EMPLOYMENT TRIBUNALS

Claimant:	**Mr M Robinson**
Respondent:	**Charles Watts Engineering Limited**
Heard at:	**Birmingham**
On:	**5, 6, 7, 8 & 9 December 2022 and in chambers on 1 March 2023**
Before:	**Employment Judge Flood** **Mr Murphy** **Mrs W Ellis**

Representation

Claimant:	Mrs Robinson (claimant's wife and lay representative)
Respondent:	Mr Fitzpatrick (Counsel)

RESERVED JUDGMENT

1. The complaint against the respondent of unfair dismissal (contrary to section 94 Employment Rights Act 1996 ("ERA")) is well founded. The claimant was unfairly dismissed by the respondent.

2. The claimant's complaint of wrongful dismissal is well founded. The claimant was dismissed in breach of contract.

3. The complaints against the respondent of automatically unfair dismissal (contrary to sections 100 & 103A ERA), detriment on the grounds of having made a protected disclosure (contrary to sections 47B and 48 ERA); and detriment on the grounds of having raised health and safety concerns (contrary to sections 44 and 48 ERA) are not well founded and are dismissed.

4. No reductions for Polkey or contributory fault are made.

5. The Tribunal will decide the remedy for unfair dismissal and breach of contract at a further hearing, the date of which will be notified to the parties separately.

REASONS

The Complaints and preliminary matters

1. By a claim form presented on 3 March 2021, the claimant brought complaints of ordinary unfair dismissal pursuant to section 98(4) of the Employment Rights Act 1996 (the 'ERA'); automatic unfair dismissal pursuant to sections 100(1)(c) and 103A of the ERA; detriment on grounds of having: (i) made a protected disclosure pursuant to section 47B of the ERA; and (ii) raised health and safety concerns pursuant to section 44(1)(c) of the ERA; and wrongful dismissal (notice pay).

2. There was a preliminary hearing for case management on 6 January 2021 where the issues were identified and recorded ('List of Issues'). The List of Issues recorded is also set out below as was referred to during the hearing. An agreed bundle of documents was produced for the hearing ('Bundle') and where page numbers are referred to below, these are references to page numbers in the bundle.

3. The final hearing of the claim had been listed for 5 days to include deliberation, judgment and remedy (if applicable). The hearing was temporarily adjourned for the second day due to the illness of the Employment Judge and then converted to a CVP video hearing, after consulting the parties. The hearing resumed for the third day but was then adjourned for the fourth day of the hearing as the claimant's representative had become unwell. The hearing was able to continue by CVP video hearing on the fifth and final day of the hearing and with the parties co-operation the Tribunal was able to get to the end of the witness evidence. The parties were ordered to provide submissions in writing by 5.10 p.m that day and comments on each others submissions in response by 16 December 2022.

4. Unfortunately it was not possible for the Tribunal to meet and continue its deliberations until 1 March 2023 and it has not possible for the written judgment and reasons to be prepared and finalised until now due to pressures on the list and availability of time for the Judge to prepare a written decision and reasons. The Tribunal sends its fulsome apologies for the long delay in the provision of the outcome in this matter.

5. The issues to be determined by the Tribunal were as follows:

   List of Issues

   A. ORDINARY UNFAIR DISMISSAL PURSUANT TO SECTION 98(4) OF THE ERA.

1. It is agreed that the Claimant was dismissed within the meaning of s. 95(1)(a) ERA.

2. Was the Claimant's dismissal for a potentially fair reason within s. 98 ERA?

    a) The Respondent contends that the Claimant was dismissed for misconduct or, alternatively, some other substantial reason.

    b) The Claimant contends that he was dismissed for the reason or principal reason of having:
        i. made a protected disclosure pursuant to s. 103A ERA (see section B below); and/or
        ii. raised health and safety concerns pursuant to s. 100(1)(c) (see section C below).

3. If the Claimant was dismissed for the reason of misconduct or, alternatively, some other substantial reason, did the Respondent act reasonably in treating it as a sufficient reason for dismissing the Claimant in all the circumstances pursuant to s. 98(4) ERA?

    a) Did the Respondent carry out as much investigation into the alleged misconduct as was reasonable in the circumstances?
    b) Did the Respondent have reasonable grounds for believing that the Claimant was guilty of the alleged misconduct?
    c) Did the Respondent have a genuine belief in the Claimant's guilt?
    d) Was the Claimant's dismissal within the range of reasonable responses?
    e) Did the Respondent follow a fair procedure in dismissing the Claimant?

4. If the Claimant's dismissal was unfair, did the Claimant's actions cause or contribute to his dismissal such that no compensation should be awarded, alternatively that any compensation awarded should be reduced by his level of contributory fault?

5. If the Claimant's dismissal was unfair, would the Claimant have been fairly dismissed in any event in the very near future such that no compensation should be awarded, alternatively that any compensation awarded should be reduced?

B. AUTOMATIC UNFAIR DISMISSAL PURSUANT TO S.103A of ERA

6. The Claimant relies on the following as amounting to qualifying disclosures:

    a) on 27 October 2020, he submitted a grievance in which he allegedly raised *'the health and safety of other workers was being endangered'*;
    b) on 5 November 2020, he submitted further information relating to his grievance in which he allegedly raised that *'the health and safety of other workers was being endangered'*; and

c) on 3 December 2020, he appealed the outcome of his grievance. The Claimant is alleging that in his grounds of appeal, he raised *'unlawful discrimination in the workplace'* and that *'the health and safety of other workers was being endangered'*.

7. Did the Claimant in fact make the above disclosures?

8. If so, do these disclosures amount to a disclosure of information as required by s.43B(1) ERA?

9. If so, was it the Claimant's reasonable belief that this information tended to show that:
   a) the Respondent has failed, is failing or is likely to fail to comply with any legal obligation to which it is subject, pursuant to s.43B(1)(b) ERA; and/or
   b) that the health or safety of any individual has been, is being or is likely to be endangered, pursuant to s.43B(1)(d) ERA?

10. If so, was the disclosure made in good faith?

11. If so, was it the Claimant's reasonable belief that the disclosure was made in the public interest?
12. If so, was the disclosure made to his employer within the meaning of section 43C(1)(a) ERA?

13. If so, was Claimant's protected disclosures the reason or principal reason for his dismissal?

C. AUTOMATIC UNFAIR DISMISSAL PURSUANT TO S.100(1)(C) of ERA

14. Did the Claimant raise health and safety concerns on 27 October 2020, 5 November 2020 and 3 December 2020?

15. If so, did the Claimant reasonably believe that the issues he raised were harmful or potentially harmful to health and safety?

16. If so, did the Claimant use reasonable means to raise such concerns?

17. If so, was the reason or principal reason for the Claimant's dismissal because he raised such concerns?

D. DETRIMENTS

18. Has the Claimant's claims been brought outside the time limit set down in s. 48(3)(a) of ERA, as adjusted for early conciliation?

19. If so, did the Claimant bring his claims within such further period as the Tribunal considers reasonable?

20. If so, did the Claimant:

a) make a protected disclosure as per paragraphs 6 - 12 above; and /or
b) raise health and safety concerns as per paragraphs 14 – 16 above?

21. If so, was the Claimant subjected to a detriment or detriments? The detriments relied upon by the Claimant are:
    a) subjecting the Claimant to a disciplinary investigation; and
    b) subjecting the Claimant to a disciplinary hearing.

22. Did the Respondent in fact carry out the above acts?

23. If so, do they amount to acts of detriment?

24. If so, were these detriments done on the grounds that the Claimant made a protected disclosure and/or raised health and safety issues?

E. WRONGFUL DISMISSAL

25. Did the Respondent dismiss the Claimant without notice in breach of contract?

26. If so, was the Claimant entitled to notice or pay in lieu of notice?

F. REMEDY

27. Is the Claimant entitled to a Basic Award?
    a) Should there be a reduction in any Basic Award payable to the Claimant on the grounds that any conduct of the Claimant prior to his dismissal was such that it is just and equitable to reduce the amount of the Basic Award, in accordance with s. 122(2) ERA?

28. Is the Claimant entitled to a Compensatory Award?
    a) What financial loss has the Claimant suffered as a result of his dismissal?
    b) Has the Claimant acted reasonably to mitigate this loss?
    c) In the event that the Claimant's dismissal is found to be substantively and/or procedurally unfair, should there be a reduction in any Compensatory Award payable to him on the basis that he would have been dismissed in any event, in accordance with *Polkey v AE Dayton Services Ltd [1987] ICR 142*?
    d) Should there be a reduction in any compensation payable to the Claimant on the ground that by his actions he caused or contributed to his dismissal?
    e) What (if any) amount of Compensatory Award is just and equitable in all the circumstances, in accordance with s. 123(1) ERA?

29. Is the Claimant entitled to an Injury to Feelings Award?

30. Is the Claimant entitled to notice pay?

Findings of Fact

6. The claimant attended to give evidence and Mr D Smith, Trade Counter Sales Assistant ('DS'), Mr R Chambers, Production Manager ('RC'), Mr J Hughes, Works Manager ('JH') and Mr R Watts ('RW'), Managing Director, all of the respondent gave evidence for the respondent. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to questioning from the Tribunal. We considered the ET1 and the ET3 together with relevant numbered documents referred to below that were pointed out to us in the Bundle.

7. In order to determine the issues set out above, we have made findings not only on allegations made as specific complaints but on other relevant matters raised as background. We made the following findings of fact on the balance of probabilities:

   7.1. The respondent is a family run engineering, welding and fabrication business and employs approximately 25 people. The claimant was employed as Trade Counter Sales Manager from 15 January 2018 until his dismissal on 18 December 2020. The claimant and RW had been friends and part of the same friendship group for around 20 years prior to his employment. RW contacted the claimant about filling the role of Trade Counter Sales Manager before he started, as the employee in that role was due to retire. The claimant was offered and took on the role and his contract of employment was at page 64 and the Employee Handbook at pages 67-127 of the Bundle.

   7.2. The claimant's role was to manage the Trade Sales Counter at the respondent's premises in Rugby. There was no written job description.

   Incident involving Mr W Bagnall ('WB')

   7.3. In 2018, the claimant made a complaint about a member of staff working on the trade counter. The claimant said he became concerned about the behaviour of WB who he described as being "*sexist and racist*" and at first tried to manage him informally. The claimant described witnessing behaviour from WB around a young female employee that was inappropriate and made him feel uncomfortable and so the claimant complained to RW. An investigation took place which was conducted by RW and the ultimate outcome of this was that WB was dismissed. We saw WB's dismissal letter written by RW at page 321. This made reference to staff and customers at the respondent having a right to come to the business "*without threat of intimidation, insult or injury*" and described WB as creating "*an atmosphere of a semi-sexist culture*" which was unacceptable. It also made reference to the use of "*non-politically correct language in front of customers, which borders on racism*" also being unacceptable. Although earlier stating that the employee was dismissed the letter finished by stating:

   "As a good will gesture, I am happy to accept your resignation, and going forward any reference required by us with be provided professionally".

7.4. At the time of his dismissal, the claimant worked alongside two other employees, DS and Mr J Robson ('JR') who were both employed as Trade Counter Sales Assistants. JR was RW's stepson and was working at the respondent when the claimant joined. DS started employment with the respondent in September 2019. The claimant and DS also knew each other well already and were part of the same wider friendship group (together with RW).

Working relationship between the claimant and DS/JR

7.5. RW accepted that the claimant's main responsibility was to serve customers and that he was responsible for supervising DS and JR. The claimant became concerned about administrative errors of JR and said he found it difficult to engage him in performance management. He told us that he discussed this with RW on several occasions in 2019 and 2020. The claimant was also of the view that DS did not have good maths or IT skills and did not understand systems of measurement. The claimant said that DS required a lot of support and training and that when he tried to do this, DS resisted this and said that the claimant was "*micromanaging*" him. He said that when he made reasonable requests of DS that he frequently swore at him. He also said that DS did not want to do contracted overtime. DS gave evidence that the claimant was not a good leader, did not know how to manage people and spoke to him and JR in a disrespectful manner. DS alleged that the claimant was not interested in doing any work and spent much of his time on his phone. He also said that he felt that the claimant was not treating him fairly, shouting at him and demeaning him in front of customers. The claimant did not accept he had an autocratic or dictatorial management style and also refused to accept that his style could have been perceived this way by others. Both agreed that DS had raised the issue with the claimant about micromanaging and that the claimant's behaviour had improved after the conversation.

7.6. Whilst not necessary to make findings of fact on the detail of these factual allegations as they predate the matters in this claim, we find that the working relationship between the claimant and both JR and DS started to become difficult once all three started to work together in late 2019. Despite the claimant being supervisor, in practice there was no clear hierarchical structure or reporting lines in place. We find that neither JR or DS took well to the claimant supervising their work on a day to day basis. The friendship between the claimant and DS deteriorated once they had started working together and JR (as the stepson of the Managing Director), may also have taken exception to the claimant instructing him how to do tasks on a day to day basis in a job JR had been doing before the claimant started employment.

7.7. As far as RW was concerned, the claimant's performance during 2018 and 2019 was good. The claimant had an appraisal with RW in May 2019 which recorded the claimant's performance as "*excellent*". It also noted that the claimant got on well with colleagues and was helpful to staff (page 333) and it was recorded that the claimant stated that JR's paperwork needs improvement (page 335). The claimant told us (unchallenged) that

when he was awarded a 6% pay rise in September 2019 that RW told him *"as far as I'm concerned, you're the shop manager"*.

Covid 19 and the respondent's response to this

7.8. When the Covid 19 pandemic started to impact in March 2020, this had a significant impact on the respondent's business. The claimant sent a text message to RW on 22 March 2020 just before lockdown was announced (page 298) suggestions about what measures the respondent should put in place to reduce contact, including excluding customers from the shop and serving at the door and non shop staff also being excluded. He expressed his concern that some people at work were "*failing to grasp the seriousness"* of Covid 19. RW replied agreeing with the claimant's suggestions noting that the shop may only be open for another week. England and Wales went into lockdown on 24 March 2020 and the respondent was forced to close its shop although was still able to complete orders. The claimant was put on furlough leave with effect from 27 March 2020 which was recorded and agreed in a letter from the respondent of the same date (page 137).

7.9. There was regular informal contact between the claimant and RW during this period and on 15 April 2020 the claimant asked about measures and risk assessments should he be required to return. He stated that his preference at this time would be to remain on furlough. The respondent started making plans to reopen its business and contacted a company called HS Direct Limited to get some advice. A risk assessment was carried out on 19 April 2020 and this was shown at pages 128-135.The claimant was notified on 22 April 2020 that the period of furlough would be ending and he was required to return to work on 27 April 2020 (page 138). The claimant met with RW in the shop on 23 April 2020 to discuss safety measures with RW telling us he wanted to get the claimant's input but that he believed the claimant had no more of a responsibility for implementing safety measures than any other employee. During this meeting it was agreed that the door between the factory shop and the trade counter shop would be kept closed (which meant that factory staff would have to go to the office and fill in a requisition for items with either RW or JH entering the shop to pick the product to complete jobs) and that the entrance to the shop would be restricted and customers would be served from the shop entrance. RW told us that other restrictions were put in place before employees returned included a screen being put in place on the trade counter, hand sanitisers being put on every work station, a cleaning station with disinfectant being put in communal areas, restrictions being put in place on the use of restrooms and making face masks available.

7.10. On 27 April 2020 the claimant returned to work and that evening sent a message to RW (page 306) stating that he felt "*pretty safe most of the time*" but raising concerns that social distancing wasn't working in the office and pointing out that one employee, M Jones ('MJ') social distancing was "*non existent*" and that being around MJ was a risk. RW spoke to MJ after this message and reminded him to keep a two meter distance. On 5 May 2020 the claimant signed the risk assessment that had been produced (page 135).

7.11. Around 22 May 2020 the claimant's father became seriously unwell and was given weeks to live. On 26 May 2020 the claimant was furloughed for a further 4 week period. On 19 June 2020 the claimant's father died and he notified RW on 20 June 2020. RW replied expressing his condolences and informed the claimant to "*Take as long as you need*". The claimant remained on furlough leave and on 30 June 2020 contacted RW to apologise for not answering a work call as he had been struggling and notifying RW that his father's funeral was to take place on 7 July 2020 and that he wanted to go away just after that (and was happy to use holiday for that). He asked RW to pass on his "*apologies and gratitude*" to JR and DS.

7.12. During the claimant's second period of furlough leave, there had been an easing of Covid 19 restrictions on 13 June 2020 and 4 July 2020 including the two meter social distancing rule. The respondent made changes to its working practices including introducing a rule that two customers wearing face masks were allowed to enter the trade counter shop (but were not permitted to enter without face masks and were served from the car park); screens were installed on the shop counter; a customer hand sanitizing station was installed; arrows indicating a one way system were put on the floor and the door between the factory shop and the trade counter was unlocked (to allow access for production/factory staff to the shop whilst wearing face masks). RW did not update the respondent's risk assessment document to reflect these changes and the version that had been produced on 19 April 2020 (signed by the claimant on 5 May 2020) remained in place. RW admitted in cross examination that in hindsight he should have updated the risk assessment but that as a small business, they were extremely busy at the time and also told us that the claimant never asked for this to be updated. RW gave evidence that on the claimant's return to work he told the claimant about the changes that had been put in place and that no concerns arose. The claimant gave evidence that RW told him that "*some procedures had changed*" mentioning the rule around two customers being allowed in the shop. We find that the claimant was informed in passing of some of the changes, but no formal briefing took place with the result that the claimant was not aware of all changes and the rationale for them.

Issues with the barrier

7.13. The claimant returned from furlough leave on 17 July 2020. He took issue with the correctness of some of the changes made by RW in his absence in particular the unlocking of the door between the trade shop and the factory shop which allowed access of non shop staff to the trade counter. The claimant of his own accord put up signs reminding employees not to enter and also created a releasable waist height barrier. RW thought these measures were unnecessary but did not address this with the claimant or instruct him to remove the measure. He was also aware that "*other members of staff did not appreciate the control that [the claimant] tried to exercise over the trade counter shop"* as before the claimant returned the door had been unlocked and free access was allowed. He saw the claimant's actions as causing friction. RW also admitted in cross examination that the claimant taking a further three

weeks off work after he father's death and during this time posting things on social media as to what he was doing had caused some staff to be upset. RW acknowledged that he should have spoken to the claimant about the signs and barriers at the time but was conscious of allowing some "*leeway*" as the claimant had just lost his father. He admitted that the claimant did have genuine concerns about Covid at this time. We find that this failure to address the developing difficulties regarding this divergence of views on Covid compliance did contribute to the later problems that occurred in the workplace and allowed friction to build up between the claimant and colleagues.

7.14. The claimant was on annual leave between 7 and 21 September 2020. During his absence, DS asked RW whether he could remove the barrier the claimant had put in place and RW told him he could and it was therefore removed. On the claimant's return from work, he noticed this and phoned DS to ask him if he knew anything about this and DS told him he did not. DS was asked in cross examination whether removing the barrier covertly and then not telling the claimant he had done so was undermining of the claimant and he said he didn't because he had spoken to RW and assumed it was OK and had denied it when speaking to the claimant as he could see the claimant was upset and did not want an argument about it. The claimant complained to RW and alleged that he told RW that he intended to replace it and RW said "*OK*". RW agrees that the claimant raised the barrier, but he thought it was just a passing comment and denied that he agreed with the claimant that a new barrier could be added. We accept the claimant's account of this conversation as he did go on to replace the barrier after this conversation with a new chain barrier. This was subsequently damaged and on 22 September 2020 the claimant complained about this to RW. The claimant said he explained to RW that he was concerned about Covid 19 personally and also its impact on the business. The claimant said he felt anxious and bullied. RW said that the claimant did not report feeling bullied but that the claimant did tell him that he felt that staff should do what he said and not use the door. We find that the claimant did express his concerns about Covid safety to RW during this conversation and state that he was feeling anxious. RW then spoke to the claimant about the situation and acknowledged that he could have managed the situation around the barrier better and been clearer to the claimant about what measures were necessary to avoid the situation creating friction. We accept RW's evidence on this matter especially as there appeared to have been no further discussions about the barrier and the claimant did not put up a third barrier.

7.15. The relationship between the claimant and JR and DS in the trade shop was not good at this time. There had already been issues between the three and the matters that arose around Covid 19 compliance and the barrier had escalated these tensions. On 25 September 2020, the claimant informed RW that he wanted to hold one to one meetings with both JR and DS as he had concerns about their performance and RW agreed that he did not have any concerns with that. When RW mentioned this to JR and DS they told him that they did not want to have one to one meetings as they were unhappy with the way the claimant was treating them and were "*miserable*" at work. RW then decided that rather than allow the claimant

hold the one to one meetings as planned, that he would conduct a team meeting with all three which he hoped would "*clear the air*" and informed the claimant by telephone on 27 September 2020. No details were provided to the claimant or the other attendees in advance of what would be discussed and no written invitation was sent.

Meeting 28 September 2020

7.16. RW held the meeting with the claimant, JR and DS in a meeting room upstairs in the respondent's premises. As the attendees made their way in, RW said "*I hope you all have your boxing gloves on*". He said this was meant as a flippant comment to "*break the ice, as you could feel the tension in the air*". The claimant did not take this comment well replying that he was not attending for a fight. This was an unfortunate and ill advised comment to have made at this time when tensions were already high, but we accept that RW did not make it maliciously and was attempting to defuse the situation.

7.17. No notes were taken of the meeting but the claimant typed some minutes of the meeting that evening from memory and e mailed these to RW on 7 October 2020 which RW accepted were broadly accurate. DS and JR had prepared some notes in advance of the meeting. RW opened the meeting by stating that people were unhappy in the shop and he wanted to allow people to talk and resolve their problems. The claimant offered to speak first and said he was not unhappy but felt that people were not all pulling in the same direction, that there was a difficult dynamic as JR was RW's stepson and DS a long time friend and that he had tried to introduce initiatives "*in a non autocratic styl*e" unsuccessfully. JR then read out from his pre-prepared notes alleging that the claimant was always on his phone, ignored customers, had been rude to customers (which had led to complaints) and that customers did not want to be served by him and some had stopped coming to the shop. He mentioned a complaint heard from MJ about an incident at Arrow Engineering where Arrow engineering staff, a customer and MJ were ridiculing the claimant and the respondent. The claimant denied being rude to customers and JR noted that word of mouth of this nature was damaging to the reputation of a family business. JR went on to state he was unhappy at work, that the claimant had created a hierarchy that was not required and JR commented "*I know I'm fucking good at my job, because I come into work every day and smash it. I've been working here the longest, I'm way more experienced than both of you*".

7.18. JR went on to say in the meeting that there was growing ill feeling towards the claimant and the claimant asked whether this was to do with his Covid 19 measures. JR responded by saying that he had been questioned about why some staff were not allowed behind the shop counter but that the claimant was able to go to other people's work areas. JR also mentioned the implementation of measures that were not needed such as an order book and a filing tray system. The claimant denied again being rude and that all measures he tried to introduce were trying to assist the staff and the business. The claimant said he let it be known to the meeting that the things JR were saying were hurtful and concerning and

both DS and RW agreed that the claimant had not taken JR's comments well.

7.19. RW then asked DS if he wanted to add anything, and DS just mentioned the conversation about micromanaging, agreeing that this had improved since they had spoken about it (giving evidence that as he could see how badly the claimant had reacted he did not have the heart to say the things he had prepared to say). RW ended the meeting by saying to the claimant that he would "*have to carry an investigation into the allegations of customer complaints*" and said that the claimant was in the job to do a particular role for him and he takes it seriously which is good to which DS responded "*yes, kudos for that*..". The claimant asked if the meeting was over and then left. It is clear to us that the claimant rightly felt "*ambushed*" by the comments made by JR in this meeting and was not expecting any of the matters to be raised. It is clear that the claimant had different expectations of the meeting that DS and JR. It would perhaps have been preferable for separate meetings to be held with RW where individual complaints could be made rather than in a group meeting of this nature and once the meeting started to develop as it did, further intervention from RW may have prevented matters escalating in the way they did. RW lost control of this meeting which led to personal comments against the claimant being made in an open forum which the claimant found hurtful.

7.20. Following the meeting the atmosphere between the three employees became worse at work and RW acknowledged that there was more tension. RW told RC about what had taken place and that he may need his assistance to manage the situation. On 30 September 2020 RW asked to meet the claimant informally in a local pub. He apologised for the way the meeting had unfolded. The claimant told RW that he was unhappy with the way that JR had raised his concerns and that he was unhappy that MJ had told JR about a customer complaint (the Arrow engineering matter). RW told the claimant in this conversation that customer complaints would need to be investigated. The claimant had alleged in his particulars of claim that he raised a grievance in this conversation but again we do not accept that a grievance was mentioned at this time as this was an informal conversation. The claimant told us he spoke to RC on 1 October 2020 who told that he knew about the meeting and that "*everybody knows…you know what it is like here*". RC said he did not say this about the meeting but said that everyone knew about the difficulties in the trade counter shop. We find that RC did make a comment about everybody knowing and the claimant took this to refer to the meeting on 28 September 2020. The claimant went off sick from 2 October 2020. RW messaged the claimant on 2 October 2020 stating:

"I'm really gutted you are feeling this way and how things have panned out this week. Can the 2 of us meet either tonight or over the weekend at a place of your choosing to chat. At the end of the day we're not just work mates"

7.21. There was some text contact between the claimant and DS on 6 October 2020 where the claimant setsout his concerns about the situation at work and described what JR had raised as an unexpected character

assassination and that it was "*the most humiliating, unprofessional experience in my entire working life*". He mentioned being gutted and that he "*could possibly end up not being able to come back to work*". The message mentioned that the claimant hoped DS would remember their friendship and that he would like to know that DS had "*got his back on this*" as he was "*sure there will be questions asked of you*"

Meeting on 6 October 2020

7.22. The claimant and RW met on 6 October 2020 in a supermarket café. No notes were taken but again the claimant made a brief note of discussions from memory and e mailed RW on 7 October 2020 with this note (page 144). RW agreed that this broadly reflected the conversation. During this meeting the claimant raised being unhappy with how JR had raised his concerns, that he was unhappy that MJ had reported a complaint to someone the claimant supervised, that he felt undermined and victimised resulting from his efforts to manage Covid compliance and that he felt undermined in his position when he was trying to implement improvements in shop processes and procedures. RW said that he wanted to deal with such matters informally and we accepted that during this meeting the claimant did not indicate that he wished to raise a formal grievance. The customer complaints that had been raised by JR during the meeting on 28 September 2020 were discussed and RW asked the claimant whether he was aware of any customers that had complained and said the claimant "mentioned a few examples". We accepted the claimant's evidence that he told RW that there was nothing that RW did not already know about and mentioned an incident with a customer called Terry Gibbs where the claimant said he asked Mr Gibbs not to refer customers to other suppliers whilst in the respondent's shop; and another incident where a customer had left dissatisfied with offcut pricing. The claimant told RW he was off with stress and anxiety, that he intended to return to work as soon as possible and asked for copies of the respondent's "*sickness policy and the disciplinary process from the employees handbook*". Following the meeting the claimant thanked RW for taking the time to see him and RW responded that he hoped they could both sleep easier. The claimant sent an email to RW following this meeting on 7 October 2020 headed "Points I can remember from last night" which included a summary of the discussions held and sent a further e mail later that same day with notes of the earlier meeting on 28 September to RW (page 144-9). The claimant alleges that raising these matters with RW in the meeting on 6 October 2020 and the e mails sent subsequently amounted to him raising a 'grievance'. We were not satisfied that this amounted to the raising of a formal grievance, but this certainly was sufficient to indicate that the claimant was raising an informal complaint to RW.

Investigations into customer complaints

7.23. RW gave evidence that following the conversation with the claimant he looked into the complaint that had been raised by JR in the meeting on 28 September 2020 that MJ had been informed about from a supplier, Arrow Engineering Limited. He described the complaint as being "*a bit ambiguous*" as he did not know who the customer was that had

complained. RW gave evidence that "*Arrow Engineering told me that a mutual customer had come in to their shop and commented that they had been to our trade counter shop and Mr Robinson, who had been behind the trade counter, had shouted at then. Arrow Engineering had in turn told MJ about it*." RW said that although any inappropriate behaviour towards customers was unacceptable he "*decided not to take any further action"* against the claimant as he was *"hoping that it was an isolated incident due to stressful circumstances with COVID-19 and his personal circumstances over the summer, which could have caused the short temper".* He went on to state that*:*

"as to the other customer complaints, again, this would take much longer to investigate, as we were still unable to identify the names of the customers"

RW told us in response to cross examination that he looked at about 10 customer complaint forms to see if anything had been received about the claimant. RC also told us that during this time he was not assisting RW with any investigations but that there was nothing that could be done about other customer complaints as only Arrow Engineering had been mentioned by name during the meeting on 28 September 2020. We were not satisfied that the RW took any action with regard to investigation during this period other than making a brief telephone call to someone at Arrow Engineering and taking the decision to not pursue the Arrow Engineering matter. The respondent at this stage did have some further information about possible complaints which had been provided by the claimant on 6 October 2020 (see para 7.22 above) but at this stage did not investigate further,

7.24. The claimant was sent a copy of the respondent's sickness policy and was asked to provide a doctor's note in an e mail sent on 8 October 2020 from the sales@charleswatts.co.uk e mail address. The claimant remained on sick leave for the remainder of his employment with the respondent.

7.25. The claimant submitted a doctor's note on 14 October 2020 to RW and stated that there was no change in his condition and that the thought of returning to work was making him feel anxious. He added "*it would be good to know what has been done in respect of my concerns and in respect to allegations made by JR".* The claimant received a reply from RW on the sales@charleswatts.co.uk e mail address on 16 October 2020 asking him how he was feeling and that the company hoped he would return when his sick note ran out the following Monday and that he had the week following that booked as holiday it would a good opportunity for the claimant to return next week (page 159). The claimant replied on 19 October 2020 attaching a further doctors note signing him off until 16 November 2020 (page 160). RW replied on 19 October 2020 stating that he was sorry the claimant was not ready to come back to work and noted "*I am slightly disappointed as I am keen to work with you in moving things on, however this can only work if you are in the workplace and can help us to see what changes we are able to make, which will help in making you feel less anxious and stressed*"

Claimant's grievance – 27 October 2020

7.26. On 27 October 2020, the claimant submitted a written grievance (page 162-5). The letter provided that the claimant wished to "*restate my grievances, explain their impact and offer suggestions that might help me get back to work*". The letter went on to make complaints about JR and MJ about similar matters raised in the meeting on 6 October 2020. He went on to make a complaint headed "*Resistance to COVID-secure measures*" and complained that he was being ridiculed and undermined and that senior management had not been supportive. He mentioned removal and damage of the barriers he had added. This section of the letter (which the claimant alleges to be a protected disclosure) stated as follows:

"I feel I have been the outlier in trying to follow Covid legislation and company policy and staff have been allowed to bully and undermine me while also subverting health and safety measures. I consider the removal of health and safety measures and deliberate non-compliance to be in breach of the H&S at Work Act. I do not understand why these behaviours have not been investigated"

He went to complain about the lack of progress about the concerns he had already raised and how the issues raised by JR in the meeting of 26 September 2020 were being investigated stating that this was causing him considerable anxiety. He said he wished to raise a "*further grievance about the way in which my grievances above and the investigations into Jack's accusations are all being managed".* He then posed a number of questions and suggesting steps for managing his return to work. The grievance finished with the claimant making the following comment:

"I feel I have worked hard to do a good job always with the best interests of the company at heart. I have been kind to my colleagues and maintained high standards of equality and acceptance of diversity; at times I have felt like I am swimming against the tide. The fact that I am now unable to come to work leaves me deeply disappointed."

7.27. This was acknowledged on 28 October by RW who informed the claimant that his grievance would be handled by RC and inviting him to a meeting on 3 November 2020 with RC (page 166). The claimant attended the meeting as planned accompanied by Mrs Robinson, and which was attended by RC with M Worthington ('MW') present as note taker. The notes of the meeting were at pages 167. The claimant outlined his concerns but stated that he was finding it difficult to engage with the questions asked and that he may contact RC with further information in writing.

Further information on grievance – 5 November 2020

7.28. On 5 November 2020, the claimant submitted further information relating to his grievance (page 170-175). This set out in detail what complaints were being made setting out further information on the complaints he was making against JR and the impact it had on him and the complaint against MJ alleging he was spreading malicious rumours. He set out complaints

about lack of Covid compliance stating:

"I believe CWE is not a COVID-secure workplace and I have not felt adequately supported when implementing COVID-secure measures in the shop. Many staff have wilfully disregarded the COVID-secure measures"

He went on to describe generic and specific examples mentioning the removal of the barrier and mentioned an incidents when a mask was not worn by MW. He also complained about the lack of mask wearing by RC and MW in the grievance meeting itself.

7.29. Following this meeting the claimant gave evidence about Mrs Robinson raising her concerns with him about the respondent's lack of Covid compliance during the grievance meeting on 3 November 2020. He said that she had indicated that she wanted to report the matter and that the claimant had asked her not to as he felt this could make things worse. He said that his wife subsequently told him that she had reported the issues observed at the respondent this day to the Health and Safety Executive ('HSE') but had not mentioned him or his concerns. The claimant denied being involved in raising a complaint to the HSE and we accepted his evidence on this.

7.30. On 6 November 2020 RC e mailed the claimant to acknowledge the e mail and said he wanted to provide some feedback on part of the issues raised and asked him to come in on the following Monday. The claimant asked to have a telephone conversation and it was agreed that this would take place on 9 November 2020 at 3pm (page 177-8). RC phoned the claimant as agreed and a transcript of the conversation was shown at pages 179-182). The conversation started by RC stating that as far as the respondent was concerned that his formal grievance started on 28 October 2020 and that all discussions prior to that were attempts at informal resolution. He went on to discuss the Arrow Engineering complaint and informed the claimant that RC had decided not to take this any further as what happened was ambiguous and that he hoped it was an "*isolated incident*" and considering the stressful time the claimant was experiencing it would not have been fair to pick the claimant up on it. RC tried to explain why the respondent had not informed the claimant sooner and made reference to possible "*further complaints*" that had been mentioned by JR in the meeting on 28 September 2020. He stated:

"now that may or may not have come out as part of this investigation that there may have been other incidences but we are hoping to obviously unearth that and speak to the right people as part of this investigation"

He went on to tell the claimant:

"there may not be anything in it there may be something in it but I can't tell you that at the moment".

We find that in these references, RC was making references to the complaints already mentioned by JR on 28 September 2020 and not new complaints made after this. The claimant asked when the decision was

taken not to pursue the Arrow Engineering matter and RC told him that RW had decided this some time in the week after their meeting. RC also went on to ask the claimant whether he still wanted to come back to work and the claimant confirmed that he did and he still wanted his job. RC said he would continue with his investigation. The claimant asked what steps had been taken other than this and was informed that some changes had been made in the shop to reflect changes to Covid measures.

Grievance investigation and outcome

7.31. RC commenced his investigation and interviewed RC on 11 November 2020 (notes of meeting at page 195); JR on 17 November 2020 (notes at page 192) and DS also on 17 November 2020 (notes at page 193). He also interviewed other members of staff, MJ (page 194) D Tidmas (page 1946); N Marshal (page 197); James Ashmore (page 198), C Gardener (page 199) and S Morley (page 197) primarily about the Covid measures in place and compliance with them. RC also asked MJ about the Arrow Engineering complaint. When challenged in cross examination that he was not really investigating the claimant's complaints here, but looking into the customer complaints themselves, RC stated that he was trying to understand whether there was anything behind the matters that JR had brought up at the 28 September meeting or whether this had been completely made up. We accepted this explanation.

7.32. RC informed the claimant on 18 November 2020 that the investigations were almost complete but there would be a delay due to a Covid issue involving RC's family. The claimant was informed on 1 December 2020 (page 209-10) that his grievance had not been upheld although it acknowledged that the meeting on 28 September 2020 had been upsetting for the claimant and RC told us in cross examination that the respondent was not happy with the way that meeting had gone. He clarified that although he referred to the company handbook in conducting this grievance investigation he did not check if JR, RW, MJ or the claimant were acting consistently with their obligations under the handbook.

Complaints alleged to have been received whilst the claimant was absent (together the "New Complaints")

7.33. RW gave evidence that as the claimant's grievance had been concluded "*it was time to resume the disciplinary investigation into the customer complaints*". He went on to state that whilst the claimant was off sick, whilst he was helping to cover on the trade counter, that:

"around 12 customers made verbal complaints to me regarding [the claimant's] behaviour and attitude towards them when he had been working behind the trade counter. Some of the customers had also witnessed him being inappropriate towards another member of staff"

RC said he asked each complainant if they were willing to provide written statements so that he could investigate and that 4 of the 12 agreed to provide written statements, provided that they would remain anonymous. RC said he wrote down the statements given by 3 individuals as they were

speaking and said that the notes he had taken were shown at pages 215-7.

7.34. The first note (page 215) related to a customer called T Gibbs and referenced an incident where that customer had asked for a discount and that the claimant had not responded ("Complaint 1"). This described the claimant as being rude and arrogant, that he spoke down to DS in front of customers and once "*had a go*" at the customer for telling a customer where he could get his job done elsewhere when the respondent could not help. The claimant accepted in cross examination that he recalled the incident where he had asked a customer not to send other customers elsewhere as this had previously been discussed with RW. We have also already found that the claimant mentioned this incident himself during the meeting he held with RW on 6 October 2020 (para 7.22 above). The second note (216) related to a customer called John from "Rugby Fabs" and noted that the atmosphere was better without the claimant and that the customer did not like being served by the claimant and gets served quicker when he is not there ("Complaint 2"). It referenced occasions when the customer was ignored at the counter or the claimant would say he was busy in a short tone. It noted that the claimant was unwelcoming and rude and that he was obtuse and the customer would rather be served by the other two members of staff. The third related to 'Gary CPR' and noted a comment about the claimant being very unhelpful and recounted occasions where the claimant did not want to look for items, that he would appear to hide behind racks to avoid serving and that he avoided a request for some work to be carried out ("Complaint 3"). It noted that the claimant was "*unhelpful and lazy*". When asked in cross examination, the claimant said that he knew the individuals who had made these complaints once their names had been identified to him much later in these proceedings.

7.35. RW told us that he asked RC to type up these statements and that he then on 3 December 2020 brought them to each complainant to read and sign if they were happy with them which they did with the final signed versions being at pages 218-220. RW said he drove to the workplaces and in one case the homes of the individuals who had complained to ask them to sign the statements. RW said that one customer indicated that they would provide a statement themselves separately which they did and which was shown at page 221. This was from R Yates at Armada Boat Hire and stated that if the customer saw that the claimant was serving he would get back in his car and drive to Coventry out of principle so as not to be served by him. It described him as rude and arrogant and said that the claimant was 'overcharging' ("Complaint 4"). The letter also recounted an incident where a customer was refused entry to the shop for not wearing a mask and then asked why the claimant did not have to wear one and said the claimant replied "*because I'm the shop keeper and you're the customer*" in a "*really obnoxious*" manner. It went on to state that this customer could not stand the claimant and not got his steels from another supplier. The claimant stated that he did not know who R Yates was.

7.36. The claimant was questioned in cross examination as to why he felt that customers would make these allegations up and he stated that he felt that

RW was looking to dismiss him and that these customers had a good relationship with RW. He was also asked about the similarity of these allegations to the internal complaints about his behaviour to which the claimant responded that this was "*almost too good to be true*". He was asked whether he was willing to concede that he could "*rub people up the wrong way*" and the claimant said he wasn't as he tried really hard to have attention to detail with customers and when asked whether there was nothing that the respondent could have done to recover the relationship with these customers the claimant said that had he known of all of the situations at the time, these could have been managed.

7.37. DS also gave evidence that whilst the claimant was on sick leave that RW assisted him and JR in the shop and that during this time "*several customers took the opportunity to complain*" about the claimant. He stated:

"*Some asked, whilst being served, what had happened to the rude grey haired man, as they could not see him in the shop. Others said that they felt more comfortable coming to the shop with [claimant] not being there and that the atmosphere in the shop seemed better"*

And went on to state:

"..none of us asked the customers to provide feedback about [claimant] or make complaints about him. They all did it on their own accord."

In cross examination, DS told the Tribunal that when customers had complained that he did not take a note of these complaints but stated:

"[JR] did, he had worked there for numerous years, he knew them a lot better than I did, I could hear them, I think he passed them on to the office"

He described JR having the conversation with customers and then speaking to RW about it.

7.38. With respect to the New Complaints, we find that discussions between RW and the four customers did take place in early December but we do not accept that these were unprompted customer complaints made directly to RW. Both RW and RC were very keen to tell the claimant during the process, that the complaints had not been co-erced (see paras 7.46 and 7.51). This is an odd thing to have focused on if these were indeed genuine unprompted customer complaints entirely coincidental to the earlier matters under investigation. We find that the initial information about customers complaining was provided by JR (referring to those same matters first raised back in the meeting on 28 September 2020). The claimant himself had given some detail about what he thought complaints might be about on 6 October 2020. We do not accept that the New Complaints were the result of customers independently complaining to RW directly once the claimant was absent. We found it implausible (with particular reference to the T Gibbs complaint but also others), that a customer would have revisited an incident that happened much earlier in the year to make a complaint directly to RW. In addition, DS's evidence which we found particularly convincing indicated that JR had involvement

but RW makes no mention of JR playing a part. We find that JR sought the information from customers that attended the shop based on his own recollection of incidents. We find that JR then provided RW with such details, which RW used to ask each customer mentioned whether they would be willing to provide a written statement for an investigation. RW essentially gathered the evidence to support the allegations made by JR previously. We were not convinced that 12 different customers had made unprompted complaints to RW in a short period as was suggested. This is implausible and this detail appears for the first time in RW's witness statement.

Letter re disciplinary investigation into the New Complaints

7.39. On 2 December 2020 the claimant was notified by a letter from RW sent by e mail that an investigation would be carried out. It stated as follows:

"Since you have been absent from work, it has come to my attention that several customers have made verbal complaints regarding your conduct whilst working behind the counter. This is a matter which I am intending to investigate myself and will need to speak with you to ascertain what happened"

Again, we do not accept that verbal complaints were made to RW at this time but rather that RW sought information from customers about incidents that JR had reported to him. It is not clear to us why the respondent chose to proceed in this manner, rather than acknowledge that it was further investigating the previous complaints. It may have been an attempt to increase the seriousness of the incidents referred to by linking these to a separate customer complaint. However we were not satisfied that these were received in the manner suggested.

Grievance appeal – 4 December 2020

7.40. On 3 December 2020, the claimant appealed the outcome of his grievance (page 222-232). This was a lengthy document split into two parts with the first setting out his challenges to the grievance outcome and the second making an allegation of unfair treatment. The letter also made allegations that JR was a drug user and challenged in detail the conclusions reached in the grievance that there had been no bullying of him by JR. It went on to challenge RC's grievance outcome that the respondent had fully supported the covid protection measures necessary to protect staff and customers, stating that the respondent was "*not responding appropriately to the risks presented by the Covid pandemic*" and that his grievance set out many examples of this. It went on to describe the grievance investigation meeting on 3 November 2020 and alleged that there were insufficient measures in place and that RC and MW's lack of mask wearing and sharing was against government guidance at the time. It further noted:

"*It is my belief that my problems at work started when I escalated performance concerns about JR to RW*" and that he believed that "*RW's judgement is complicated by his personal relationship with JR*"

The claimant was asked in cross examination whether this contemporaneous comment in his own letter showed what the claimant believed was really the source of his problems with the respondent and not any complaints about Covid compliance or discrimination at the respondent. The claimant stated that "t*here were a number of issues coming to a head at the same time*" and the problems he had with JR was "*certainly one of them*.

7.41. The document went on to allege inconsistencies and make complaints of non compliance with the ACAS code of practice and the employee handbook. It went on to make allegations of "*more serious, repeated breaches of policy*" and referred to comments in the claimant's grievance of 27 October 2020 about him "*swimming against the tide in relation to Equality and Diversity"*. He went on to allege there were a "*range of normalized behaviours at [the respondent] that I believe contravene the Equality & Diversity and Health and Safety sections*" of the handbook. It alleged that there had been inappropriate behaviour with one employer carrying out harassment by frequently sending inappropriate and/or obscene content via social media which the claimant had reported. He made a specific allegation against RW that on his induction RW had walked the claimant around reception making a comment about it being "*all English names here*". He alleged that another manager overtly used racist slurs and that he had raised the matter of institutionalised racism. He alleged that DS has been subject to homophobic comments which offended the claimant. He concluded that he was staggered at the heavy handed approach to investigating his conduct when other serious issues were routinely ignored. The claimant was asked why these serious matter were not referred to in the two earlier letters of complaint on 27 October and 5 November. The claimant said they were alluded to but expanded on in this letter and it was suggested by Mr Fitzpatrick that the claimant only made allegations of discrimination once he had been informed he was being investigated for a disciplinary complaint. It was also suggested that the claimant had elaborated on his complaint of racism by suggesting that a slur to refer to the traveller community had been used in his claim form but making no reference to this at the time. The claimant suggested this was what he was referring to when he made more generalised allegations.

7.42. The claimant was also asked about his own sending of messages that could be regarded as obscene of offensive with particular reference to a message he sent to a friendship group including some employees of the respondent entitled "The Naked Challenge". There was much discussion about this both in the earlier preliminary hearing and at the hearing. The claimant told us that this was a viral challenge which involved filming the reaction of one's partner when they entered the room naked. The claimant said it did not show any nudity at all as the joke was to show the reaction of the other person. We accepted that there was no nudity on the video shared but accepted Mr Fitzgerald's suggestion that the nudity was implied. Mr Fitzgerald put to the claimant that this video tended to show that he did not believe that any messages shared between work colleagues showed any form of unlawful behaviour as he was engaged in similar activities. The claimant suggested that there was a big difference

between this type of message and those he was referring to which showed pornographic content. We also heard evidence from RW about his experience of his employees sending explicit videos amongst each other. RW acknowledged that this does happen and that the claimant had mentioned to him in the first week of his employment that a fellow employees had sent an inappropriate message. RW told us that he spoke to the employee about this and that the claimant never received a video of this nature again. He said that it was out of his control that employees sent videos amongst themselves outside of working hours and on personal phones. He said he was not minimizing issues of sexual harassment but that he did not think that anyone was being harassed. He also expressed the view that the claimant was happy to be part of "*company or factory banter*" when it suited him but that he was now trying to hold an earlier incident that had been resolved against the respondent.

7.43. The claimant was also asked about the allegation of homophobic bullying of DS in light of the evidence given by DS denying that any such actions took place. The claimant insisted that DS had talked to him about it and said it had been upsetting him. DS evidence to the Tribunal was that he did recall a conversation with the claimant where he told the claimant he though MW thought he was gay. He told us that he was *"well known for acting a little camp*" and was not offended if people thought he was gay. The claimant was also asked why he did not complain at the time about the comment he says that RW made about English names and said that he did not feel confident enough to raise it at the time. We find that the claimant did elaborate and exaggerate incidents that had occurred when writing this letter in order to emphasise purported misconduct of others for the purpose of comparison with himself. We were not satisfied that the claimant was genuinely making complaints about the impact of these matters on him or others. This is particularly so, given that the claimant had made complaints before which had led to action being taken (see 7.3 above)

7.44. The claimant's appeal was acknowledged on 8 December 2020 and he was informed JH would be dealing with it (page 251).

<u>Disciplinary investigatory meeting – 8 December 2020</u>

7.45. The claimant was invited to and attended by telephone an investigatory meeting held with RW on 8 December 2020. He was informed that this was not a disciplinary meeting but was to answer questions. The transcript of the meeting was at pages 237-238. RW asked the claimant three questions during the meeting and recorded his responses. Firstly he asked the claimant whether he could recall any occasion when he had been rude or unhelpful towards any customers. The claimant challenged the question and asked what the allegation was that he was expected to respond to but stated that in his working life that there had never been any complaints about his customer care. RW then asked the claimant whether he was aware of any customers that had stopped trading with the respondent due to the way the claimant had behaved and spoken to them. The claimant again questioned what this related to and was told by RW that customers had made complaints to him that they no longer trade in the shop. The

claimant asked why they are in the shop if they no longer traded and stated that he was not aware of anyone stopping trading because of him. RW then asked him whether he was aware of customers taking their custom elsewhere because of the way the claimant had spoken to them. The claimant again asked whether this related to a specific allegation and was told that although RW was aware of a specific allegation he would not say at this time. He went on to say that was all he had to ask. The claimant then stated that he felt it strange that he had never had any complaints over 3 years but that since he had been off work since the start of the grievance, there were now complaints.

7.46. RW then responded by saying:

"I cannot do anything about customers complaining. Customers have the right to complain in your absence and you know whatever, I have not, you know, in any way, you know, goaded a customer into saying what they've said to me when you go behind the counter"

Following this meeting RW met with DS and JR on 8 or 9 December 2020 and took handwritten notes of his meetings (pages 239 to 244 which RW and JR signed). These were typed up and shown at pages 245- 6. RC firstly asked both whether the claimant had ever spoken down to them in front of customer to which DS responded he had and JR responded no. They were then asked if they recalled the situations referred to in the New Complaints. The answers provided as they were recorded were vague in nature and in some cases referenced the incidents but also mentioned a further incident where the claimant had injured himself cutting a piece of steel and an incident involving a dispute with a courier.

7.47. RW wrote to the claimant on 10 December to inform him that he had concluded his investigation. The letter stated:

"I have now completed, as far as possible, my investigation into the customer complaints against you that have now been made. I have enclosed details of the allegations and supporting evidence.

I am recommending that this matter be subject to a disciplinary meeting."

He was invited to a disciplinary hearing to be conducted by JH on 15 December 2020. It informed the claimant of his right to be accompanied. The letter added:

"You should note that the allegations, if proven, are sufficiently serious to warrant the termination of your employment."

The letter attached a statement prepared by RW which stated that he had received "*several customer complaints*" and that he had also questioned counter staff about these and had concluded that the matter should move forward to a disciplinary hearing (page 256). It also included anonymised versions of the New Complaints referred to above and the typed version of the notes of RC's interview with JR and DS.

<u>Grievance appeal</u>

7.48. The claimant was provided with the outcome to his grievance appeal on 11 December 2020 in a letter written by JH. JH was asked in cross examination whether he thought there was a conflict of interest in him dealing with both the claimant's grievance appeal and his subsequent disciplinary hearing and he agreed that there "possibly" was but that there were only 3 managers that could deal with these matters in the business, himself RW and RC all of who had been involved in other parts of the process. JH gave evidence that to consider the claimant's appeal he considered the documents relevant to this and decided that there was no need to meet with the claimant as the matters he wanted to raise were clear. He said he spoke to RC who he shared an office with (this being an informal meeting with no notes taken) with and then prepared his grievance outcome letter which was shown at pages 263-4. This letter went through in an unstructured manner comments the claimant had made by way of appeal and set out JH's comments in response before concluding that:

"*I feel we have acted fairly and are, and always have been committed to following a fair procedure. We have looked into all of the issues you have raised where sufficient evidence has been provided and I believe the correct decision has been made regarding your grievance."*

It was put to JH that he did not consider properly all aspects of the claimant's grievance appeal and this was a tick box exercise, although he disagreed, we do conclude that the process carried out by JH was cursory and brief and did not fully address all the issues raised by the claimant in his grievance appeal.

<u>HSE query re Covid measures</u>

7.49. On 15 December 2020, RW took a call directed to the respondent from C Gregory, an inspector with the Health and Safety Executive. The transcript of that call was shown at pages 270-272. Mr Gregory stated that the HSE had been contacted with a reference to concerns about Covid controls at the business. He asked about the controls in place and RW told him of these. Mr Gregory said that an anonymous report had been received that there was not much by way of controls on site. He said he would send an e mail with some questions and to request some paperwork and also asked some general questions about the business and how it operated which RW answered. CG e mailed RW on 17 December 2020 summarising their discussions and RW responded to him stating "*we have a disgruntled employee who may have contacted you"* (pages 292-4). RW admitted in cross examination that he was referring to the claimant in this comment and that he believed it was the claimant that had complained to the HSE. This was a significant incident and again damaged the relationship between the claimant and RW who believed that the claimant had made an external report criticising the company.

<u>Disciplinary hearing – 17 December 2020</u>

7.50. Following a request by the claimant to delay the hearing and to allow him

to bring an alternative companion, the disciplinary hearing was held on 17 December 2020. In advance of that hearing the claimant sent a letter to RW which set out further complaints which he asked RW to consider before the disciplinary hearing(page 275-281). This was again a lengthy letter making a number of points including that the claimant believed that the disciplinary investigation announced on 3 December 2020 was "*contrived to try and justify a decision that you have already made to dismiss me*" and that his "*grievances present serious concerns that have not been given genuine or impartial consideration*" and that rather than address these, the respondent had chosen to dismiss him. He accused RW of taking sides with DS and JR against him and his decisions were influenced by his personal relationship with JR. He challenged the validity of the investigation process and alleged RW was not impartial. He also made detailed comments on each of the complaints referred to in the disciplinary invitation setting out his version of events, and alleging that RW had used complaints that the claimant had already spoken to RW about. He suggested that RW had concluded his investigation without having any meaningful input from the claimant. He also alleged that JH should not conduct the disciplinary hearing as he had dealt with the claimant's grievance appeal.

7.51. The hearing was conducted by JH with MW in attendance and the claimant was accompanied by Mrs Robinson. JH stated at the outset that the hearing was to consider customer complaints against the claimant which he said had been raised to RW "*without being asked, we have not coerced them at all*". The claimant when asked said although he had received the invite letter including some documents, he was still unaware as to what the allegations were. JH stated that the allegation was the claimant's "*behaviour/action in a customer complaints negatively impacting the business, customers not trading with us due to your behaviour or actions in the shop*". When asked what the behaviours complained of were, the claimant was told by JH that it was "*unhelpful making them wait, over charging them, being rude towards them, speaking down to colleagues in front of customers, customers saying they will go elsewhere due to your attitude.*" JH asked the claimant to comment on the customer complaints and the claimant referred to the letter he had sent in advance. When asked by Mrs Robinson whether the claimant could know who made the complaints was told that their anonymity needed to be protected. JH asked the claimant if he was aware that customers were unhappy being served by him.

7.52. The claimant made some comments on each complaint statement. JH then asked the claimant "*what qualities do you think the ideal shopkeeper should have?*". The claimant said this was a surprise question but that he thought it would be someone polite, honest and who put the customer first. JH was challenged on this question during cross examination stating that this was not appropriate when considering an allegation of conduct but was more an issue of capability and JH acknowledged that there were no issues with the claimant's capabilities. The claimant was asked by JH whether he was aware whether the alleged behaviour towards customers was unacceptable to which the claimant said that unhelpful behaviour, overcharging and rudeness would be unacceptable. Mrs Robinson went

on to challenge points around process. JH informed the claimant that he would take away what was discussed and would be in touch and when pushed for further information by Mrs Robinson said that the claimant would probably hear from the respondent tomorrow. There were two outstanding queries from the hearing from the claimant relating to why customers had requested to be anonymous and whether any further investigations into the claimant's conduct were underway. JH admitted in his evidence he should have provided the answers to these points before giving his outcome and did not but that these would not have changed the outcome. JH also admitted in cross examination that a new allegation about the claimant "*speaking down to staff*" was added by him during the meeting and conceded that this was not a fair thing to do. When asked during cross examination about the issue of anonymity of customers making complaints, JH said that he acknowledged the disadvantage to the claimant of not knowing who had complained but that there was a risk to the people who had complained who would be uncomfortable coming in to the shop if the claimant knew they had complained. He denied the suggestion put to him in cross examination that if a customer complained about a staff member, the employer should dismiss that staff member for the convenience of the customer.

7.53. JH gave evidence that after the hearing he looked at all the evidence and considered the claimant's letter of 16 December 2020 and the comments he provided during the meeting. We were not satisfied however that JH did consider the detailed points raised in the claimant's letter of 16 December 2020 about each of the New Complaints as no reference is made to these in either his evidence or in the dismissal letter. He considered the points raised about the validity of the investigation but concluded that he could not see any reason why customers would provide false statements. When asked he confirmed that he had considered whether the complaints could have been vexatious but dismissed this suggestion. He told us that he concluded that DS and JR had witnessed the behaviour and he also concluded that the claimant's "*conduct had damaged the company's reputation*". He concluded it was clear from the complaints received that "*as a consequence of [the claimant's] behaviour and attitude, some of the customers had taken their business elsewhere, which in turn meant that the business had suffered financial loss".* He determined that the allegations that the claimant's behaviour had been inappropriate and had negatively impacted the business had been upheld. When asked in cross examination whether any root cause analysis had been undertaken about effects on the business of what the claimant had done or any figures were produced he said this did not take place but that because of the difficulties the business was experiencing during the Covid period, it could not afford to lose any customers. We accepted that these were the genuinely held views of JH at this time.

7.54. JH told us that he went on to consider the appropriate sanction and concluded that *"a lesser sanction such as a written warning was not appropriate in this case".* He concluded that he did not believe the claimant had shown the qualities of a good shopkeeper based on what the claimant told him these were. He told the Tribunal that he considered that the claimant was in a position of great trust and he did not show any

remorse of appreciation that he had done anything wrong. He concluded it was "*evident that he had failed to provide excellent customer service*" which had caused financial loss and damaged the company's reputation. He concluded that there was a significant breach of trust and confidence and that the respondent would have serious reservations trusting him in the future. He agreed in cross examination that he had not considered any mitigation such as the factor that had been considered at an earlier stage that the claimant's father had recently passed away.

7.55. He told us that considered that this fell within the category of gross misconduct within the company's handbook as "*1) behaviour or action that potentially brings our organisation into serious disrepute and 2) serious breach of trust and confidence".* He said he decided that the appropriate sanction was summary dismissal, and that this decision was his alone. We did not accept that the decision to dismiss the claimant was made solely by JH but that this was ultimately the decision of RW which was implemented by JH. We conclude this primarily because the claimant's dismissal letter includes a very clear indication that the decision to dismiss was one which involved and included a decision of RW that the claimant could no longer work at the respondent. We find that JH was substantially influenced in his decision making by the views, express or implicit of RW, that the claimant could no longer work at the respondent given what had transpired.

Dismissal letter – 18 December 2020

7.56. A letter was prepared and JH showed his letter to RW before he sent it. RW told JH that he wanted to add a few paragraphs to the letter which he did before the letter was sent. The claimant was dismissed summarily by the letter sent to him dated 18 December 2020 (page 295-6). This letter included a brief section informing the claimant that he had been dismissed with immediate effect stating:

"We consider the customer complaints to amount to gross misconduct as we believe your behaviour and actions have brought the company's name into disrepute, we have also lost trust and confidence in your ability to do your job to the highest standard we expect."

It stated that the complaints had been from long standing customers who had not complained before and to lose custom in uncertain times due to a member of staff's behaviour was *"extremely detrimental to the business".*

7.57. RW added the following section to the end of the dismissal letter:

Furthermore, in light of your personal views towards the management team and co-workers including myself (RW) which you sent in your grievance letter 4th Dec ends any future relationship with CWE.

You addressed myself (RW) competence as your boss, you questioned CWE's response to the pandemic to which we are fully compliant with HSE, and you also went on to accuse various members of the team to be racists, homophobes and drug users. All of which was inappropriate,

irrelevant and unfounded. Again, this we believe is you bringing the company into disrepute.

Having made these accusations, it is difficult to see how you think you could return to work when you have spoken so negatively about the company and its employees."

It was put to RW that the fact that he had recently received a complaint from the HSE about Covid compliance and that RW thought it was the claimant that had made it was in his mind when he added these comments to the dismissal letter which was denied. We did not accept this denial and find that this was in his mind at this time. RW told the Tribunal that he was saddened that a friendship that had lasted 25 years would be coming to an end. It was put to RW that those words meant that there was no prospect of the claimant ever working with the respondent again and RW agreed that "*absolutely*" that was what it means but that the claimant could have appealed his dismissal if he wanted to. He went on to state that the claimant had upset various members of his team when making the comments he made in his letter of 4 December who were "really offended" by the accusations he made.

7.58. It was put to RW and JH in cross examination that these matters were the true reasons the claimant had been dismissed which was denied. We did not accept this evidence. The statements included by RW in the dismissal letter suggest very strongly what the true reasons for dismissal were. We find that the claimant's personal accusations of racism, homophobia and drug taking against the managers of the respondent in his letter of 4 December 2020, the breakdown in the relationship between the claimant, DS and JR, and also the suspicions of RW that the claimant had reported the respondent to the HSE were ultimately the reason why RW decided the claimant could not remain employed. RW told us when giving his evidence that it would not have been possible to avoid the claimant's dismissal by speaking to the customers and see if the problems they had raised could be sorted out. He said that he did not think this would work as "*they made it pretty clear that they were not happy trading with us and with [the claimant's] attitude towards them in the shop, I don't think that me apologising on his behalf would have made any difference to them coming or revisiting the shop*"

7.59. The letter provided the claimant with a right to appeal. The claimant informed RW by a letter of 21 December 2020 that he did not intend to appeal and alleged that his dismissal was flawed and unfair and that RW was clearly the decision maker (as well as the subject of the earlier grievance and the investigator). He stated that he had no confidence an appeal would be dealt with fairly. When asked about this during the tribunal hearing the claimant said that he knew that the appeal would be dealt with by Mr B Watts who was RW's father and also still part of the business. He also said that the comments made by RW in his dismissal letter made it clear that an appeal would be futile. We accepted the evidence of the claimant in this regard. He commenced early conciliation on 21 December 2020 and presented his claim form on 3 March 2021.

The Relevant Law

8. The relevant sections of the ERA we considered were as follows:

43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

43C Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—

(a) to his employer,

44 Health and safety cases.

(1) An employee 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—

…

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

47B. Protected disclosures.

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

48. Complaints to employment tribunals

(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section …44 (1).

…

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1) …. (1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

94. The right

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

95. Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……

(4) Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

9. Section 122(2) of the ERA provides:

   Where the tribunal considers that any conduct of the complaint before the dismissal (or where the dismissal was with notice before the notice was given), was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

10. Section 123(6) of the ERA provides:

    Where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

11. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides at article 3 (c) that any such claim made must be one which 'arises or is outstanding on the termination of the employee's employment'

12. **Williams v Michelle Brown AM/UKEAT/0044/19/00** where HHJ Auerbach considered the questions that arose in deciding whether a qualifying disclosure had been made:
    "It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

13. **Cavendish Munro Professional Risks Management Ltd v Geduld UKEAT [2010] ICR 325, [2010] IRLR 38** made it clear that to be a disclosure there must be a disclosure of information, not an allegation. In **Fincham v HM Prison Service EAT/0925/01** confirmed that the disclosure of information must identify, albeit not in strict legal language, the breach of the legal obligation that the claimant is relying on. In **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436** - paragraphs 31 and 32 on the irrelevance of the distinction between 'allegation' and 'information' in whistleblowing complaints as this is essentially a question of fact depending on the particular context in which the disclosure is made.

14. In **Okwu v Rise Community Action Ltd EAT 0082/19**, the EAT held that disclosures could still qualify for protection even though primarily raised to individual matters and this did not mean that a claimant could not also reasonably believe them to be in the public interest.

15. **Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] IRLR 64 [2012] ICR 372** – *"section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's*

treatment of the whistleblower".

16. **International Petroleum Ltd & Ors v Osipov & Ors [2017**] the EAT determined that "*the words "on the ground that" were expressly equated with the phrase "by reason that in Nagarajan v. London Regional Transport 1999 ICR 877. So the question for a tribunal is whether the protected disclosure was consciously or unconsciously a more than trivial reason or ground in the mind of the putative victimiser for the impugned treatment. 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". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference*."

17. The burden of proof provisions in relation to Section 103A complaints which were set out in the case of **Kuzel v Roche Products Ltd [2008] EWCA Civ 380 (CA)** are relevant. The Court of Appeal approved the approach to the burden of proof set out by the EAT as being as follows:-

"1*. Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent, some other substantial reason, was not the true reason?*

2. If so, has the employer proved his reason for dismissal?

3. If not, has the employer disproved the Section 103A reason advanced by the Claimant?

4. If not, dismissal is for the Section 103A reason."

It further noted at para 59

"*The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."*

18. In **Secure Care UK Ltd v Mott: EA-2019-000977-AT (previously UKEAT/0122/20/AT**), the EAT found that the 'materially influences' test applicable to section 47B claims for detriment by reason of making a protected disclosure (see **Fecitt v NHS Manchester [2012] ICR 372**), was the incorrect test and the Tribunal should apply the sole / principal reason test required by the terms of section 103A.

19. In **Eiger Securities LLP v Korshunova: UKEAT/0149/16/DM** the EAT found that whether the making of a protected disclosure was "a matter which was in the employer's mind at the time of dismissal" is not the correct test and

Tribunals should apply the test as to whether disclosure was the reason or the principal reason for dismissal.

20. Conduct does not have to be blameworthy to fall within the ambit of S.98(2), although blameworthiness could be relevant when considering the dismissal's fairness - **Jury v ECC Quarries Ltd EAT 241/80**.

21. If a dismissal is asserted to be on the grounds of conduct, then the test laid down in **British Home Stores –v- Burchell [1978] IRLR 379** requires an employer to show that:-

    21.1. it believed the employee was guilty of misconduct;

    21.2. had reasonable grounds to hold that belief;

    21.3. it formed that belief having carried out a reasonable investigation, given the circumstances.

22. In determining the question of reasonableness it was not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether "*the dismissal lay within the range of conduct which a reasonable employer could have adopted*" as set out in the case of **Iceland Frozen Foods v Jones [1982] IRLR 439**.

23. The "range of reasonable responses" test applies not only to the actual decision to dismiss, but also to the procedure adopted by the employer in putting the dismissal into effect - **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.**

24. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

25. A fair investigation requires the employer to follow a reasonably fair procedure. Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and the appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

26. **Burdett v Aviva Employment Services Ltd [UKEAT/0439/13]** per HHJ Eady - "*it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct (see Eastland Homes Partnership Ltd v Cunningham UKEAT/0272/13/MC per HHJ Hand QC at paragraph 37). Failure to do so can give rise to an error of law: the Employment Tribunal will have failed to determine whether it was within the range of reasonable responses to treat the conduct as sufficient reason for dismissing the employee summarily.*"

27. **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38) - Even if the Tribunal has concluded that the employer was entitled to regard an employee as having committed an act of gross misconduct (i.e. a reasonable investigation having been carried out, there were reasonable

grounds for that belief), it will still need to consider whether it was within the range of reasonable responses to dismiss that employee for that conduct. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors.

28. Tribunals must not put themselves in the position of the employer and consider what they themselves would have done in the circumstances. It must not decide what it would have done if it had been management, but whether the employer acted reasonably. A decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer. — **Grundy (Teddington) Ltd v Willis 1976 ICR 323, QBD; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA, .**

29. **Harper v National Coal Board 1980 IRLR 260, EAT** — so long as an employer can show a genuinely held belief that it had a fair reason for dismissal, that reason may be a substantial reason provided it is not whimsical or capricious.

30. **Dobie v Burns International Security Services (UK) Ltd 1984 ICR 812, CA** - third-party pressure to dismiss can amount to some other substantial reason within the meaning of section 98 (1) (b) ERA. Whilst an employer does not have to establish the truth of any allegations made against the employee or agree with the request to dismiss, an employer cannot simply hide behind the decision of the client and must do everything that it reasonably can to avoid or mitigate any injustice to the employee - **Henderson v Connect South Tyneside Ltd 2010 IRLR 466, EAT.** The employer must show that some pressure was exerted by the customer - **Grootcon (UK) Ltd v Keld 1984 IRLR 302, EAT**. In **Securicor Guarding Ltd v R 1994 IRLR 633, EAT,** the EAT held that it was unfair to dismiss without at least asking that customer whether there was any objection to the continued employment of the claimant.

31. **Ezsias v North Glamorgan NHS Trust 2011 IRLR 550, -** the breakdown of the working relationship between an employee and his colleagues could be some other substantial reason within the meaning of section 98 (1) (b) ERA. n However **Ezsias** and the authorities of **McFarlane v Relate Avon Ltd [2010] ICR 507** and **Leach v Office of Communications 2012 ICR 1269, CA** caution as to the reliance on this ground where there are specific actions of misconduct that should be put to the employee and the Tribunal must always look at the background to consider fairness. As to the procedure an employer should follow when contemplating dismissal for a relationship breakdown, this will depend to a large extent on the nature of the breakdown, the prospects for repairing the relationship and the existence of alternatives to dismissal - **Jefferson (Commercial) LLP v Westgate EAT 0128/12.**

32. It may be fair to dismiss without warning where the employee's continued employment is against the interests of the business, either because of gross inadequacy or where the employee would not have changed his or her ways in any case — **James v Waltham Holy Cross UDC 1973 ICR 398, NIRC**.

33. It is important that the employee knows the full allegations against him or her. Disciplinary charges should be precisely framed, and evidence should be

limited to those particulars **— Strouthos v London Underground Ltd 2004 IRLR 636, CA. Hussain v Elonex plc 1999 IRLR 420 -** where the employee is fully aware of the case against him and has a full opportunity to respond to the allegations and the obtained statements are peripheral to the decision reached, the failure to disclose will not render a dismissal unfair.

34. **Polkey v A E Dayton Services Ltd [1987] IRLR 503 HL**, the chances of whether or not the employee would have been retained must be taken into account when calculating the compensation to be paid to the employee. Tribunals are required to take a common-sense approach when assessing whether a Polkey reduction is appropriate - **Software 2000 Limited v Andrews [2007] IRLR 568**; the nature of the exercise is necessarily "broad brush" - **Croydon Healthcare Services v Beatt [2017] IRLR 274**; and the assessment is of what the actual employer would have done had matters been dealt with fairly not how a hypothetical fair employer would have acted (**Hill v Governing Body of Great Tey Primary School [2013] IRLR 274).**

35. When considering contributory fault the conduct must be "culpable or blameworthy" - **Bell v The Governing Body of Grampian Primary School [2007] All ER (D) 148.** The Tribunal may take a very broad view of the relevant circumstances when determining the extent of contributory fault - **Gibson v British Transport Docks Board [1982] IRLR 228.**

36. The ACAS Code of Practice on Disciplinary and Grievance Procedures ("ACAS Code") may apply to 'some other substantial reason' dismissals where there is a conduct issue when the dismissal process is initiated even if ultimately the dismissal is not for conduct but for some other substantial reason (**Lund v St Edmunds School [2013] ICR 26**).

37. In a claim for breach of contract, the question for the Tribunal is whether there has been a repudiatory breach of contract justifying summary dismissal. The degree of misconduct necessary in order for the employee's behavior to amount to a repudiatory breach of contract is a question of fact for the Tribunal to determine. The test set out in **Neary and anor v Dean of Westminster [1999] IRLR 288** is that the conduct:
"*must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain [the employee] in his employment*".

38. In **Briscoe v Lubrizol Ltd 2002 IRLR 607, CA**, the Court of Appeal approved the test in Neary above and stated that the employee's conduct should be viewed objectively, and so an employee can repudiate the contract even without an intention to do so.

39. In the case of **West London Mental Health NHS Trust v. Chhabra [2014] IRLR 227,** the Supreme Court confirmed that in order for misconduct to amount to gross misconduct there does need to be some sort of "willful" or deliberate breach of the employee's duties.

40. **Mgubaegbu v Homerton University Hospital NHS Employment Foundation Trust UKEAT/0218/17 (18 May 2018, unreported)** Choudhury J The Tribunal must make its own findings of fact in relation to the breach in

order to determine whether that breach was sufficiently serious to warrant immediate termination.

Conclusions

41. The issues between the parties which fell to be determined by the Tribunal were set out above and we set out our conclusion on each matter to be determined below, although we have approached some of the issues in a different order.

PROTECTED DISCLOSURE AND HEALTH AND SAFETY DETRIMENT AND DISMISSAL COMPLAINTS (SECTIONS 44 (1) (C), 47B ERA, 100 (1) (C) AND 103A)

42. The claimant contends that he was subject to detrimental treatment and ultimately dismissed on the grounds that he made protected disclosures and/or raised health and safety issues contrary to sections. The first question to consider is that set out at paragraph 7 of the List of Issues, i.e whether the claimant made one or more qualifying disclosures as defined in section 43B ERA, which was disputed by the respondent. Dealing with each alleged disclosure in turn:

42.1. Para 6 a) - On 27 October 2020, he submitted a grievance in which he allegedly raised 'the health and safety of other workers was being endangered'

Our findings of fact at para 7.26 above record that the claimant's written grievance submitted on this date alleged that the removal of health and safety measures was "*in breach of the H&S at Work Act*". Dealing with each question at paras 7-12 of the List of Isssues above in turn:

42.1.1. Was there was a disclosure of information?

There was a disclosure of information here as the claimant is making specific reference to the removal of health and safety measures, making a reference to the removal of the barrier by DS between 7 and 21 September 2020 with the agreement of RW.

42.1.2. Did the claimant believe that what he had disclosed tended to show that the respondent has failed, is failing or likely to fail to comply with any legal obligation to which it is subject and/or that the health or safety of any individual had been, was being or was likely to be endangered?

We conclude that the claimant did believe that the removal of the barrier by DS was something that tended to show the failure to comply with a legal obligation and that the health and safety of any individual was being endangered. The claimant had been concerned about Covid 19 safety measures from the outset of the pandemic e mailing RW on 22 March 2020 with his suggestions (para 7.8). He was involved in discussions with RW about the implementation of such measures (para 7.9). He raised concerns about the social distancing of one particular employee on 27

April 2020 (para 7.10). We also found that the claimant "took issue" with the correctness of the changes that RW had made on his absence on furlough leave when he returned from work on 17 July 2020 and took steps to put additional measures in place (para 7.13). He was upset when the barrier he had put in place was removed on his return from annual leave on 21 September 2020 (para 7.14) and again when it was damaged and when he spoke to RW about this highlighting his concerns about Covid 19 (para 7.14). The claimant's grievance makes specific reference to not complying with health and safety legislation. The claimant consistently raised matters of Covid 19 compliance and this was the source of at least some of the issues he had with the respondent, particularly as differences of view and opinions on this matter was also adding to the friction already in place between the claimant and his co-workers.

42.1.3. Was that belief was reasonable

We have also considered whether that belief was reasonable. In respect of both his belief that there was a risk to health and safety and a failure to comply with a legal obligation, we consider that the answer is yes. There was clearly a difference in opinion between the claimant and RW (and other co-workers) as to the measures that were required. The rules had relaxed in England and Wales at the time, but whether this was correct or not was a matter up for public debate at that time. By 27 October 2020, restrictions were starting to be reintroduced with the three tier system starting on 14 October which would ultimately lead to a second full lockdown on 31 October 2020. The view of RW and others that this was unnecessary did not make the claimant's differently held view unreasonable. This is particularly so, given that the risk assessment that the claimant had signed and become familiar with had not been updated (para 7.12) and that no formal briefings around the changes and their rationale had been arranged by the respondent (para 7.12). Given those circumstances, the claimant's beliefs were reasonable to hold.

42.1.4. Did the claimant believe that the disclosure was made in the public interest? Was that belief reasonable?

We have considered whether the claimant believed that making the disclosure was in the public interest and of so whether that belief was reasonable, and have concluded that in both cases the answer was yes. Covid compliance was a matter of importance to the general public, customers and staff at the respondent. We also consider that at this particular time of heightened public risk and concern, this was a belief that was reasonable to hold.

We were satisfied that on this occasion this amounted to a qualifying disclosure by the claimant.

42.2. <u>On 5 November 2020, he submitted further information relating to his grievance in which he allegedly raised that 'the health and safety of other workers was being endangered'</u>

Our findings of fact at para 7.28 above record that the further information about his grievance which the claimant submitted on this date does state his view that the respondent was not a Covid secure workplace and that he had not been adequately supported in implementing measures. Dealing again with each relevant question in turn:

42.2.1. Was there was a disclosure of information?

We conclude that there was a disclosure of information here as the claimant not only makes a general allegation but also goes on to list specific incidents including the removal of the barrier and failures in respect of mask wearing at his grievance meeting .

42.2.2. Did the claimant believe that what he had disclosed tended to show that the respondent has failed, is failing or likely to fail to comply with any legal obligation to which it is subject and/or that the health or safety of any individual had been, was being or was likely to be endangered?

For the same reasons as are set out at para 42.1.2 above, we were also satisfied that the claimant believed what he had disclosed tended to show the failure to comply with a legal obligation and that the health and safety of any individual was being endangered.

42.2.3. Was that belief was reasonable

For the same reasons as at para 42.1.3 above, we also conclude that the claimant's belief was reasonable.

42.2.4. Did the claimant believe that the disclosure was made in the public interest? Was that belief reasonable?

For the same reasons as set out at para 42.1.4 above, we conclude that the claimant believed that making the disclosure was in the public interest and that belief was reasonable.

We were satisfied that on this occasion this amounted to a qualifying disclosure by the claimant.

42.3. <u>On 3 December 2020, he appealed the outcome of his grievance. The Claimant is alleging that in his grounds of appeal, he raised 'unlawful discrimination in the workplace' and that 'the health and safety of other workers was being endangered'.</u>

Our findings of fact in relation to the claimant's appeal are at para 7.41 to 7.44 above. We have considered each constituent part as to whether this was a qualifying disclosure.

42.3.1. Was there was a disclosure of information?

We conclude that there were three separate and distinct disclosures of information here. Firstly the claimant complains about the validity of the

grievance outcome provided to him making reference to the respondent's handbook and the ACAS Code. Secondly he makes a similar allegation about a failure to comply with Covid 19 measures to the ones already made. Lastly he goes on to specifically make an allegations of discriminatory conduct taking place at the respondent throughout his employment, making specific reference to the sharing of obscene content by one employee, the comment about English names by RW, the use of racist slurs by other managers and homophobic bullying of DS. There is specificity in the information here, rather than a generalised allegation.

42.3.2. Did the claimant believe that what he had disclosed tended to show that the respondent has failed, is failing or likely to fail to comply with any legal obligation to which it is subject and/or that the health or safety of any individual had been, was being or was likely to be endangered and was that belief reasonable?

In order to consider that question it is necessary to consider each of the particular disclosures of information made in this appeal as they were different in nature. Firstly in respect of the complaints about his grievance process, the claimant does make specific reference to the ACAS Code of Practice and particular provisions of the respondent's handbook. We were satisfied that the claimant believed that the many failures he alleged were breaches of a legal obligation as each is identified and set out clearly in his appeal letter. We conclude that at least in respect of the alleged breaches of the ACAS Code of Practice, was it reasonable for the claimant to believe that the respondent was in breach of a legal obligation by in his view failing to comply with it. The respondent's employee handbook is described as containing policies and procedures to be read alongside the claimant's contract of employment. Even if the provisions of the employee handbook the claimant said were breached did not all strictly have contractual force, it was reasonable for the claimant to consider that any such breaches as he was alleging were breaches of a legal obligation. Secondly in terms of the allegations of failure to comply with Covid safety measures, or the same reasons as are set out at paras 42.1.2 and 42.1.3 above, we conclude that the claimant believed what he had disclosed tended to show the failure to comply with a legal obligation/the health and safety of any individual was being endangered and that was belief was reasonable.

However in respect of the allegations raised by the claimant about discriminatory conduct we were not satisfied that the claimant had a genuine belief that the respondent was in breach of a legal obligation in respect of the particular incidents he refers to (see our findings of fact at paras 7.41-7.43). We conclude this because unlike the issue of Covid 19 measures, this was not something that the claimant had been complaining about before in the recent past. Neither, as with the complaints about the grievance/disciplinary process, was this of direct relevance to his current situation. The claimant's explanation that he was raising such matters at this point to highlight the inconsistency and unfairness of his own treatment was not convincing. Some of the events referred to were historic including the allegation regarding English names which took place at the very start of his employment. The issue regarding inappropriate content

being shared via social media appears to have been raised informally and resolved with RW as well (see para 7.42). Whilst we accept there may have been a marked difference in degree between the Naked Challenge video and pornographic material, the claimant's willingness to participate in this sort of video sharing would suggest this was something he was prepared to engage in at some level and may not have found as offensive as is now suggested. We also accepted the evidence of DS that the matter of alleged homophobic bullying was also not perhaps as significant as the claimant is now suggesting. These particular allegations although in the way they are expressed were very serious, were not raised in the claimant's original grievance or further clarification of it in October and November 2020. We also note that the claimant felt comfortable making such complaints in the past as when he raised a complaint re WB, he was supported and it was actioned by RW by way of disciplinary action. We conclude that although there was some substance in the facts behind each matter referred to, that the claimant did not raise such matters holding a genuine belief that there had been discriminatory conduct, but to counteract the disciplinary allegations that had been levelled against him by bringing up other issues which might suggest other conduct at work was worse than his. There may be valid reasons for the claimant to do that, for example as he suggests to illustrate inconsistency of treatment of different forms of behaviour. However this does not equate with the claimant holding a genuine and reasonable belief that the respondent in the examples cited was failing or likely to fail to comply with any legal obligation to which it is subject and/or that the health or safety of any individual had been, was being or was likely to be endangered

42.3.3. Did the claimant believe that the disclosure was made in the public interest? Was that belief reasonable?

In respect of the Covid compliance issues, for the same reasons as set out at 42.1.4 above, we accept that the claimant at least make this disclosure believing it to be in public interest and that this was belief was reasonable.

In respect of the issues of alleged breaches of the ACAS Code and the respondent employee handbook, we were not satisfied that the claimant reasonably believed these disclosures were in the public interest as these were matters relating to his own personal situation only, not the wider public interest. We have considered the authority of *Okwu* above as cited by the claimant, that a personal interest in a matter does not preclude it also being a matter of public interest. However in the claimant's case, he has not demonstrated that he held a reasonable belief that making these disclosures was in the wider public interest. As we have concluded that the issues raised about discriminatory conduct were not matters that the claimant reasonably believed tended to show that the respondent has failed in any legal obligation we do not need to go on to consider whether such matters were matters that the claimant reasonably believed to be in the public interest. If this had been necessary, for the same reasons for the disclosures made relating to breaches of the handbook and the ACAS Code, we also conclude that the claimant has not shown that he held a genuine and reasonable belief that what he was raising was in the public interest

43. We conclude therefore that the claimant made qualifying disclosures on 27 October, 5 November and 3 December 2020 about the respondent's failure to comply with Covid 19 safety measures only. This is significant to note when we come on to consider the reason for the detrimental treatment and dismissal. As such disclosures were made to the respondent, his employer, those three disclosures were protected disclosures as defined by section 43A ERA.

44. We have also gone on to consider whether the claimant made health and safety disclosures and so fall within the circumstances set out in section 44 (1) (c) ERA. On the same occasions and relating to the same information which we have found the claimant to have made qualifying disclosures, we firstly conclude that the claimant brought to the respondent's attention by reasonable means circumstances connected with his work which we also conclude he reasonably believed were harmful or potentially harmful to health and safety.

45. In order to determine whether the claimant made a health and safety disclosure, it also has to be shown that he was employed at a place where there was no representative of workers on matters of health and safety at work or no safety committee. We were not addressed on this matter and no evidence was called by either party. The handbook makes no reference to a health and safety representative or a health and safety committee and we conclude on the balance of probabilities that given that the respondent is a small employer, they would not have had such a representative or committee. We therefore conclude that the occasions on which the claimant made protected disclosures also amounted to the claimant making health and safety disclosures withing the circumstances set out in section 44 (1) (c).

46. As the claimant made the protected disclosures and health and safety disclosures we have set out above ("the Disclosures"), we went on to consider whether firstly he was subjected to any detriment as a result of doing so. The claimant relied on two separate acts of detriment. We set out our conclusions below on whether the respondent subjected the claimant to detriment and if so, whether it was done on the ground that he made one or more of the Disclosures:

46.1. Subjecting the claimant to a disciplinary investigation

Our findings of fact were that RW decided that he would need to commence an investigation having heard about customer complaints from JR at the meeting on 28 September 2020 (see para 7.19). There was further brief discussion about those complaints when the claimant and RW met on 6 October 2020 (para 7.22). We also accepted that RW contacted Arrow Engineering to enquire about the one named complaint that appeared to have been made, although did not take any further substantive steps at this time. The claimant also made an enquiry about how the investigations were proceeding on 14 October 2020 (para 7.25). Therefore we conclude that RW had already made a decision to start a disciplinary investigation before the first of the Disclosures on 27 October 2020 and thus the decision to "subject the claimant to a disciplinary

investigation" was not on the ground that the claimant had made a protected disclosure. The grievance then led to a 'stay' in the investigation and the disciplinary investigation only recommenced once the claimant was provided with an outcome on 1 December 2020 (paras 7.32 and 7.33). The claimant was notified on 2 December 2020 that RW would need to investigate complaints received during the claimant's absence on sick leave (which was after two of the three Disclosures) but we conclude that the reference to "investigate" here relates to RW wishing to speak to the claimant about such matters to get his account, rather than the commencement of a new investigatory process. The claimant's complaint in respect of this alleged detriment fails primarily because the decision took place before the Disclosures occurred.

46.2. Subjecting the Claimant to a disciplinary hearing.

RW decided that having conducted his investigation, including interviewing the claimant on 8 December 2020 (para 7.45), that the claimant was required to attend a disciplinary hearing and the claimant was informed by a letter dated 10 December 2020 (para 7.47). This decision took place after all three Disclosures. Therefore we have considered whether either of the three Disclosures "*materially influenced (in the sense of being more than a trivial influence)*" (as per Fecitt above) the decision of RW to invite the claimant to attend a disciplinary hearing. We also take into account the guidance in Osipov above that it is for the respondent to show the ground upon which the act was done and that we may (but are not required to) draw adverse inferences from an employer's failure to provide a satisfactory explanation. We conclude that the Disclosures did not materially influence the decision to convene a disciplinary hearing. By this time, there had been an investigation and in light of the findings it was as the respondent submits a logical and reasonable next step for the respondent to put those matters to the claimant in the formal setting of a disciplinary hearing. The respondent had therefore shown to our satisfaction that the reason the claimant was invited to a disciplinary hearing was to answer the disciplinary allegations made against him as a result of the investigation. The disciplinary process was at this time already under way with the investigations starting before any of the Disclosures had occurred. We were satisfied that the decision to move to the next stage of that process and invite the claimant to a disciplinary hearing was not on the ground of the claimant having made the Disclosures.

47. Having concluded that the Disclosures were not the reason for the detrimental treatment relied upon, the claimant's complaints the complaints under sections 44 (1) (c) and 47B ERA are dismissed. Given that none of the complaints for unlawful detriment have succeeded, we did not need to go on to consider whether there was a series of similar acts or failures, whether it was reasonably practicable for the claim to be made to the Tribunal within the primary time limit, and if not whether a claim was made within a reasonable period thereafter. All the detriment claims failed having been considered fully on their merits.

48. We have then gone on to consider whether the claimant was dismissed for

the reason or principal reason of having made a protected disclosure pursuant to s. 103A ERA and/or raised health and safety concerns pursuant to s. 100(1)(c). Here the test we must apply is not whether the dismissal was materially influenced by the Disclosures but whether the Disclosures were the sole or principal reason for the claimant's dismissal (see Mott above). We have also considered the guidance on the application of the burden of proof in such cases in Kuzel above. We were satisfied that the claimant has shown that there is a real issue as to whether the reason put forward by the respondent was not the true reason and moreover, we have concluded that the respondent has not proved that reason for dismissal and our analysis and conclusions on this matter are set out at paragraph 51 below. However as envisaged by the guidance in Kuzel, although open to us to find that dismissal was for the reasons the claimant asserts i.e the Disclosures, we are not required to do so. In this case, we conclude that the respondent has in fact disproved the section 103A reason advanced by the claimant and we are satisfied that the claimant was not dismissed for the sole or principal reason of having made one or more of the Disclosures. We conclude this for the following reasons:

48.1. The claimant naturally relies heavily on the paragraphs added to his dismissal letter by RW (see para 7.57 above). RW here refers expressly to the claimant's grievance letter of 4 December 2020 and makes a link between the claimant's "*personal views towards the management team and co-workers*" ending "*any future relationship*" with the respondent. It also states that having made "*accusations*" it was difficult to see how the claimant could return to work. On its face that seems to suggest that RW at least had decided having read the claimant's grievance letter of 4 December 2020 that he would have to be dismissed. However it is important to consider the content of the Disclosures themselves. As we have concluded at para 43 above, it was the information provided by the claimant in relation to alleged failure to comply with Covid 19 law/guidance that amounted to protected disclosures within the meaning of 43B and 43C and circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety within the meaning of section 44 (1) (c) ERA. We were satisfied that the claimant raising matters of Covid compliance with the respondent in either the letter of 4 December 2020 or the earlier letters of 27 October and 5 November 2020 was not the reason or principal reason he was dismissed. The claimant had been raising matters of Covid compliance from the very start of the pandemic (see paras 7.8, 7.9, 7.10 and 7.14). RW at least in the early stages was receptive to this and included the claimant in his preparations for the return of employees to work (see para 7.9). Although the difference in views did latterly cause some tension, this was more in relation to his co-workers DS and JR and not particularly RW who acknowledged even later in July 2020 that the claimant's concerns were genuine. We were not convinced that the claimant pointing out to RW in correspondence, the matters he had already made RW aware of in terms of Covid compliance were the reason or principal reason for his dismissal.

48.2. We accept that the personal allegations made against RW and his fellow managers by the claimant in his grievance of 4 December 2020 did play a large part in the decision at least by RW to dismiss the claimant. It is clear

from the dismissal letter itself that RW took great exception to the accusations of racism, homophobia and drug use. In the context of the personal relationship between RW and the claimant (and other managers) these were no doubt difficult allegations to read. However these matters were not the subject matter of the Disclosures (and thus not protected disclosures within the meaning of 43B and 43C and circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety within the meaning of section 44 (1) (c) ERA) they do not assist the claimant in showing that his dismissal was for a prohibited reason.

48.3. RW had only days earlier received contact from the HSE about an anonymous complaint which he concluded had come from the claimant which he described as a "disgruntled employee". We conclude that this was likely to have played a part in RW's decision making but again nothing about this matter was said to be a protected disclosure within the meaning of 43B and 43C ERA.

48.4. The claimant himself appears to acknowledge around the time he believed the respondent would dismiss him and submitted his grievance appeal that his problems at work arose from the difficulties in his relationship with (in particular) JR, and the problems that arose from JR also being RW's stepson (see para 7.40 above). We have reached similar conclusions as the claimant did at the time and conclude this was one of the major reasons for his dismissal.

49. The claimant's complaint under section 103A is therefore not well founded and is dismissed.

ORDINARY UNFAIR DISMISSAL PURSUANT TO SECTION 98(4) ERA

50. As the claimant is an employee with over two years continuous employment and had the right not to be unfairly dismissed so we have gone on to consider this complaint. The first question we must ask ourself was whether the claimant's dismissal for a potentially fair reason within s. 98 ERA. The respondent contends that the claimant was dismissed for misconduct or, alternatively, some other substantial reason, namely either (i) third party pressure or (ii) a breakdown in relationship and confidence. Dealing with each in turn, we have firstly considered whether the respondent has shown that the claimant was dismissed for conduct reasons. The respondent relies in this regard on the New Complaints (see para 7.33-7.38 above) which it contends mirrored the behaviours complained about by DS and JR during the meeting of 28 September 2020 and as such the claimant brought the respondent into disrepute and caused it to lose trust and confidence in the claimant. The respondent must in order to establish that conduct was the reason for dismissal show that it had a genuine belief in the claimant's guilt; that it had reasonable grounds for that belief and it formed that belief having carried out a reasonable investigation (as per Burchell above).

51. We find that the person who implemented the claimant's dismissal, JH, held a genuine belief both that the claimant had committed the acts referred to in the New Complaints and that this had led to the respondent's business being

detrimentally affected (see para 7.53 above). However, we also conclude that although RW (who was the ultimate decision maker - see para 7.56 above) may have genuinely believed that the conduct referred to in the New Complaints had occurred, the matters set out in the New Complaints were not the reason that RW decided to dismiss the claimant. We conclude on the basis of our findings of fact at para 7.58 that RW had made a decision that the claimant could no longer remain employed because of the claimant's personal accusations of racism, homophobia and drug taking against the managers and employees of the respondent (including RW and JR themselves) in his letter of 4 December 2020, the breakdown in the relationship between the claimant, DS and JR, and also the suspicions of RW that the claimant had reported the respondent to the HSE. The matters referred to in the New Complaints may have reinforced the decision of RW but were not in our conclusion, the reason or primary reason for dismissal.

52. In any event, even if the New Complaints bringing the respondent into disrepute and causing loss of trust and confidence was the true reason for dismissal, we were not satisfied that that the respondent had reasonable grounds for believing this was an act of misconduct having carried out a reasonable investigation. We had the band of reasonable responses clearly in mind in deciding this. The evidence the respondent purported to rely on to justify dismissal was flawed in the manner it was obtained (see para 7.38 above) consisting of one sided accounts of customers who had been asked to provide some comments about their interactions with the claimant. We conclude that a reasonable employer would have conducted a more even handed investigation, by asking questions about specific incidents rather than asking customers to give an account of what their overall view was of the claimant, his behaviour and personal qualities. We also find that a reasonable investigation would have sought the claimant's explanation for his alleged behaviour in respect of the New Complaints which was not done in any level of detail during the meeting on 8 December 2020 (paras 7.45 and 7.46). In this meeting, vague allegations were put to the claimant without any detail to allow him to comment or explain his side of the story (see para 7.45). Even though the claimant did provide his detailed input on each of the New Complaints in writing (see para 7.50), the claimant was not provided with a full opportunity to give the explanation for his behaviour during the disciplinary hearing before JH. The New Complaints were anonymous and rather than drill down into detail on each incident, general questions were put to the claimant by JH including a question about what qualities an ideal shopkeeper should have. We find that asking such a question was outside the range of reasonable behaviour in determining whether an employee had committed an act of misconduct but was more in the nature of an interview question. We also found that JH did not consider the claimant's detailed input on the New Complaints (see para 7.53). The failure to seek and consider appropriately the claimant's side of the story, meant that the unfairness in failing to interview the claimant during the investigation was not remedied at the disciplinary hearing stage.

53. The failure to assess properly the claimant's explanations and challenges as to what was being put to him is not just relevant to whether the respondent had reasonable grounds for any belief that he was guilty of misconduct, but also to what penalty was imposed, and to the procedure followed. The range

of reasonable responses test applies to all aspects of what the respondent did and we conclude that the respondent acted outside this in these matters too. No reasonable employer in the respondent's position would have disregarded the claimant's explanation and mitigation and a reasonable employer would have considered and assessed any explanations in deciding what view to take of culpability and what sanction to impose. JH and RW had already made up their mind to dismiss (even though each had different reasons) and the dismissal of the claimant was a foregone conclusion before the disciplinary hearing even took place. The claimant had no valid or substantive right of appeal (see para 7.58 above). The decision to dismiss the claimant was therefore outside the range of reasonable responses to any conduct issues that occurred.

54. We have also considered the alternative grounds for dismissal put forward by the respondent. We were not persuaded by the arguments made that the respondent had dismissed the claimant in response to customer pressure which was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Whilst the New Complaints recount four complaints against the claimant by customers, there is really nothing here which suggests any pressure was exerted on the respondent (as envisaged by the authorities of Dobie and Grootcon above) by customers to take any action at all. These were just four of presumably numerous casual customers of the respondent. The New Complaints were not unprompted but were statements made and produced at the respondent's request. We do not consider that the respondent has shown that any of the complainants in the New Complaints made any indication at all about the claimant's continued employment (as anticipated in the Securicor case) which would satisfy the respondent deciding that they were under pressure to dismiss him.

55. We then went on to consider whether the claimant's dismissal was because of the breakdown of internal relationships/loss of trust and confidence which could be regarded as "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". We take note of the guidance in Ezsias and similar authorities above and conclude that the respondent has not shown that the reasons that led to the claimant's dismissal which we concluded at paragraph 51 necessarily led to a loss of trust and confidence that would justify the dismissal of the claimant. RW was offended at the personal accusations made in the claimant's grievance appeal letter against him and colleagues and had a suspicion that the claimant had reported the respondent to the HSE. He was also concerned as to the ongoing relationship between the claimant and DS/JR which was complicated by his own personal relationship with all three. However none of these matters were put to the claimant or considered in the context of whether they should necessarily have led to the claimant's dismissal. The respondent did not consider whether the relationships could be repaired by mediation or otherwise.

56. Having determined that the respondent has not discharged the burden of proof in showing that the claimant was dismissed for some other substantial reason, we did not need to consider whether the respondent acted reasonably in treating that reason as a sufficient reason for dismissing the Claimant in all

the circumstances pursuant to s. 98(4) ERA. However again, even if the respondent dismissed for these reasons, an employer acting reasonably in those situations will generally collect evidence, put it to the claimant and allow him or her to answer it at a hearing before deciding how to proceed. Alternatives to dismissal which should reasonably be considered within the range of reasonable responses include mediation or redeployment. For the same reasons we have set out above, the decision to dismiss the claimant had been predetermined by RW before the claimant was given an opportunity to challenge it and JH was carrying out the process of holding a disciplinary hearing and recording a decision already made

57. When considering whether the respondent followed a fair procedure we have taken into account the size of the respondent's undertaking. This is a small employer, but one with managers who have some experience dealing with disciplinary and dismissal matters and well-drafted written policies. A formal disciplinary process was followed, although there were procedural failings that put it outside the range of reasonable responses, specifically the failure to properly investigate the customer complaints, the failure to consider the claimant's explanations and mitigation and the failure to offer a substantive right of appeal. Within the range of reasonable responses, the respondent's size and resources do not excuse the unfairness in its actions in this case.

58. We find, therefore, that the claimant was unfairly dismissed by the respondent within section 98 of the Employment Rights Act 1996.

59. As we have found the dismissal to be substantively and procedurally unfair, the next stage is to consider whether the claimant's actions caused or contributed to his dismissal such that no compensation should be awarded, or alternatively that any compensation awarded should be reduced by his level of contributory fault. When considering a deduction to the basic or compensatory award on the basis of contribution, firstly, it is necessary to identify the conduct which is said to give rise to possible contributory fault. Secondly, we must decide whether that conduct is blameworthy. Thirdly, under section 123(6) ERA, we should consider whether the blameworthy conduct caused or contributed to the dismissal to any extent and finally we must determine to what extent it is just and equitable for the award to be reduced.

60. The claimant's conduct said to give rise to contributory fault is not set out with any particularity by the respondent in its submissions, other than the reference to the claimant's "behaviours outlined above". We have taken this to refer to the matters that the respondent alleged were matters of misconduct set out in the New Complaints which formed the basis of the disciplinary hearing and is what the respondent contended was the reason for his dismissal. For the reasons set out at paragraph 51 to 53 above and 62 below we do not consider the conduct of the claimant to be blameworthy and so do not need to go on to consider whether it caused or contributed to his dismissal.

61. We have also considered whether the claimant would have been fairly dismissed in any event in the very near future such that no compensation should be awarded, alternatively that any compensation awarded should be

reduced in accordance with *Polkey v AE Dayton Services Ltd [1987] ICR 142*. We were not able conclude that had the respondent carried out the procedure in a fair and reasonable manner that the claimant would still have been dismissed. The respondent's failings in process, substantially altered the possible outcome in particular the flaws in the investigation. We were not able to speculate as to what would have happened had this not taken place as it may have led to an entirely different outcome. For these reasons, no reduction on the basis of Polkey is appropriate.

WRONGFUL DISMISSAL

62. In determining whether the respondent dismissed the Claimant without notice in breach of contract, we have to ask ourselves whether what the claimant did which led to his dismissal so undermined the trust and confidence inherent in the contract of employment that the respondent was entitled to dismiss him. We have to conclude that there was some form of deliberate or wilful breach of the employee's duties. Firstly, for all the reasons set out above (paragraphs 51-53), we conclude that the respondent has not shown that the claimant as a matter of fact commit acts of misconduct in relation to the New Complaints. Secondly, given the tribunal's findings in paragraph 51 above, that the reason for terminating the claimant's employment was not misconduct, even if the claimant did commit a breach of contract, the respondent did not accept the repudiatory breach of contract and terminate in response to it. We conclude that the claimant's acts in making complaints about the respondent's managers, or the difficulties in the personal relationships set out in detail above were not actions of the claimant which amounted to repudiatory conduct which would entitle the respondent to dismiss lawfully without notice. The claimant was wrongfully dismissed and is entitled to his notice pay.

REMEDY

63. The remedy to which the claimant is entitled will be determined at a separate remedy hearing which will be listed to be heard by CVP(with a time estimate of 1 day) and the date notified to the parties. At that hearing, the Tribunal will determine the remaining issues relating to remedy from the List of Issues that have not yet been determined which are set out below:

63.1. What is the amount of Basic Award to which the claimant is entitled?

63.2. Is the Claimant entitled to a Compensatory Award?

(a) What financial loss has the Claimant suffered as a result of his dismissal?
(b) Has the Claimant acted reasonably to mitigate this loss?
(c) What (if any) amount of Compensatory Award is just and equitable in all the circumstances, in accordance with s. 123(1) ERA?

63.3. How much notice pay is the claimant entitled to?

64. In accordance with its powers under rule 3 of the Employment Tribunal Rules of Procedure the Tribunal encourages the parties to take steps to try to

resolve as many of the remaining issues in dispute by agreement as they are able to in advance of that remedy hearing so as to comply with their duties to assist the Tribunal in furtherance of the overriding objective.

Employment Judge Flood

Date: 11 April 2023