonstration and invited to attend by Mr McKie. This was during the commercial meeting that took place earlier that same day, at which the claimant was in attendance.

Detriments as against the Fifth Respondent

99. On 24 May 2019, by email to Ms Woolley, the claimant raised concerns around contractual payments to Kier (see pp B199-207).

100. A meeting was arranged to take place between Ms Woolley, Mr Chadderton and the claimant to discuss this issue further. This meeting took place on 29 May 2019. (notes of this meeting are at pp B212 and 213).

101. It was accepted by Ms Woolley and Mr Chadderton that the information brought to them by the claimant fell within the Council's definition of Whistleblowing. Consequently, the claimant was afforded protection through anonymity. (see pp B214, B221, B222-224). The identity of the person who made the protected disclosures was not disclosed to anybody by the Audit Department. This was maintained throughout the audit investigation, through the publication of the report and following the release of the report (see p B508).

102. As a consequence of the disclosures made by the claimant, it was decided to bring forward an audit of the contract. This was brought forward from 2020 to 2019.

103. Mr Seddon was appointed to undertake the audit investigation. The audit investigation was in line with the Council's Whistleblowing Policy (the policy starts at B553, with the relevant part of the policy being para 23 on p B557).

104. As part of Mr Seddon's audit investigation, the claimant was asked to send to Mr Seddon any relevant documents/information that he had possession of. As part of his investigations, and in line with the norm when there was an audit, Mr Seddon attended at the offices of those he needed to discuss issues with, including the claimant.

105. Mr Seddon did not inform anybody of the identity of the person who made a protected disclosure throughout his investigations.

106. Mr Seddon had no remit in relation to termination or extension of contracts.

107. Mr Seddon made no promise to 'protect' the claimant during the investigations, other than to protect his identity through maintaining confidentiality in relation to the identity of the person who made protected disclosures.

108. Mr Seddon's involvement in terms of investigation, and need to engage with the claimant came to an end either at the end of July 2019 once the fieldwork was completed, or at the latest 19 August 2019 once the draft report was issued for comment to the distribution list, which did not include the claimant. This is a plausible conclusion given that Mr Seddon was clear in his evidence that his role was simply to undertake the fieldwork for audit and produce the report, after which he moved onto other work tasks, which ties in with the dates on the report (see p.B515)

109. On 18 September 2019, at 15.22, after the claimant had had notice that his contract was being terminated, the claimant sent an email to Mr Seddon informing him that his contract was being terminated alongside other allegations.

110. Mr Seddon did not reply to the claimant on this matter but raised this up his line management chain as he perceived this to be a higher level of whistleblowing. A response on behalf of Mr Seddon (and for completion purposes, Mr Barrow) was sent to the claimant by Mr Walton on 26 September 2019, noted below. Ms Pilawski forwarded this email to Mr Seddon on 26 September 2019, at 09.27, informing him of the action that the Council was taking. See page B461.

<u>Detriments as against the Sixth Respondent</u>

111. In response to the email of 19 September 2019, Mr James Walton, Head of Finance with the First Respondent, responded on behalf of the First Respondent by email on 26 September 2019 at 09.25. This was to inform the clamant that his allegations would be considered under the Whistleblowing Policy. This also informed the claimant that Mr Barrow would be responding to him in accordance with the Policy (see p.B461)

112. On 26 September 2019, at 11.19, an email was sent to the claimant by Ms Smallman-Brooks on behalf of Mr Barrow, confirming that the matters raised would be considered under the Council's Whistleblowing Policy. This identified that there were new matters raised, which would be explored by a group set up to explore them, with a likely period of six months to undertake the necessary work. This was following advice received from the Audit Department

113. Mr Barrow commissioned the project group. However, it was Mr Barrow and Mr Morgan who decided on membership and who would be invited to discuss the issues in hand. Mr Barrow had no role in this group, other than to keep updated with developments and findings.

Conclusion

114. Based on the findings above, the claimant has not adduced sufficient evidence to establish that he has been subjected to any of the detriments that make up his pleaded case. Specifically, and turning to each of the pleaded detriments as per that recorded in the Record of Preliminary Hearing of 19 June 2020:

a. Failure of the First Respondent to instigate its whistle-blowing policy. The claimant has not established in what way the First Respondent has failed to instigate its whistle-blowing policy, nor failures in relation to its application. There is nothing to support that he has been subjected to a detriment in the way as pleaded.

b. Exclusion of the claimant from internal meetings and emails. The claimant has not established in what way he was excluded from meetings and emails. The meetings he appears concerned with appear to be meetings that relate to matters outside of his remit, and involve complex negotiations involving legal representatives and senior persons of the First Respondent. It would not be reasonable to view these as him being subjected to a detriment in those circumstances. This does differ in respect of the re-arranged meeting by Mr Morgan. This is a meeting, on our findings, that fell within the claimant's area of work but he was not included in. However, in the circumstances of his exclusion, that being that the claimant had disclosed sensitive information in an inappropriate forum, it would be unreasonable to view this as a detriment. Although, this does overlap with causal connection. In terms of emails, the claimant has not satisfied the evidential burden in relation to this. The evidence supports that the claimant continued to be involved in emails that related to his role up until termination of his contract. The claimant also brings that Mr Barrow's exclusion from his team that he set up was a detriment. Based on our findings, Mr Barrow did not have involvement in who was on the team concerned. But further, in circumstances where the claimant was leaving his engagement with the First Respondent, not involving him in matters that were likely to last 6 months, would not reach the level of being a detriment.

c. Removal of duties from the claimant. The claimant has not adduced sufficient evidence which supports that he was subjected to this detriment. Not only does he produce little to no evidence, it would be unreasonable to view as a detriment tasks which the claimant was covering due to illness being moved to a person who is then engaged to cover the role of the absent worker/unfilled role. In terms of access to the IT systems, first the claimant has failed to

establish that Mr Morgan had subjected him to this detriment, as pleaded. And secondly, we do not consider it be a detriment that the claimant's access to the IT systems of the Council had been brought to an end in line with his leaving of his engagement. This is expected, and normal process when anybody comes to the end of an engagement with an employer.

d. Terminating the engagement of the claimant. The claimant knew from July 2019 that his engagement was coming to an end at the end of September 2019. He was aware that this contract could be extended beyond this date. And he knew that his contract depended on need, which would effectively vanish once a Senior Quantity Surveyor was appointed. And that is precisely what happened. In the view of this tribunal, it would be unreasonable for any worker to consider a detriment a termination of their contract in these circumstances.

e. Not considering redeployment opportunities. The claimant adduces no evidence that this detriment existed as applied to him. There were no opportunities available for him to be redeployed into, and the only opportunities available, the claimant refused to engage with as their pay was too low. This tribunal finds no detriment in those circumstances.

115. For the avoidance of any doubt. The detriments brought by the claimant, both individually and as a whole, are no more than unjustified grievances. None of which this tribunal consider reach the level of satisfying the concept of detriment for the purposes of the claim as brought.

116. Further, based on our findings above, there is a fundamental difficulty in the claimant's case in relation to Mr Brown, Mr Morgan or McKie. Mr Brown had no knowledge that the claimant had made a protected disclosure in advance of any of the alleged detriments which the claimant says Mr Brown subjected hm to. Neither did Mr Morgan nor Mr McKie. And there is no suggestion or evidence that somebody with knowledge of the claimant's protected disclosures had influenced their decisions in relation to those alleged detriments. In the absence of knowledge, or influence of somebody with such knowledge, then the claimant's case against those individuals had to fail.

117. The claimant has not satisfied the tribunal that he has been subjected to the detriments as alleged, and therefore we do not consider it necessary to assess the reasons for the alleged treatment, as per section 48(2) of the Employment Rights Act 1996.

118. Further, as the claimant has not established that he has been subjected to any detriment on the grounds of having made a protected disclosure, it is not necessary for this tribunal to reach any conclusions in relation to whether parts of the claim were brought out of time.

119. In these circumstances, all claims brought by the claimant are ill-founded and dismissed.

Claimant's comments following handing down of judgment

120. During the handing down of judgment there were signs that the claimant disagreed with the decision that was made, and the reasons that were being delivered. This is not unusual, given that in a tribunal hearing one party is inevitably going to be happier with the result. This was obvious by the visible reactions of the claimant when particular findings were being addressed.

121. There are four matters raised by the claimant, which I consider prudent to record here, as a record of the claimant's response to the judgment as noted by the tribunal.

122. First, immediately on concluding the handing down of judgment the claimant expressed that he was intending on appealing the decision. He then proceeded to explain the grounds on which he would appeal the decision. This is a matter for the claimant as to whether he wishes to pursue an appeal of this case, and he has every right to do so. This was explained to the claimant, and that if this was his intention then the correct approach is to complete the relevant forms to initiate an appeal, with the tribunal not being the appropriate forum at which his appeal grounds need to be expressed. In response to this, and given his expressed intention, the claimant was informed that the tribunal would, of its own initiative, produce and send to the parties a written record of the reasons. This document is those written reasons.

123. Secondly, the claimant raised issues concerning compliance of case management directions, expressing that they had not been not resolved in the judgment. It is unclear as to what this concerned; I am sure the claimant will explain this should this be one of his grounds of appeal. However, we note here that such a matter was not raised as a matter to be resolved as a preliminary issue at the start of the hearing. And there was no suggestion that non-compliance had impeded the claimant's presentation of his case, such as to impact upon the fairness of these proceedings. This is most clear in that there was no application for postponement or anything else raised by the claimant in this respect. We can only presume that this relates to specific documents. However, the matter of disclosure, and specific disclosure had already been raised and resolved before EJ Hughes at the Preliminary Hearing of 18 March 2021. During this hearing, the claimant did not identify any specific documents

that were relevant to the issues in this case and where there had been a failure to disclose.

124. Thirdly, the claimant made an allegation of incompetency of the tribunal. And that this had impacted on his human rights.

125. And fourthly, the claimant started asking questions about the constitution of the tribunal panel, focusing initially on the colour of those that made up the tribunal in this case. The claimant also raised questions concerning the social backgrounds of the panel. The judge interjected explaining to the claimant that such questions are not questions he is permitted to ask of the tribunal, before asking the claimant to think and tread carefully about any insinuations or allegations he was making. The claimant responded by explaining that it is very relevant if he was to record the tribunal as being a racist tribunal. It was explained to the claimant that if he is seeking to raise a complaint on this basis then this tribunal is not the correct place to do so, and that he would need to contact Regional Employment Judge Findlay to formalise such a complaint. However, it was also explained to the claimant that the judge will be taking that step in any event. I note here, that the claimant raised no such suggestion during the hearing at any stage, but only after receiving the decision.

126. The hearing was at that point brought to an end.

127. I note that the issues raised at the end of this hearing follow a number of the matters raised by the claimant at the Preliminary Hearing before EJ Hughes on 18 March 2021.

Employment Judge **Mark Butler**

Date: 07 June 2021