EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. S. Mahmood	v	**King & Moffatt U.K. Limited**

Heard at: **Birmingham** **On:** **14,15,16,17,20 & 21 February 2023**

Before: **Employment Judge Wedderspoon**
Mr. K. Palmer
Mrs. D. Rance

Representation:
Claimant: **In Person**
Respondents: **Dr. Ahmed, Counsel**

JUDGMENT

1. The claim of constructive unfair dismissal is not well founded and is dismissed.

2. The claim of direct age discrimination is dismissed on withdrawal.

3. The claim of direct race discrimination is not well founded and is dismissed.

4. The claim for unlawful deductions is not well founded and is dismissed.

5. The claim for protected interest disclosure detriment is not well founded and is dismissed.

6. The claim for victimisation is not well founded and is dismissed.

REASONS

1. The Tribunal gave oral reasons for its decision at the conclusion of the hearing. The claimant asked for written reasons. These are the Tribunal's written reasons.

2. By claim forms dated 30 July 2021 and 25 November 2021 (and by way of amendment pursuant to Employment Judge Meichen's order dated 27 January 2023 the claimant brought complaints of
(a)constructive unfair dismissal;
(b)direct race discrimination;
(c)direct age discrimination;
(d)unlawful deductions of wages;
(e)victimisation;
(f)protected interest disclosure detriment.

Issues

3. The claims and issues to be determined are as follows :-
Time
4. Given the date the claim forms presented and the date of early conciliation any complaint of discrimination or unlawful deduction from wages or public interest disclosure about something that happened before 8 April 2021 may not have been brought in time.

5. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide :-
   5.1 was the claim made to the tribunal within three months plus early conciliation extension of the act to which the complaint relates
   5.2 if not was their conduct extending over a period
   5.3 if so was the claim made to the tribunal within three months plus early conciliation extension of the end of that period
   5.4 if not were the claims made within a certain period tribunal things the tribunal will decide (a) why were the complaints not native tribunal in time (b) in any event it just and equitable in all the circumstances to extend time

   5.5 Was the unauthorised deductions complaint made within the time limit in section 23 of the Employment Rights Act 1996 the tribunal will decide
      5.5.1 was the claim made to the tribunal within three months plus early conciliation extension of the date of payment of the wages for which the deductions was made
      5.5.2 if not was there a series of deductions and was the claim made to the tribunal within three months plus early conciliation extension of the last one
      5.5.3 if not was it reasonably practicable for the claim to be made to the tribunal within the time limit
      5.5.4 it was not reasonably practicable for the claim to be made to tribunal within the time limit was it made within a reasonable period.

   5.6 Was the detriment complaint made within the time limit in section 48 of the employment rights act 1996 the tribunal will decide
   4.6.1. Was the claim made to the tribunal within three months plus early conciliation extension of the date of the act or failure to act;

4.6.2 if not was there a series of similar acts or failures and was the claim made to the tribunal within three months plus early conciliation extension of the last one
4.6.3 if not was it reasonably practicable the claim to be made to the tribunal within the time limit;
4.6.4 it was not really practical for the claim to be made to the tribunal within the time limit was it made within a reasonable period.

Unfair dismissal

6. Was The claimant dismissed?
Did the following things occur
6.1 respondent's failure to provide the claimant with a copy of the staff handbook
6.2 respondent's failure to pay claimant for his travel time
6.3 respondent's failure to give claimant a pay rise to pay back pay
6.4 respondent's failure to pay college fees
6.5 respondent's treatment of claimant following an incident on site on 14 January 2021
6.6 respondent's treatment of claimant requiring him to participate in the investigation about his conduct and subsequently issuing him with a performance improvement plan
if so did that breach the implied term of trust and confidence
6.7 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between claimant and the respondent and whether it had reasonable proper cause for doing so;
6.8 was the breached a fundamental one the tribunal need to decide whether the breach was so serious that the claimant was entitled to treat the contract at being at an end
6.9 did the claimant resign in response to breach the tribunal need to decide whether the breach of contract was a reason for the claimant's resignation
6.10 did the claimant affirm the contract before resigning the tribunal need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach
6.11 if the claimant was dismissed what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract
6.12 was it a potentially fair reason
6.13 did the respondent recently in all circumstances and treating it as a sufficient reason to dismiss the claimant

Remedy for unfair dismissal

6.1 does the claimant wish to be reinstated for previous employment
6.2 does the claimant wish to be re-engaged to comparable employment or other suitable employment;
6.3 should the tribunal order reinstatement tribunal considering particular whether reinstatement is practicable and if the claimant caused or contributed to dismissal whether it would be just

6.4 should the tribe in order re-engagement the tribunal considering particular whether engagement is practicable and if the claimant caused or contributed to dismissal whether it would be just
6.5 what should the terms of re-engagement me
6.6 if there is a compensatory award how much should it be the tribunal decide
6.6.1 what financial losses has the dismissal because the claimant
6.6.2 has the claimant taken reasonable steps to replace the lost earnings for example by looking for another job
6.6.3 if not for what period of loss should the claimant be compensated
6.6.4 if there a chance the claimant would have been failing dismissed anyway the fair procedure had been followed or for some other reason
6.6.5 if so should the claimant's compensation be reduced by how much
6.6.6 did the ACAS code of practice on disciplinary and grievance procedures apply
6.6.7 did the respondent or the claimant reason failed to comply and it
6.6.8 if so, is it just next door to increase or decrease any award payable to claimant, proportion up to 25%
6.6.9 if the claimant was unfairly dismissed did he cause me to dismissal by blameworthy conduct
6.6.10 if so, would it be just next door to reduce the claimant's compensatory by what proportion
6.6.11 does the statue 52 weeks payable £89,493 apply
6.7 what basic award is payable to the claimant in any
6.8 would be just next door to reduce the basic award because of any conduct the claimant before the dismissal if so to what extent.

7.Direct Race Discrimination
7.1 The claimant describes himself as British Asian. He compares himself to Seamus O'Donnell who is white British.
7.3 did the following things occur :-
7.3.1. Respondent's failure to provide the claimant with a copy of the staff handbook;
7.3.2 respondent's failure to pay the claimant was travel time;
7.3.3. Respondent failed to give claimant a pay rise and pay;
7.3.4 respondent failed claimant's college fees;
7.3.5 respondent's treatment of claimant following an incident on the site on 14 January 2021
7.3.6 respondent's treatment of claimant in requiring him to participate in an investigation about his conduct and subsequently issuing him with a performance improvement plan
7.4 was that less favourable treatment than the claimant's comparators
7.5 if so was it because of race
7.6 did the respondent's treatment amount to a detriment.

8. Victimisation
8.1 Did the claimant do a protected act as follows
8.1.1 a report to the respondent on 15 January 2021 following an incident concerning PPE ?

8.2 Did the respondent do the following things :-

8.2.1 the respondent failed to pay the claimant's college fees
8.2.2 the respondent's treatment of the claimant following an incident on site on 14 January 2021
8.2.3 placing the claimant on a performance improvement plan
8.3 by doing so did its subject the claimant to a detriment
8.4 if so, was it because the claimant did a protected act

<u>9. Remedy for discrimination & victimisation</u>
9.1 should be tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant what should it recommend
9.2 what financial losses has the discrimination caused the claimant
9.3 has the claimant taken reasonable steps to replace lost earnings for example by looking for another job
9.4 if not for what period of loss should the claimant be compensated
9.5 what injury to feelings as the discrimination because the claimant and how much compensation should be awarded for that
9.6 has the discrimination caused the claimant personal injury and how much compensation should be awarded for that
9.7 is there a chance that the claimant's employment would have ended in any event should their compensation be reduced as a result
9.8 did the ACAS code of practice on disciplinary and grievance procedures apply
9.9 did the respondent all the claimant unreasonably failed to comply with it
9.10 is it just and equitable to increase or decrease any award payable to the claimant
9.11 by what proportion up to 25%
9.12 should interest be awarded how much?

<u>10.Unauthorised deductions</u>
10.1 Did the respondent make unauthorised deductions in the claimant's wages in relation to pay the travel time, a pay rise due together with back pain and/or reimbursement of college fees
10.2 if so how much was deducted ?
10.3 was any deduction required or authorised by statute?
10.4 was any deduction required or authorised by a written term of the contract?
10.5 did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
10.6 did the claimant agree in writing to the deduction before it was made?

<u>11. Protected Disclosure</u>
11.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the employment rights act 1996 the tribunal will decide
11.1.1 what did the claimant say or write when to whom the claimant says he made a disclosure in a report to the respondent on 15 January 2021 following an incident concerning PPE
11.1.2 did he disclose information
11.1.3 did he believe the disclosure of information was made in the public interest
11.1.4 Was that belief reasonable
11.1.5 did he believe it tended to show that the health or safety of any individual had been was being or is likely to be endangered

11.1.6 was that belief reasonable
11.2 If the claimant made a qualifying disclosure it was a protected disclosure because it was made to the claimant's employer

<u>12. Detriment (Employment Rights Act 1996 section 48)</u>
12.1 Did the respondent do the following things :-
12.1.1 The respondent failed to pay the claimant's college fees
12.1.2 The respondent's treatment of the claimant following an incident on site on 14 January 2021
12.1.3 Placing the claimant on a performance improvement plan
12.2 By doing so did its object the claimant to a detriment
12.3 If so was it done on the ground that that he made a protected disclosure.

<u>Hearing</u>

13. The Tribunal determined that it would hear liability first including issues of contributory fault and Polkey.
14. At the commencement of the hearing the claimant applied to strike out the respondent's response. He referred to an outstanding application he made on 27 November 2022. The basis of the application was that the respondent had fabricated evidence for the purposes of the Tribunal hearing to cover up discrimination. The Tribunal enquired why the claimant had not mentioned this application before Employment Judge Harding on 14 December 2022. The claimant stated that there was insufficient time before Judge Harding to discuss the issue. The respondent was taken by surprise by the application.
15. The Tribunal determined it would commence its reading and hear the application at 2p.m. if the claimant still wished to make it. This would also give time to the respondent to take instructions. The Tribunal informed the claimant that he needed to address the Tribunal as to whether there was unreasonable conduct and whether a fair trial was still possible.
16. Following the case of **Blockbuster v James 2006** Lord Justice Sedley made it clear that a strike power was a draconian one. The power should only be exercised if a party had acted unreasonably and a fair trial was no longer possible taking into account the issue of proportionality.
17. The respondent applied to replace some documents which had not been formatted properly at pages 135-140. The claimant did not object and they were added. The respondent also sought to add to the documents page 703 to 709. The claimant objected to the inclusion of these documents. The claimant accepted that they may be relevant to the issues but he submitted they were fabricated. The claimant did not say he was prejudiced and the Tribunal determined that the documents as they were potentially relevant should be included in the bundle and the claimant could directly put to the witnesses the documents were fabricated. The claimant would suffer no prejudice.
18. Following reading the documents and witness statements, the Tribunal heard the claimant 's application to strike out the response dated 27th of November 2022. The claimant relied upon Rule 37 (1)(b) of the 2013 Rules namely the manner in which the proceedings conducted on behalf the respondent was

unreasonable and pursuant to Rule 37(1)(c) of the 2013 Rules there was non-compliance with an order of the employment tribunal.

19. The claimant relied upon first, alleged dishonest conduct by the respondent of (a)misrepresenting that he was not making a victimisation complaint (which he says was pleaded); (b)by misrepresenting he was not making a holiday pay claim (which he says was referred to in his pleaded case) and (c)failing to include in its agenda prior to the Preliminary Hearing the victimisation complaint he had pleaded. The Tribunal noted that following the order of Employment Judge Meichen, the claimant's claim had been amended and victimisation was now included. The holiday pay claim amendment application was refused by Judge Meichen and the claimant had not applied for a reconsideration application or appealed it.
20. Furthermore, in his strike out application the claimant relied upon the failure by the respondent to comply with case management orders provided by Judge Jones so to include the appropriate documents in the bundle from the claimant. However, the claimant now accepted all of his documents were included in the bundle (save one document which was not identified by the claimant). Also, the claimant relied upon the fact that the respondent misled the Tribunal by failing to include his medical evidence and the full grievance outcome letter. Although those documents have now been included. The claimant also raised that the medical evidence and the contract of employment were not scanned appropriately. The claimant accepted there were now full copies in the bundle. The claimant also alleged that an email from David of XS training was fraudulent and he relies upon the fact when he requested a copy from David himself, the writer of the document sent it to him from a different email address to the one he used to send it to the respondent; it was on this basis he submitted it was a fabricated document (page 354). He also submitted that the respondent told him Dawn Sargent was not giving evidence because she is no longer employed by the respondent which is untrue. He submitted a fair trial is not possible because he said witness statements included lies and inconsistencies and that some documents have been tampered. He submitted it was proportionate to strike out the response.
21. The respondent resisted the application and relied upon the solicitor's detailed response to the claimant's application dated 7 December 2021. The respondent submitted the claimant had agreed the bundle of documentation on 6 February 2023. The respondent submitted there was no tampering of documentation. To strike out a response on these unfounded allegations would be wholly disproportionate. A fair trial was still possible in any event, the claimant could cross-examine witnesses for the respondent and put his case to them.
22. The Tribunal having heard the submissions and considered the documentation determined not to strike out the response. The power pursuant to Rule 37 of the 2013 Rules was a Draconian one as recognised by Lord Justice Sedley's judgment in the Court of Appeal **Blockbuster Entertainment v James**. The Tribunal must be satisfied that a fair trial is no longer possible and that striking out the response is proportionate.
23. The Tribunal determined that the claimant had not established that the respondent had acted unreasonably. The bundle of documents was agreed; all documents were now included with fully scanned copies save for one unidentified document. The victimisation complaint is now a claim before the Tribunal to determine following a successful amendment application. The application to add a holiday pay claim has been already considered by Judge

Meichen and that application was refused; the refusal was not subject to any reconsideration before that Judge or an appeal. Medical evidence is now included in the bundle. The claimant had not established that there was a deliberate effort to conceal evidence to the Tribunal on the basis of his submission. If he wishes to do so, he can cross examine the witnesses and ask them directly in cross examination. If there are inconsistencies in the evidence, this works in the claimant's favour. The tribunal does not find that a fair trial is not possible at this stage. Further it is wholly disproportionate to strike out the response at this stage when the matter is ready for hearing and all parties and witnesses have attended. The claimant will have an opportunity to put his case. In those circumstances, the application to strike out the response was refused. The Tribunal timetabled the hearing.

24. On day two of the hearing under cross examination the claimant withdrew his age discrimination complaint. The Tribunal explained, following the application of the respondent to dismiss that claim, that if the tribunal were to dismiss it the claimant could not raise it again. The claimant was content, so the tribunal dismissed the age discrimination claim.
25. On day two the claimant did not accept a document presented to the tribunal prepared by the respondent for the purposes of the hearing showing rates of pay for his comparator Seamus for the period 27th of September 2019; 16th of April 2020 and 30th of April 2020 were accurate. He requested to see the pay slips of Seamus, his comparator. The wage slips were provided by the respondent on day 3 and the wage slips correlated with the document prepared by the respondent; the claimant's comparator, Seamus O'Donnell; they showed that at all material times Seamus was paid less than the claimant.
26. The Tribunal heard from the claimant. The Tribunal also heard from the respondent's witnesses; Jonathan Pugh, Managing Director; Mr. Fergal Hanley, Operations Manager for the U.K; Mrs. Harrington, H.R. Manager; Mr. McDonagh, Site Manager; Mr. Paul Kelly, Site Supervisor and Mr. Beasley, Contracts Manager.

27. At the end of the case following delivering its judgment the claimant thanked the Tribunal for carefully listening to his case and offered the Tribunal three boxes of chocolates. The Tribunal thanked the claimant but was unable to accept this offer.

FACTS

28. At the commencement of cross examination, the claimant clarified his pleaded case. In respect of his complaint of failing to be paid travel time he agreed this was relevant for the period of up to September 2019. In respect of the pay rise claim, the claimant stated that this was for the period of January 2020 and January 2021. In terms of non payment of college fees this concerned the period August 2020. Further he was informed in respect of the refresher course he would not have those fees paid in February 2021 (page 61). Furthermore, he was informed by Fergal Hanley in the grievance outcome dated 8 July 2021 that the respondent would not pay college fees.
29. The confrontation he complains about took place on 14 January 2021. The date of the issue of the performance improvement plan was on 5 March 2021. The claimant accepted that when he resigned on 20 September 2021 he was relying upon the same allegations contained in his discrimination complaints and the dates for the same. The victimisation complaint concerned a protected act

which took place on 15 January 2021. The protected interest disclosure he complains about is the same complaint dated 15 January 2021. He contended that the detriment of non-payment of college fees was August 2020 or February 2021; the same altercation is relied upon occurred on 14 January 2021 and the performance improvement plan was implemented on 5 March 2021.

30. The claimant accepted that he had no reason as to why he had failed to bring his complaints within three months of the last act of discrimination and he was aware of the fact following case management hearing before Judge Jones that anything occurring before April 2021 was out of time and he had no reasons why he did not bring the complaints in time.
31. On day two the claimant clarified that in respect of the discrimination allegations, he made no allegation against Jonathan Pugh the managing director of the business. In respect of the issues of non-provision of the staff handbook and non-payment of travel time he alleged Dawn Sargent had been discriminatory. In respect of the failure to provide a pay rise and backpay he alleged that Mrs. Harrington, Dawn Sargent and Fergal Hanley had discriminated against him. In respect of the non-payment of college fees he alleged it was Dawn Sargent in August 2020 and in February 2021 who was responsible and Fergal Hanley was responsible on 8 July 2021 as set out in the grievance outcome. In respect of the incident on site 14th of January 2021 the claimant alleged it was Darragh McDonagh who had discriminated against him and he was victimised along with Fergal Hanley and Mrs. Harrington. In respect of being subject to an investigation and being placed on a performance improvement plan the claimant alleged there were four responsible individuals; Dawn Sargent; Fergal Hanley; Helen Harrington and Darragh McDonagh. In respect of allegations of unfair dismissal and victimisation, he relied upon the same people involved in these incidents as referred to above and when asked about detriment as a result of public interest disclosure he also added Helen Harrington as being responsible for the college fees.

32. From 2 September 2019 the claimant was employed by the respondent as an apprentice electrician (page 135-139). The respondent is in the business of operating as a mechanical and electrical contractor throughout Ireland, the United Kingdom and Europe and has approximately 300 employees.

33. On 8 August 2019 the claimant signed the contract noting that his job title was *"apprentice electrician"*. The contract stated that this was generally for four years. The claimant was required to work 39 hours but also was required to be flexible.

34. The claimant's contract of employment (pages135-139) states that the contract of employment sets out the main terms and conditions of the claimant's employment together with the employee handbook *"constitutes all your terms and conditions of employment with King and Moffat UK Ltd hereafter referred to as the company"*. At the end of the contract of employment it states that *"the company reserves the right to make reasonable changes to your terms and conditions of employment policies and procedures written in the employee handbook as are necessary for the operation of the business and will notify you in writing at the earliest opportunity possible such changes and in any event within one month after such changes have taken place please confirm the documents by signing this page below and return your copy to me"*.

35. The claimant did not receive an employee handbook at the time and he chased for this at page 268 of the bundle on 17 September 2019. The claimant emailed Dawn Sargent, the administrator stating "*could you kindly send me the employee handbook and any other handbooks of documentation"* He did not receive a response so the claimant followed this up with a further email dated 23 September *"by any chance could you send me the employee handbook and any other documents I may need regarding my employment because I still haven't received them".* Mrs. Harrington responded by email 23 September 2019 stating the *"employee handbook is a work in progress at the moment so I don't actually have an up-to-date documents to share with you right now however is that there are any specific questions you have I will do my best to answer them for you just drop me an email or give me a call get back to you as soon as I can"* (page 269).

36. The claimant's case before the Tribunal is that failing to provide him with an employee handbook was a direct act of conscious race discrimination against him. Adam Clark employee of the respondent, a qualified supervisor, emailed Helen Harrington on 15 May 2020 requesting Helen Harrington to point him in the direction of the employee handbook. Mrs. Harrington responded to that email stating that the handbook was in the process of being updated at the moment. She also stated if there was anything specific he would like some information on he could email her. She further stated that it had been on SharePoint but *it's been taken down because it was out of date also we've had some changes to things like leave allowance in different jurisdictions so we've needed to create separate handbooks for Ireland and the UK plan is to create two employee portals on SharePoint for each of the geographical area so that everyone will be able to access things like the handbook.* Upon being shown this evidence in cross examination the claimant contended that it was a fabricated document. The claimant also stated there was an inconsistency in the respondent's evidence because both handbooks in the bundle purported to be one Irish and another English but were precisely the same. Mrs. Harrington stated in her evidence there was a mistake and the Irish version was different because it mentioned euros in the section about the bicycle to work scheme. The Tribunal were not persuaded that the email from Adam was fabricated or that there was anything but a mistake in the inclusion of two similar handbooks and accepted the evidence of Mrs. Harrington.

37. Mrs. Harrington by email 21 July 2021 (page 458) informed the claimant that the respondent had just updated the employee handbook this month and attached it. The claimant (page 459) requested the previous employee handbook. On 29th of July 2021 (at page 462) Helen Harrington emailed the claimant the previous employee handbook; she went on to say that was the first one specifically for the UK that the company had. The claimant accepted there were no changes to his terms and conditions in the course of his employment with the respondent.

38. In respect of payment the claimant accepted in evidence that he was not entitled to JIB pay rates. The respondent used the JIB pay rates as a guide but did not apply these pay rates strictly because it was not JIB registered. Mr.

Pugh confirmed that he took into account the JIB rates when he evaluated individuals' competence to assist him in setting the hourly rate to be paid. In cross examination, Mr. Pugh did not recall seeing at the claimant's interview he had level 3 qualification certificates. The claimant was initially offered a level 2 post.

39. On 23 and 30 September 2019 and on 7 October 2019 the claimant submitted expenses claim forms p.271 to 275. These expense forms included a request for payment of travel time and mileage for petrol claims. These were not paid to the claimant.

40. The claimant was informed by Dawn Sergeant that he was not entitled to claim for travel time. The respondent's policy for payment of travel time was inconsistent. According to the evidence of Mr. Hanley which the Tribunal accepted whether travel time was paid during this period depended on which site, the distance travelled and what job an individual was performing. From January 2021 (page 341) the respondent recognised the inconsistency in payment of travel time across the business and determined to introduce a new consistent regime. The claimants' evidence is that from January 2021 he was paid travel time.

41. The claimant was aware pursuant to his contract of employment that he should notify his manager (at page 137) if he was absent from work due to sickness and to submit medical certificates. Further he was under a duty to comply with health and safety rules including wearing of protective clothing and equipment on site. The claimant was aware that if he did not wear protective clothing on site it could be a disciplinary offence. The contract of employment also made the claimant aware of the grievance process but at the time of signing the contract, he did not have the handbook which detailed the precise process as how to lodge a grievance.

42. Prior to starting his employment, on 31 July 2019 the claimant contacted Mrs. Harrington to state that he had been placed on the wrong level of apprentice because he already had level 1, 2 and 3 in electrical. On 7 August 2019 Mrs. Harrington confirmed page 267 that the claimant would be a level 3 apprentice.

43. On 5 February 2020 and 2 April 2020 pages 278-9 and page 286 the claimant enquired whether there was an update as to his job title. On 30 March 2020 the claimant passed his six-month probationary period.

44. On 8 April 2020 page 287 the claimant requested back pay because he said he had been on the wrong contract. On 20 April 2020 at page 480 claimant contacted Dawn Sargent and requested an update in respect of his contract being changed from "apprentice" to "electrical improver". The claimant accepted that his title did not change at any stage. He alleged that he should be an improver referring to an extract from Google page 4 191 which states who is a Level 3 NVQ electrical qualification for the Level 3 NVQ electrical 2357 – 44 is for electrical improvers who have previously completed the level II and three diploma in electrical installations brackets 2365) or equivalent. The claimant was unable to identify the source of the information but he said he found it on

Google. He provided a document which he had prepared for the tribunal (page 495) which showed two pathways to becoming an electrician these were (a)stages 1 to 4 as an apprentice or (b)stages 1 to 3 as electrical improver. The claimant contended that by reason of his qualifications that he had (namely levels 1,2 and 3) he should have had the role as electrical improver. Under cross examination, the claimant agreed he had accepted and signed a contract as a trainee electrician. The claimant applied for card in January 2020 from the electrical certification scheme; the claimant's application for that certification was not included in the bundle so it was not clear what he had included in it. ECS graded him (page 400) as a trainee JIB grade trainee electrician stage 3. The claimant did not pursue this issue any further or include it in his grievance. The claimant did not complain as part of his claim before the Tribunal that he was wrongly graded.

45. On 16 April 2020, Don Sargent at page 277 requested the claimant to call him about his rate of pay. The claimant was informed he would receive a pay rise (p.288). The claimant stated he remained underpaid (page 289) and should be paid £15.10 per hour. On 30 April 2020 the claimant received a further pay rise. On 4 May 2020 the claimant requested back pay page 295.

46. On 10 August 2020 (p.302) the claimant requested Dawn Sargent to book him on the 18th edition regs course. Dawn asked the claimant who he wanted her to book it through (p.303). The claimant confirmed he wanted to do it with BET although he was doing his NVQ with XS training (p.304) because the BET course was in person. On 12 August 2020 (p.305) Dawn Sargent, administrator, informed the claimant she needed to speak to BET and find out what the cost was. She enquired whether XS do the 18th edition (the provider of the claimant's NVQ). The claimant's preference was to do the course in person. The claimant requested that the respondent pay for his college fees for the 18th edition qualification.

47. On 25th of August 2020 (page 307) Dawn Sargent came back and said "*unfortunately management have said they are not in a position to afford the cost of the course as this will need to be carried out with your own enrolling college even though it is online I'm sorry about that*." On 25 August 2020 the claimant requested that he be booked in with XS training.

48. When the claimant joined the respondent's business he had already started his apprenticeship at another employer. The respondent had used BET as a training provider. The claimant signed up with XS Training which the respondent had no prior experience of. When using its usual provider BET, all of the fees were paid upfront for employees at the start of the apprenticeship. This included all college and exam fees. As the claimant was starting with the respondent at a time when he had started his apprenticeship elsewhere and was using XS as a provider this was a different situation. XS Training fees were not paid upfront and were payable by a separate and additional invoice.

49. The claimant raised non-payment of college fees as part of the grievance he lodged on 11 June 2021 page 427 as discussed at the meeting on 25 June 2021. The respondent's explanation was that Seamus had always been with BETs; the claimant had not. Seamus was enrolled with BETS at all material times and the respondent was required to pay BETS upfront for all college fees to include 18th edition reg course and exam. The claimant enrolled with XS Training. Their payment structure was different in that a separate invoice was raised for the 18th edition. The claimant paid for the fees out of his own pocket.

50. The investigation of the claimant's grievance established that the invoice department queried why a separate invoice was sent to the respondent. Before the finance team resolved the issue, the claimant paid for it. In the grievance outcome the respondent requested the claimant to forward the invoice and it would be paid. The claimant was paid by the respondent.

51. On 14 January 2021, the claimant was present at the Felixstowe site. Darragh was the site manager. The claimant sustained an accident when a hammer fell through the side of a lift shaft and hit his leg. The accident was reported to Darragh who completed an accident form reporting that the claimant was not wearing PPE (as reported to him by another) and had failed to barrier off his work area. The claimant signed the document with Darragh that day.

52. On 15 January 2021 the claimant made a written complaint to Dawn Sargent. He stated he had been injured on site at Felixstowe when a club hammer fell from the floor above, through a gap in the ceiling, into his work area and struck his knee. He said he was not able to walk properly. The claimant went to TSL the main contractor to report the incident. TSL informed the claimant to report it officially through Darragh the site manager. The claimant stated in his complaint that he was wrongly accused of not wearing PPE and was told by Darragh he was going to give the claimant a yellow card. The claimant felt this was unfair because he hadn't done anything wrong nor did he think wearing PPE would have prevented the accident. In respect of barriers, the claimant says he couldn't have barriered off the area because it was a working staircase and people were using it. The claimant said he didn't want to sign the accident report but felt he had to in order to stop an argument from escalating with Darragh. The claimant said that Darragh told him not to inform TSL and that the claimant told him that he already had. The claimant went on to say that Darragh had been *"intimidating and disrespectful to him and the other UK apprentices since they had arrived on site"*.

53. On 17 January 2021 page 322 Seamus contacted Dawn Sargent complaining that he was unhappy with the way he and other apprentices were being spoken to by Darragh. He referred to being made to feel intimidated and stated it was completely unacceptable. Both the claimant and Seamus refused to return to Felixstowe site. A meeting took place between Jonathan Pugh, Mr. Hanley, Dawn Sargent and Mrs. Harrington. Jonathan Pugh determined that Seamus and the claimant ought to be sent back to the site at Felixstowe. Mr. Pugh was not asked in evidence why he made this decision.

54. By email dated 19 January 2021 (page 330) the claimant informed Dawn Sargent that he had been booked into his AM2; the earliest date he could get was 16 February which gave him three weeks to do his online preparation learning, a practical refresher course to sort out the payment of his 18th edition course. On 15th February 2021 (page 360) the claimant emailed Dawn Sargent to explain that he had been studying from 25 to 30 January 2021 and 1 to 6 February 2021 for his 18th edition. From 8 to 10 February 2021, he had been carrying out online AM2 preparation and revision. Between 11 and 12 February 2021 he was undertaking his AM2 refresher course at BET. On 15 February 2021 he was doing an online preparation course and revision for AM2 and between 16 and 18 February he was to do his AM2 assessment.

55. On 19 January 2021 both Seamus and the claimant were given yellow cards for being late. The site opened at 7a.m. Both the claimant and his comparator, Seamus were late to the site in the context that they arrived after the site opening on 5, 7,8 12th, 14th 15th and 19th January 2021. The site opening time was 7 a.m. in the morning and they arrived after 7 a.m. on these dates. Under cross examination the claimant did not accept he had been late.

56. The claimant's contract of employment stated that the claimant's standard hours were 8 a.m. to 5p.m. The contract stated that the hours may be varied from time to time and the employee was expected to be flexible. The evidence before the Tribunal was that the respondent and the team on site expected the claimant and Seamus to attend at the time of the site opening. On site electricians work as part of a team conducting different work so in order that the teams could be put together and be allocated work it was expected that all workers would attend at the same start time of the opening of site. On 21 January 2021 Seamus and the claimant contacted Dawn Sargent to complain they felt that the yellow card for lateness should be retracted because they were working above the stated hours in the contracts of employment. They didn't mind working extra hours when needed but felt it was unfair to be issued with a yellow card when they were not technically late. By email dated 21st of January Helen Harrington contacted Dawn Sargent asking whether either the claimant or Seamus were raising a grievance about being given a yellow cards. Dawn Sargent responded "No they haven't and they had settled down now". Mr. Hanley in an email dated 21st of January to Helen Harrington stated that Seamus had improved a great deal since he was challenged at work that the claimant had the same attitude and had not improved. On 26th of January 2021 Helen Harrington emailed Darragh McDonough and Thomas Tobin (page 342) stating that yellow cards should not be provided to employees for poor timekeeping; yellow and red card systems were to be used only for safety situations.

57. On the 2 February 2021 page 344 the claimant notified payroll his hours that week; Monday to Friday "had college"; Monday to Thursday 8 to 6 and Friday 8 to 5. On 8 February 2021 the claimant notified payroll he "had college" Monday to Thursday 8 to 6; Friday 8 to 5; On 12 February Dawn Sargent asked the claimant to provide her with dates in which he was last on site working and confirm how many weeks he has been away studying. In response by email dated 12th of February to Dawn Sargent the claimant stated "basically the previous two weeks I studied for my 18th and this week I'm going to a.m.2

refresher courses and next week I'll doing my exams". Dawn Sargent requested the claimant to contact her on 12th of February. Dawn Sargent contacted the claimant's tutor David Alexis who had confirmed that there has been no requirement by the college for the claimant to complete his studies outside his employment during the dates. By email dated the 12th February 2021 David from XS Training Limited wrote to Dawn Sargent stating that the online course was designed for a candidate to study in their own time; the guided learning hours are approximately 24-hour's and the candidate should have achieved sufficient knowledge and understanding after around 24. He stated as a study we provide many practice exams and candidates must achieve over 80% in the practice exam before we book their exam. Candidates study the material in their own time so that they can still carry out their day-to-day working activities while studying the material in the evenings and weekends. He also stated that if a candidate wanted to take time off to study time off, it should not be any longer than 24 hours to 3 days. Regarding the online AM2 preparation course this is similar to the above and candidates study material in their own time in preparation for the assessment. Candidates have access to the material up to and including the days of the AM2 assessment so that they can even study the material during lunch breaks. A maximum of two working days will be allocated if the candidate was to attend a physical centre for preparation. However due to the material being online, study can be taken in his or her own time and this is what makes a training so popular among students because they don't need to take the time off work.

58. Dawn Sargent on 12th February contacted Jonathan Hugh and Helen Harrington by email and stating that the claimant had been due to attend college 25th to 29th of January and he was paid 40 hours; 1 to 5 February inclusive he was paid 40 hours. She further stated in speaking to the tutor David Alexis, David confirmed there was no requirement by the college for the claimant to complete studies outside employment. The claimant said he had been studying at home as it was part of the college requirement. None of the colleges were currently undertaking the normal two-week block release learning apart from the one day per week every Monday on live remote learning until the colleges reopen and resume to normal block release attendance. Dawn Sergent suggested that she had tried to call the claimant but he kept cutting off her calls. The Tribunal did not hear evidence from dawn Sargent but heard evidence from the claimant who disputed that that he had cut her calls off. The Tribunal accepted the claimant's evidence on the balance of probabilities.

59. On the basis of this material, the respondent acted reasonably in investigating the claimant where he was not required to be in college and had been paid.

60. By further emails 12th of February Dawn Sergent enquired what site the claimant was working on between the 18th to 22 January. The claimant confirmed he was at Felixstowe. By email dated 15 February; the claimant confirmed from Monday to Friday he "had college".

61. By letter dated 15 February 2021, page 359, Helen Harrington wrote to the claimant saying "you have not attended work since 25 January 2021 and have advised the payroll team that you have been attending college. The college have confirmed that there has been no requirement for you to attend in person since that date and that in fact the course of study that you are pursuing has

been designed to be completed outside of work thus allowing students to continue to work full-time. Several attempts have been made to contact you over the last number of days to seek clarification from you on this matter as you have not responded to any of the attempts to contact you I am writing to request you contact Jonathan Pugh by next Monday 22nd of February. Please note that a failure to contact the company before the above date may render you subject to disciplinary action up to and including termination of employment".

62. By email dated 15th of February 2021 page 360 the claimant had spoken to Dawn. He followed this up by email stating *"so basically with XS training their courses are designed for you to do in your own time but because I got booked in for my AM 2 on weekend 22 January 2021 it only left me with three weeks to complete a part of the AM2 is based on the 18th so in order for me to pass the AM to I would have to have done the 18th edition course that's why I had to have this much time off. If I did it in my own time it left me with six days which would not have been enough time to complete and was coming to work it would have been too much to do. The time to complete the 18th edition course is dependent on learning speed it is guided at 35 hours for someone who has already done any previous editions as I didn't do any previous editions I was completely new so it took me longer to do please see below what date I was doing what and please see attachments 25th to 30th of January 18 edition studying 1st to sector February 18 edition studying 8th to 10th every online a.m. to preparation course in revision 4 AM to 11 to 12 February AM2 refresher course at BET please see attachment today 15th of February online preparation course in revision for 16th to 18th February doing my AM2 assessment"*.

63. On 17 January 2021 page 323 the claimant's colleague, Seamus made a complaint against Darragh. A cursory investigation took place into this allegation. The claimant stated that he was happy to raise a formal grievance but did not do so and the matter was not investigated in any formal manner despite that the respondent's disciplinary procedure at page 149 refers to examples of gross misconduct including bullying, serious breach of rules policies or procedures, falsification of any company records including reports accounts and expenses and intimidate or conduct.

64. Thomas McConnell also made a complaint about Darragh in July 2021 describing him as a bully who mistreated others (pages 478 and 479).

65. On 19 January 2021 page 330 the claimant informed the respondent that he had booked his AM2 exam and requested 18th edition course to be paid. He explained that he had been booked in for his AM2 earliest date he could get was 16 February which was four weeks from now so I've got three weeks to do my online preparation learning practical refresher course and the 18th edition. The 18 edition course hasn't been paid, I have emailed the 18th course details in separate email, if I forward to you could you kindly sort this for me as part of the AM2 is based on the 18th edition. Dawn Sargent did not respond to this email.

66. On 19 January 2021 332 the claimant signed a yellow card for lateness. A yellow card was given to both the claimant and his comparator Seamus

O'Donnell. The claimant accepted he was treated the same as his comparator Seamus O'Donnell and accepted that there was no difference in treatment at all. At the tribunal hearing the claimant continued to dispute that he was late to site.

67. By email dated 22nd of February Mr. Hanley invited the claimant to attend a meeting to discuss his recent absence from work/attendance at college. It stated "this is a potential disciplinary meeting; the disciplinary policy is attached for your information. The claimant was given a right to accompaniment and the meeting was conducted via teams. At the meeting the claimant was informed that the meeting was called to investigate an allegation that the claimant had submitted payment claims for time spent at college when he was not actually in college. The claimant said he told Dawn that he had college and that he had to go in for a bit of it and a bit of it was online. The claimant said he got very short notice from college and asked Dawn what he should do. Dawn told him to talk with Jonathan and the claimant said he had ended up paying for the course himself because Dawn did not come back with an answer. Mr. Hanley told the claimant that the investigation had been triggered because the company pays when someone is physically in college but not when studying online; the claimant had told Dawn he had college. Mr. Hanley informed the claimant he would also be looking into the claimant's overall performance. The claimant was suspended whilst the investigation was ongoing.

68. On 1 March 2021 the claimant passed his NVQ. The claimant was invited to attend a meeting on 2 March and he was placed on the improvement plan on 5 March by email dated 6 March (page 384). When the claimant read the proposed improvement plan he felt there were certain points which were unfair and he could not commit to the plan at time. He said he would be willing to speak about it to discuss the points he felt were unfair and wished to come to a reasonable amicable agreement. The claimant was also subject to performance improvement plan concerning ability. The evidence of Mr. Hanley to the Tribunal was that from site the claimant was compared to others of the same level and was considered not to have been same standard.

69. On 16 March 2021 the claimant stated he felt the targets were unfair; there had not been any issues in the past regarding the objectives. The claimant further stated that he was under investigation for being absent whilst doing college work but had been given an objective in the performance plan to carry out all tasks given by site manager. He stated he had informed Fergal Hanley the day before he was not able to carry out tasks in the given timeframe time. He also stated that his contracted hours were 8 a.m. to 5 p.m. but that the site Foreman demanded attendance at 7 a.m. He stated he was not actually late. Further the objective to comply with health and safety he said was unfair because it did not relate to absence. He accepted the objective to book off time using the who's off application because it was the only objective which related to his absence.
70. During a telephone call between the claimant and Dawn Sargent on 17 March the claimant informed Ms. Sargent that he had achieved his NVQ.
71. On 16th of March Fergal Hanley responded to the claimant's comments about the improvement plan. He stated that the respondent had not said a performance improvement plan was only related to the college instance. The

purpose was to look at the claimant's performance and conduct as a whole since joining the company to give the claimant a clear direction of what was required going forward. He also cited as the PIP was not just related to the college instance the claimant was required to be flexible in terms of attendance on site. As to the health and safety objective, everybody was required to comply with health and safety requirements. The evidence from the respondent (and not challenged) was that it frequently used PIP for performance in the workplace.

72. On 31st of March the claimant stated that he had not signed the PIP because he felt it was unfair. In addition, the objective of working scheduled hours was unfair because it had not been made clear as to what was expected.
73. On 8 April 2021 a meeting was held with the claimant via the telephone with Mr. Hanley. The claimant stated he had not agreed to sign because he did not generally think he should be on improvement plan because he had not done anything wrong to be placed on a plan. Mr. Hanley said the improvement plan was there because the claimant had been claiming time off for college but he had not attended college. Mr. Hanley stated that this could have been a dismissal matter because the claimant was claiming time off work when he was sitting at home doing revision. The claimant asked about the grievance procedure because he was not generally happy with the improvement plan. The claimant informed Mr. Hanley that he had explained to Dawn Sargent, he had taken time off because he needed time off for college purposes because of the short time he had to prepare for his examination. He requested a copy of the grievance procedure. The improvement plan imposed on the claimant was based on objectives (1)to comply with all health and safety on site (2)to use whos off (3)complete any works instructed by the site manager and (4)the timekeeping and attendance.
74. By email dated 8 April 2021 page 402 the claimant confirmed he wanted to raise a grievance.
75. At the end of April 2021 the claimant sustained a burn injury and had to have some time off work.
76. In May 2021 the claimant was required to work at Huntington where the site manager was Paul Kelly. By email dated 27th of May 2021 Robert Beasley contacted Fergal Hanley to state that the claimant was to be sent back to Peterborough next week because they did not want him on site because of a bad attitude and he does not do site hours; back talks to Paul, quoting his contract and does no work on site and was lazy. Mr. Paul Kelly emailed 28th May 2021 stating that the claimant was late to site. He had been paired with Gabby but he attended late on the second day and on Wednesday. He said that Gabby did the bends but then later corrected it to state that the claimant did the bends and that Gabby had said the claimant was good at it. He stated it makes it worse because the claimant can do the work but is just idle. On 31 May 2021 the respondent instructed the claimant to go to Peterborough.
77. On 7 June 2021 the claimant advised he was sick (p.424)

78. On 11 June 2021 (at page 427) the claimant wrote that he wished to implement the first stage of the full grievance process. He did not at that stage provide any details save to say we wanted to lodge a grievance. By 11 June 2021 the claimant had some discussions with his manager Fergal Hanley (see page 429) informally but the issues were not resolved so he wanted the grievance to move

to the next level. In discussion with his manager Fergal Hanley, page 402, the claimant stated that the grievance was in respect of the improvement plan but he did not provide details. The claimant in his evidence to the Tribunal stated that he wanted to grieve about not being paid for two weeks while he was at college, but he also stated his main complaint was the performance improvement plan.

79. On 15 June 2021 the claimant confirmed he was still ill but would advise when he is able to return to work. On 24 June 2021 the claimant was sent the grievance policy.
80. A grievance meeting was held on 25 June 2021 (page 433) the claimant covertly recorded the meeting. He was provided with the right to be accompanied but declined. The claimant stated he was invited to explain what his grievance was about that he believed that the respondent did know. The Tribunal did not accept that evidence because the claimant did not particularise his grievance when he lodged it. In the meeting the claimant complained about being treated unfairly by being put on the performance improvement plan, he raised the issue about attendance at college and non-payment. The claimant also complained (page 434) he had been targeted by Darragh once he had raised a complaint and he raised he was on the wrong rate of pay. At this meeting it was the first time the claimant raised the issue of race when he referred to the difference of treatment by reason of the colour of his skin. The claimant did not at this stage raise any concerns about age discrimination and the first time he raised age discrimination was when he included the allegation in his claim form dated 1 July 2021.
81. On 8 July 2021 (page 447) the claimant was issued with a provisional grievance outcome. The claimant was informed that the PIP was commonly used to communicate improvement requirements a review of the claimant's conduct and performance identified that certain areas of the claimant's performance required improvement including comply with health and safety marking time off on whos off, improving the quality of the work and timekeeping and attendance. He was told he was expected to be flexible with his hours of work. The respondent stated that the college had informed Dawn Sargent there was no requirement for the claimant to be off work and the claimant could have continued to attend work during this time. Consequently, the company did not pay. However, with the additional information provided by the claimant and having investigated whether the claimant's colleague who was paid it was determined that there was a weakness in the system that the colleague was in fact paid for the two weeks. So to treat the claimant fairly he would also be paid. The respondent stated that there is an expectation claimant was informed to start work at 7 o'clock the opening site time. The claimant was informed that the respondent is not a JIB registered company. As for the payment of the 18th edition course; other colleges include this in their standard coursework fees whereas XS training do not; this is why you are charged separately for the 18th edition course. The finance team disputed the invoice because it did not usually receive a separate invoice for this. However prior to the query being resolved, the claimant went ahead and paid for it. The claimant was invited to forward the invoice so we can reimburse you.

82. On 12 July 2021 the claimant provided a fit note for the period from 14 June to 11 July 2021 and an invoices for courses on 15 July 2021. The respondent confirmed that the claimant would be reimbursed for the 18th edition course fee but not the cost of the AM2 refresher course because this was not a required course.

83. On 20 July 2021 the claimant requested a copy of the handbook. Further the claimant provided documents to support his claim for a pay rise or back pay (page 457). On 21 July 2021 the respondent provided the claimant with an updated handbook. The respondent requested the claimant to provide a fit note (page 458). On 21 July 2021 the claimant requested the 2019 handbook (page 459).

84. On 21 July 2021 the claimant was issued with a fit note stating he had low mood and stress for the period of 11th to 31 July 2021 (see page 460). On 6 August 2021 p.466 the respondent wrote to the claimant reminding him to follow the absence management process and submit fit notes. On 6 August 2021 (p.467) the claimant stated he would send over sick notes as soon as he had them. The claimant's communications with the respondent indicated he wished to return to work as soon as he was fit (page 467).

85. On 25th of August 2021 Helen Herrington informed the claimant following the investigation she had followed up with payroll to confirm the two weeks he was studying he would be paid; it was to be processed in the next payroll. On 25 August 2021 Helen Herrington reminded the claimant to send a fit note. The claimant responded that he would send it over as soon as he receives it.

86. On 20 September 2021 the claimant (page 470) resigned with immediate effect. He stated *"after deep thought and consideration I am resigning as of today 20/ 09/2021 due to unfair treatment from yourself and other senior members of staff. I will send over the outstanding sick notes as soon as I received from my doctor."* On 21st of September 2021 the claimant provided a fit note that he was unable to work due to low mood and asthma.

The Law

Constructive Unfair dismissal

87. Section 95 (1) (c) of the Employment Rights Act 1996 ("ERA") relevantly provides *"For the purposes of this Part an employee is dismissed by his employer if (and only if)-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".*

88. An employee seeking to establish that she has been constructively dismissed must prove :- (1)that the employer fundamentally breached the contract of employment; and (2)that she resigned in response to the breach (see **Western Excavating (ECC) Limited v Sharp (1978) IRLR 27**).

89. It is an implied term of the contract of employment that the employer will not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee; **Malik v BCCI plc (1997) IRLR 462; Baldwin v Brighton & Hove CC (2007) IRLR 232.**

90. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT in **Pearce v Receptek (2013) All ER (D) 364** at paragraphs 12/13 *"It has always to be borne in mind that such a breach (of the implied term) is necessarily repudiatory and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious".* The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal not in an employment context, in the case of **Eminence Property Developments Limited v Heaney (2010) EWCA Civ 1168** *"..the legal test is simply stated..it is whether looking at all the circumstances objectively that is from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract'.* That case has been followed since in **Cooper v Oates (2010) EWCA Civ 1346** but is not just a test of commercial application. In the case of **Tullet Prebon Plc v BGC Brokers LP (2011) EWCA Civ 131** Aikens LJ took the same approach and adopted the expression *'Abandon and altogether refuse to perform the contract. In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that since it is repudiatory it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract'.*

91. It is not enough to show merely that the that the employer has behaved unreasonably although "reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach." (see **Buckland v Bournemouth University Higher Education Corporation (2010) EWCA Civ 121**).

92. Where a fundamental breach of contract has played a part in the decision to resign the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning; **Wright v North Ayrshire Council (2014) IRLR 4 (paragraph 16).**

93. Where a Claimant relies upon a final straw to resign the final act may not be blameworthy or unreasonable but it must contribute something to the breach even if relatively insignificant **Omilaju v Waltham Forest London Borough Council (2005) EWCA Civ 1493.** Further, there cannot be a series of last straws; once the contract is affirmed earlier repudiatory breaches cannot be revived by a subsequent "last straw" and following affirmation it takes a subsequent repudiatory breach to entitle the employee.

Direct Discrimination

94. Section 13 of the Equality Act 2010 states "A person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others.

95. Pursuant to section 23 (1) of the Act, on a comparison for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

96. Section 136 (2) and (3) of the Equality Act 2010 states

    "(2)If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the Court must hold that the contravention occurred; (3)But subsection (2) does not apply if A shows that A did not contravene the provision."

97. If the Claimant can prove a 'prima facie' case of discrimination, then the burden shifts to the Respondent to show that such discrimination did not in fact occur. In the recent Supreme Court case of **Royal Mail Group Limited v Efobi (2019) EWCA Civ 18** it was confirmed that the burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove on the balance of probabilities those matters which he wishes the tribunal to find as facts from which in the absence of any other explanation an unlawful act of discrimination can be inferred.

98. To establish a prima facie case, the Claimant has to show that she was treated less favourably than others were or would have been treated, and in addition to this also needs to show 'something more' which indicates that discrimination may have occurred:

    'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

    (***Madarassy v Nomura International plc*** **[2007] ICR 867** at [56] *per* Mummery LJ)

99. If the respondent establishes that the claimant was guilty of an act of gross misconduct, it is entitled to dismiss the employee without notice. The Tribunal is to determine on the evidence whether the claimant did commit an act of gross misconduct. If he did not he is entitled to be paid notice.

Victimisation

100. Pursuant to section 27 of the Equality Act 2010, a person is victimised by another person (B) when subjected to a detriment because A has done a protected Act or B believes that they have done a protected act. Protected acts are defined in subsection (2) as including doing any other thing for the purposes of or in connection with this Act; or making an allegation whether or not express that A or another person has contravened this Act. It is not a protected act to make a false allegation in bad faith. Furthermore the claimant is not protected against victimisation to simply complain about unfairness in a general sense. If

it is established that a employee did a protected act and the employer subjected the employee to a detriment, the critical question for the tribunal is why did the employer subject the employee to a detriment? Was it because they had done a protected act or was it wholly for other reasons see the case of **Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065.**

Protected interest disclosure detriment

101. Section 43B of the Employment Rights Act 1996 which states that a qualifying disclosure means any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following (d) that the health or safety of any individual has been or is being or is likely to be endangered.

102. Section 47B the same act makes it clear this employee and the 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 he has made a protected disclosure.

103. In order to be protected there must be disclosure of information in the case of **Kilraine v London Borough of Wandsworth 2018 ICR 1850** the Court of Appeal noted that allegation could amount to disclosures of information depending on their content and on surrounding context. In the case of **Kilraine and London Borough of Wandsworth UKEAT 0260/15** the Tribunal was guided to take care when deciding whether the alleged disclosure was providing information and that providing information and allegations were often intertwined. The fact that information is also an allegation is not relevant.

104. In terms of reasonable belief of the disclosure tending to show a relevant failure, there are two requirements (a) genuine belief that the disclosure tended to show relevant failure in one of the five respects or deliberate concealment of the wrongdoing and (b) that belief must be reasonable belief. Reasonableness involves applying an objective standard to the personal circumstances of the discloser so that the reasonableness test might differ depending on whether the disclosure was a layperson or an expert. A lay observer may reasonably believe the same disclosed information indicated wrongdoing without first making such checks **Korashi v Abertawe Bro Morgannwg Local Health Board 2012 IRLR 3**. The definition is concerned with what the worker believed at the time when they made a disclosure not what they may have come to believe later on following **Dodd v UK direct solutions Ltd 2022 EAT 44**.

105. In respect of endangerment of health and safety pursuant to section 43B(1)(d) of the ERA, the nature of the health and safety danger needs to be specified but can be done in general terms see **Fincham v HM Prison service 0925/01 EAT.**

106. The burden of proof is that the employee must prove that they have made a protected disclosure and there has been detrimental treatment on the balance of probabilities. The respondent has then the burden of proving the

reason for the detrimental treatment. In the case of **NHS Manchester and Fecitt and others 2012 IRLR 64** the Court of Appeal held that the test in detriment cases is whether the protected disclosure materially influences in the sense of being more than a trivial factor in the employer's treatment of the whistle blower. The Tribunal must consider what consciously or unconsciously was the employer's reason for the detriment. It will need to consider whether to draw an inference from its findings of fact. The Tribunal must focus on the mental processes of the individual decision maker. It will require the decision maker to know of the protected disclosure.

107. In respect of whether it is the reasonable if the claim made in the public interest this requires analysis of the case following **Chesterton Global Limited and others and Nomurhamed 2017 EWCA Civ 979** the Court of Appeal should consider all relevant factors in the circumstances which could include numbers in the group whose interests the disclosure served; the nature of the interest affected; the nature of the wrongdoing and the identity of the wrongdoer.

108. The next question for the tribunal is did the information in the claimants reasonable belief show that the health and safety of an individual was endangered or there had been a breach of legal obligation.

Unlawful deduction from wages

109. The claimant must establish on the balance of probabilities that a deduction has been made. It must be established what is properly payable under the contract of employment. If it is established that wages are properly payable pursuant to section 13 of the Employment Rights Act 1996 it is for the employer to establish that he was authorised to make the deduction.

Time for discrimination/victimisation complaints

110. Section 123 of the Equality Act 2010 states

(1)Subject to section 140B (extension for ACAS Conciliation) proceedings on a complaint within section 120 may not be brought after the end of –
(a)the period of 3 months starting with the date of the act to which the complaint relates, or
(b)such other period as the employment tribunal thinks just and equitable.

(3)For the purposes of this section –
(a)conduct extending over a period is to be treated as done at the end of the period;
(b)failure to do something is to be treated as occurring when the person in question decided on it

(4)In the absence of evidence of the contrary a person (P) is to be taken to decide on failure to do something-(a)when P does an act inconsistent with doing it or (b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expect4ed to do it.

111. If any allegation is out of time then the importance of time limits has been emphasised in **Robertson v Bexley Community Centre (2003) IRLR 434** at

paragraph 25 as set out in **Caston v Lincolnshire Police (2010) IRLR 327** states "time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal can not hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So the exercise of discretion is the exception rather than the rule. Plainly the burden of persuading the Employment Tribunal to exercise its discretion to extend time is on the claimant (she after all is seeking the exercise of the discretion in her favour). "

112. Lord Justice Underhill in the case of **Adedeji v University Hospitals NHS Foundation Trust (2021) EWCA Civ 23** held that *"the best approach for a tribunal in considering the exercise of the discretion under section 123 (1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular "the length of and the reasons for the delay."*

Time unlawful deductions and public interest disclosure detriment

113. Pursuant to section 23 of the Employment Rights Act 1996 a worker may present a complaint to a Tribunal about a deduction from his wages, before the end of the period of three months beginning the date of payment of wages from which the deduction was made or where a complaint is brought in respect of a series of deductions, the last deduction payment in the series. Where the Tribunal is satisfied the claim could not reasonably practicably be presented before the end of the relevant period of three months the tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable. In respect of public interest disclosure detriment pursuant to section 48 of the Employment Rights Act 1996 there is a similar limitation period of three months beginning with the date of the act or failure to act to which the complaint relates w within or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint be presented before the end of that period of three months.

114. The burden rests upon the claimant to establish that it was not reasonably practical in the sense it was not reasonably feasible to have brought the complaint in time. It is a strict test.

Submissions

115. The respondent provided a detailed written submission and supplemented these with oral submissions. Dr. Ahmed for the respondent submitted that the race and victimisation complaints were brought substantially outside the primary limitation period and were discreet stand-alone events which were not a connected series of events. The claimant had failed to provide any evidence in his witness statement as to any reasons as to why he could not bring such claims within the primary limitation period despite being aware from the preliminary hearing before Judge Jones he must provide such evidence. The respondent submitted on this basis that the claim should be dismissed as out of time; there being no ability to exercise its discretion to extend time. Further, the respondent submitted that the respondent's act of requesting the

claimant provide sick notes pursuant to his contract of employment in July 2021 could not constitute an act of discrimination/victimisation; it could not be considered to be less favourable treatment.

116. The respondent further submitted that the unauthorised deductions complaints which are stand-alone claims are substantially outside three month limitation period. Dr. Ahmed invited the Tribunal to prefer the respondent's evidence that the claimant had been paid all he was due. There was no evidence before the tribunal to exercise its discretion to extend time for this late claim. The claimant had not provided any explanation as to why it was not reasonably practicable to bring his claims within time.

117. The respondent also submitted that the unfair constructive dismissal claim claimant and the public interest disclosure detriment claims should be dismissed on the basis that the claimant was placed on a performance improvement plan on 5 March 2021 but he did not resign until 20 September 2021 (see page 171). The claimant failed to provide any evidence as to the final straw until Friday afternoon when raised by the Tribunal and on conclusion of the evidence. The respondent submitted that the claimant's allegations did not meet the definition to meet the statutory definition nor were they in the public interest. The Respondent contended that the claimant resigned was not dismissed. Alternatively, the respondent could have dismissed the claimant at some point and that there should be a deduction of 100% percent contributory fault and Polkey.

118. The claimant submitted he was discriminated against, victimised and subject to detriment. He had asked for a copy of the handbook because of his rights; the respondent was trying to cover up the detail in the handbook so that the claimant would not be aware of his entitlements. He was placed on the wrong contract he was given no reason for this. Seamus was paid to do the course and the 18th edition by the respondent. The claimant was not and there was a long delay in payment. When he sustained an accident he was threatened and the claimant reported it. The claimant says that this was a public interest disclosure to report it would prevent other employees getting hurt because the respondent incorrectly recorded accidents and the fact that it was wrongly alleged he was not wearing PPE. He also did a protected act by complaining about less favourable treatment of English apprentices. He suffered a detriment when he was sent back to site. He told Dawn Sargent he was going on study leave. He was also placed on an improvement plan which extended far beyond beyond the enquiry of not being in college. He was targeted by Paul Kelly between 24th and 28th of May because he made a public interest disclosure; Paul Kelly would have known about this because he had a good relationship with Darragh. The respondent had no intention of retaining the claimant after he made his complaint. He decided to resign; the final straw placed on a performance improvement plan.

119. The claimant submitted it was just equitable to extend time as he was deprived of the grievance procedure and he was unaware of ACAS. For his constructive unfair dismissal he relied upon a series of acts. His mental health difficulties deepened by reason of the respondent's behaviour. Although the claimant made this submission, he had not put this in evidence to explain his delay in issuing his claim.

Conclusions

Credibility

120. The claimant had a tendency to make very serious allegations without any evidence. For example, the claimant stated that the respondent had fabricated an email to support its case. The claimant contacted the author of the email who forwarded it to the claimant using a different email address. This was insufficient for the Tribunal to find that the email was fraudulently fabricated by the respondent. The claimant accused the respondent of deliberately leaving out documents from the bundle. However, once the claimant alerted the respondent's solicitor about missing documents, they included the documents as requested. The claimant had originally contended that he been discriminated against directly by reason of age. When he was taken to the allegations set out in case management order of Judge Jones, he conceded that none of the allegations related to the protected characteristic of age. So, the claimant had pursued an age discrimination claim from the commencement of the proceedings from July 2021 when in fact when he further considered it there was no age discrimination claim.

121. The claimant was taken to a further and better particulars of document attached to the first and second claims; he accepted that both attachments repeated the same material and there was no additional information. The claimant also alleged that before Judge Meichen at the preliminary hearing on 27 January 2023 (page 691-694) he was permitted by Judge Meichen to use alternative comparators but this was not recorded in the case management order and the Tribunal did not accept that assertion. The Tribunal found the claimant's evidence to be evasive; rather than answering questions directly put by the respondent's counsel, the claimant attempted to argue his case. The Tribunal found his evidence to be unsatisfactory. The claimant was unwilling to make concessions. He was taken to the payment evidence of his white British comparator and the fact that he and the comparator were both being provided with yellow card notices for lateness; the claimant accepted that unfairness was that both employees were treated unfairly in this regard but felt that it was discrimination against him but he was unable to identify the basis upon which he asserted that. Further, in the course of his evidence the claimant stated that Fergal Hanley, Mrs. Harrington, and Miss Dawn Sargent consciously discriminated against him because of his race (not unconsciously); the claimant was a hundred percent sure about this and there was no doubt in his mind. He stated that he did not believe that Mr. Pugh discriminated against him.

122. The Tribunal formed the view that there was a somewhat chaotic approach in the business so that a simple step of updating a handbook for British employees was incomplete. Although the Tribunal did not hear from Dawn Sargent the email trail in the bundle indicated that she was not answering the claimant's queries promptly and did not appear to read them competently. Mr. Jonathan Pugh gave his evidence in a straightforward manner. The Tribunal also found there was lack of knowledge amongst senior management about processes within the company. For example, Fergal Hanley for the respondent appeared not to be familiar with the grievance procedure. Mrs. Harrington at times was vague about procedure. There was no recognition that the claimant's complaint dated 15 January 2021 was a potential protected act or a public interest disclosure; it simply was not considered by the respondent's witnesses to fall within this category even potentially. The Tribunal concluded that it was a business with a lack of consistent processes including a failure to consistently pay mileage costs prior to January 2021; in summary at times the left hand did

not know what the right hand was doing and for an employee of the business this was unsatisfactory.

Conclusions

Direct race discrimination

123. Failure to provide the staff handbook -Upon signing the contract of employment the claimant should have been provided with an employee handbook. The signing of the contract in fact requires the claimant to agree that he has actually received it. At the date of signing his contract on 8 August 2019 the claimant had not received a copy. The claimant requested a copy of the handbook by emails dated 20th of July and 21st of July 2021 (pages 456 and 459 of the bundle). He did not receive a handbook from the respondent until 21 July 2021 and received the original Irish handbook on 29 July 2021 (page 462).

124. The claimant's case is that the failure to provide him with the handbook was an act of race discrimination because in the absence of the handbook he would not know the full terms and conditions of this contract of employment. He did not identify anybody else who had not been provided with a handbook. Further, he disputed the respondent's case that the employee handbooks provided in the bundle were Irish or British versions because they were identical which therefore did not explain why he was not provided with it; (see pages 151 and 195). In evidence Mrs. Harrington stated that by mistake the same British handbook had been included in the bundle; the Irish one differed because it referred to the bicycle to work scheme in euros instead of pounds.

125. The Tribunal was not satisfied that the claimant had established a prima facie case of discrimination related to race. The fact that he did not receive a handbook at the start of his employment was inconsistent with the terms and conditions of this contract but he was unable to specify his comparator received a handbook when they signed the contract of employment.

126. Furthermore, the respondent relied upon an email from Adam Clarke (pages 703 and 705) who in May 2020 had requested a copy of the handbook and was told that it was out of date. The tribunal reached the conclusion, it was unsatisfactory that the claimant was not provided with handbook at the commencement of his employment and in particular that he was required to sign a contract of employment stating that he had received it but that this was not less favourable treatment related to race. In conclusion the tribunal reached the view that the handbook had been updated for the purposes of the respondent's business in Britain and that is why claimant did not receive the handbook. This explanation established on the balance of probabilities that the failure to provide a handbook had nothing whatsoever to do with the claimant's protected characteristic of race.

127. Failure to pay for his travel time. The claimant claimed travel time and petrol costs in his claim for the week ending 20 September 2019. He was paid the petrol costs of £49.20 but not the 2 hours travel time he claimed. He also claimed petrol costs of £25.50 and travel time of 2 hours in September. Mr. Hanley's evidence to the tribunal is that there was historically a lack of consistency with the payment of travel time across the company; it could be paid depending upon the geography of the site and time of travel. By reason of

this consistency the respondent determined to change the policy company wide in January 2021.

128. The claimant relied upon the payslip of Seamus his comparator who was paid at a rate of basic hours of 55 hours. He alleged that Seamus was paid hours worked plus some travel time at the basic rate. He said that additional hours over 39 contracted hours were paid at overtime rates of time and a half. Seamus received overtime of 0.98 hours at an increased rate. The claimant invited the tribunal to find that Seamus was paid for travel time.

129. The Tribunal accepted that Seamus must have been paid travel time. He was paid overtime at an increased rate and paid for 55 hours on a basic rate; he was only contracted to work for some 39 hours; the additional basic hours payment on the balance of probabilities was related to travel time. However, although Seamus was paid travel time in September 2019 there was no evidence before the Tribunal to find that both the claimant and Seamus were working at the same sites during this period or had similar travel times. On this basis the Tribunal found that the claimant had not established that his chosen comparator Seamus was in a similar situation to him during these periods namely there was no material difference between the circumstances of the claimant and Seamus. In the circumstances the claimant had failed to establish a prima facie case of discrimination. The Tribunal accepted Mr. Hanley's explanation that it was recognised by the respondent that there was an inconsistency of payments amongst all employees for travel time so that the company introduced a new policy at the beginning of 2021. The Tribunal concluded that the non-payment of travel time for the alleged periods had nothing whatsoever to do with race.

130. In addition, the claimant conceded in evidence that there were no payments outstanding from January 2021. The claim is brought significantly out of time and no evidence has been put before the Tribunal to explain the delay or extend time. For all these reasons this claim is dismissed.

131. <u>Failure to give the claimant a pay rise and pay back pay</u> – The claimant signed his contract of employment on 8 August 2021 (p.139) which described him as "apprentice electrician" with a payment of a rate of £7.49 (30 July page 263). He was appointed as a second level apprentice. Prior to signing his contract on 31 July 2019, the claimant raised at page 264 he was being placed at the wrong level. On 7 August 2019, Mrs. Harrington emailed the claimant that his hourly rate will be level 3 apprentice at a rate of £11.74 (page 267) The claimant actually commenced work with the respondent on 16 September 2019. He was not paid £7.49 as set out in his contract but actually paid at the rate of £11.74 (page 502). The claimant compared himself with Seamus who was an apprentice level 1. Seamus was paid less than the claimant at a rate of £7.38 per hour and was not paid as much as the claimant in the course of his employment. The claimant was paid at a rate of £12.09 from 16 April 2020 whilst Seamus was paid £11.43. From 30 April 2020 the claimant was paid £13 per hour and Seamus was £11.43. The claimant failed to establish that he was subject to less favourable treatment in terms of payment of an hourly rate to his comparator Seamus. The Tribunal determined on this basis that the claimant

failed to establish a prima facie case of race discrimination and dismissed this allegation.

132. On 5 February 2020 (page 278) the claimant requested changes to his job title. On 20 February 2020 (page 280) he requested an update in respect of his contract being changed from apprentice to electrical improver. On 11 March 2020 (page 284) the claimant asked Dawn Sargent whether she heard from Fergal Hanley about whether his contract was to be changed from apprentice to improver. There was no evidence before the Tribunal that the claimant was treated less favourably than his named comparator. Although the claimant informed the Tribunal that Seamus received a full pay rise because he went from a stage 2 apprentice to stage 3, the pay slips showed that the claimant consistently earned more than him.

133. On 8 April 2020 (page 287) the claimant requested back pay because he alleged he had been on the wrong contract and rate since September (2019). The claimant changed from apprentice to improver. On 2 April 2020 (page 286) Dawn Sargent responded that she had been in touch with HR and they would be actioning. From 16 April 2020 (p.289) Dawn Sargent informed the claimant that stage 3 JIB rate was £12.09 per hour. On 16 April 2020 (p.289) the claimant said the rate was supposed to be £15.10. The claimant was basing his assertion on JIB rates but the respondent does not strictly use JIB rates because it is not JIB registered but uses the rates as a guide. At £12.10 per hour the claimant was still paid more than his comparator, Seamus. On 30 April 2020 the claimant's pay was increased to £13.00 per hour. This was a greater rate to Seamus who was paid £11.43 per hour. On 4 May 2020 (page 295) the claimant requested back pay. Dawn Sergent asked the claimant on 4 May (p.296) whether his application for an ESC card prompted the claimant to ask for higher rate. The claimant explained he was on an apprentice rate and contract and when he was not meant to be so it was fair to be asked for the JIB rate (see page 297). From the evidence the claimant did not raise this issue again with the respondent until the grievance meeting on 25 June 2021 (page 435) when he alleged that he had been qualified since March 2021 but was not offered a higher rate. The claimant told the Tribunal that back pay was paid to Seamus O'Donnell. In the grievance outcome dated 8 July 2021, page 448, the respondent stated they were not a JIB registered company and sought information from the claimant when he requested a pay rise in back pay the payroll team advise that they need the dates in order to be able to investigate. Mrs. Harrington's evidence to the tribunal was that the claimant had not been paid any back pay nor was to Seamus O'Donnell and she provided the tribunal with salary slips to evidence this.

134. The Tribunal concluded that there was no less favourable treatment of the claimant. The claimant's comparator did not have back pay paid to him. The wage slips did not indicate any back pay payment and the Tribunal accepted the evidence of Mrs. Harrington that there was no such payment. On this basis the claimant failed to establish a prima facie case of less favourable treatment. This allegation is dismissed.

135. <u>Failure to pay the claimant's college fees</u> -On 10 August 2020 (p.302) the claimant requested Dawn Sargent to book him on the 18th edition regs course. Dawn asked the claimant who he wanted her to book it through (p.303).

The claimant confirmed he wanted to do it with BET although he was doing his NVQ with XS training (p.304) because the BET course was in person. On 12 August 2020 (p.305) Dawn Sargent, administrator, informed the claimant she needed to speak to BET and find out what the cost was. She enquired whether XS do the 18th edition (the provider of the claimant's NVQ). The claimant's preference was to do the course in person. The claimant requested that the respondent pay for his college fees for the 18th edition qualification.

136. On 25th of August 2020 (page 307) Dawn Sargent came back and said "*unfortunately management have said they are not in a position to afford the cost of the course as this will need to be carried out with your own enrolling college even though it is online I'm sorry about that.*" On 25 August 2020 the claimant requested that he be booked in with XS training.

137. There is no dispute that the respondent did pay for the college fees of Seamus, the claimant's comparator. Both the claimant and his comparator were enrolled with a college and both were going their 18 edition qualification. However the Tribunal finds that there was a material difference between the claimant and his comparator. The claimant came to the respondent from another employer. Seamus had always been with BETs; the claimant had not. Seamus was enrolled with BETS at all material times and the respondent was required to pay BETS upfront for all college fees which included 18th edition reg course and exam. The claimant enrolled with XS Training. Their payment structure was different to BETS; as a provider BETS raised a separate invoice for the 18th edition. The invoice department of the respondent did not understand the invoice. At the time that the claimant wanted to complete his 18th edition with XS, the respondent had already paid for the course and 18th edition ahead of time for Seamus. The management determined it did not have in its budget a further payment for the additional cost for the claimant doing 18th edition with another provider. The Tribunal was satisfied that there was a material difference between the claimant and Seamus situation in respect of different billing of different providers at different times and when the billing fell in respect of the respondent's budget. The claimant had to pay for the fees out of his own pocket. He included as part of his grievance the non-payment of his college fees and the respondent did eventually pay them (but he was not paid for the AM2 course because this was not required as part of his qualification). The Tribunal finds that the claimant had not established a prima facie case of discrimination that could lead it to conclude that the claimant has been discriminated against by reason of his race.

138. <u>The respondent's treatment of the claimant following an incident on site on 14 January 2021</u> The Tribunal having heard all the evidence found that the claimant relied upon the following matters; (a) failure to investigate his complaint dated 15 January 2021 namely failed to investigate that there was inaccurate recording of an accident and less favourable treatment of UK employees; (b)being sent back to the site where he had complained of ill treatment (c) being given a yellow card for lateness (d)ill treatment by Mr. Kelly and (e)the requirement to provide sick notes.

139. The complaint made by the claimant dated 15 January 2021 alleged that inaccurate information had been included on the accident form completed by Darragh; he alleged inaccurately it was suggested he had not been wearing PPE and inaccurately suggested he should have barriered the area; this the claimant contended was impossible because he was required to work on stairs. He also expressly stated that he along with other UK apprentices had been badly treated by Darragh; this implied they had been discriminated against. The claimant's comparator had not sustained an accident at work. He did complain about ill treatment of Darragh but did not imply it was discriminatory conduct. However, his complaint was not investigated. Mrs. Harrington said that she had spoken to the managers; the Tribunal found this to be a cursory enquiry.

140. The claimant's complaint was sent to Dawn Sargent. This was passed to Helen Harrington who saw the allegation within one week. On the balance of probabilities, the Tribunal did not accept the evidence of Darragh or Mr. Kelly that they were unaware of the claimant's complaint. Both witnesses were long standing employees of the respondent and friends. Darragh had been the apprentice of Mr. Kelly. In the context that the claimant's evidence (which was accepted by the Tribunal) that there was gossip on site about the incident and Mrs. Harrington's evidence that she made enquiries with managers, the Tribunal determined on the balance of probabilities that both men were aware that the claimant had complained but on the balance of probabilities were unaware about the detail of the complaint.

141. The respondent's investigation into this matter consisted of the cursory enquiry by Mrs. Harrington with managers and a site visit by Mr. Collins, Health and Safety manager who attended the site. He checked the paperwork with Darragh (page 335); Darragh had completed the documentation (p.316-7). There were no witnesses save for the claimant to the accident. Mr. Collins simply checked the paperwork and did not discuss anything. The claimant's case confirmed in evidence was that he was subject to victimisation following the incident on 14 January 2021. The Tribunal has already found that the claimant sustained an injury on site when a hammer hit his knee. The claimant reported this to his own manager and to the site manager despite the fact that his manager had informed him it was unnecessary to report it to the site manager. He signed a record of the accident accepting that he was not wearing PPE and had not barriered off his working area however on 15 January 2021 the claimant had complained that he had been forced to sign the document and it was untrue that he did not have PPE (see page 319). *"He asked me if I was wearing PPE which I was and I replied yes and he started accusing me of not wearing PPE and said he was going to give me a yellow card for it when I absolutely done nothing wrong and that I replied I did have my PPE on but what has the PPE got to do with the hammer falling from above through a gap in striking my knee said I wasn't following the safe plan of action which states Barry should have been placed in my work area but I told him that because I was working near a staircase I couldn't barrier the staircase due to people walking up and down kept telling me to sign it which I didn't want to sign because of the inaccurate information that was written by signs due to stop the argument from escalating and then after that he told me not to report it to TSL*

to which I said I have to because it's procedure topping up because of the paperwork involved that he didn't want me want to fill out and threaten me by saying that if I reported he will have to give me a yellow card for not wearing PPE but I still went to reported it to TSL. In addition to this incident he has been very intimidating and disrespectful to me and the other UK premises since we have arrived on site.

142. The respondent did not investigate that the form was completed inaccurately save for a cursory enquiry by Mrs. Harrington. There is no actual comparator. Seamus did not make a complaint of an inaccurate recording of an accident on an accident form.

143. Seamus complained about ill treatment (see page 322). He did not complain expressly or implicitly about race discrimination. However, his complaint along with the claimant's complaint of ill treatment was not investigated by the respondent with the diligence to be reasonably expected. However the Tribunal found this was on the balance of probabilities due to a chaotic business and a lack of competency of senior management and HR who failed to recognise the potential implications of the claimant's complaints. The Tribunal finds that the claimant has failed to establish that he was subject to less favourable treatment by reason of the non-failure to investigate his complaint. Seamus made a complaint and his too was not investigated. The failure to investigate the claimant's complaint dated 15 January 2021 had nothing whatsoever to do with race.

144. (b)In respect of the claimant's allegation of being returned to site following his complaint, neither he nor his comparator, Seamus wanted to go back to the site (p.324). The Tribunal accepted the evidence that Mrs. Harrington, Fergal Hanley, Dawn Sergent and Jonathan Pugh met to discuss this. Mr.Pugh determined both the claimant and Seamus should return to the Felixstowe site. The claimant's evidence to the Tribunal was that Mr. Pugh did not discriminate against him. The Tribunal found that the claimant had failed to establish a prima facie case of discrimination.

145. (c)In respect of the allegation of being given a yellow card for lateness, both the claimant and Seamus were late for work for the same dates in January from 5th to 19th (see attendance list page 337). The respondent's view was that the claimant and Seamus should attend the site when the site opened namely at 7a.m.; this required flexibility from both of them whose contractual start time was 8 a.m. The contract of employment also stated that employees were expected to be flexible. Starting at the time of the opening of the site meant that the claimant and Seamus could be partnered up with others to carry out tasks. The claimant and his comparator were treated the same for lateness and warned about their lateness; in the circumstances there was no less favourable treatment and this allegation is dismissed.

146. (d)Ill treatment by Mr. Kelly. The Tribunal found Mr. Kelly to be a very direct and brusque person. Mr. Kelly was not impressed by the claimant as a worker on the site and he was not shy to say so. Mr. Kelly formed this view through his observations of the claimant's work and formed the opinion that the claimant was lazy. The Tribunal finds that Mr. Kelly was both direct and brusque of his treatment of the claimant but that this treatment had nothing whatsoever to do with race; he had formed the opinion from his observations of the claimant that the claimant was lazy. This allegation of race discrimination fails.

147. (d)In respect of the requirement to provide sick notes whilst off sick- The respondent required employees who were sick from work to provide a medical certificate for all absences in excess of two working days and weekly thereafter if the absence continues. The Tribunal does not find that Mrs. Harrington requested medical sickness certificates from the claimant whilst he was off sick by reason of his race; Mrs. Harrington requested the medical certificates in accordance with the claimant's contract of employment (page 137). This allegation of race discrimination fails.

Victimisation

148. The claimant's case is that he did a protected act by reporting on 15 January 2021 an incident concerning PPE (page 319-321). His case is as a result of the protected act he was victimised by (a)the respondent refused to pay for his college fees (b)treated him badly following an incident on 14 January 2021; the claimant relied upon the same matters for his direct claim namely (i) failure to investigate his complaint dated 15 January 2021 namely failed to investigate that there was inaccurate recording of an accident and less favourable treatment of UK employees; (ii)being sent back to the site where he had complained of ill treatment (iii) being given a yellow card for lateness (iv)ill treatment by Mr. Kelly and (v)the requirement to provide sick notes and also (c)placed him on a performance improvement plan.

149. The claimant relied in his evidence about his comment at page 321 which stated "he has been very intimidating and disrespectful to me and other UK apprentices since we have arrived on site" as a protected act. The Tribunal determined reading section 9 (1)(b) and (c) with a purposive effect that UK apprentices could amount to nationality or national grounds within the meaning of "race". The tribunal found that the claimant was making an allegation that Darragh of the respondent had contravened the Equality Act and discriminated against him and other UK apprentices. The Tribunal also determined that the respondent and Darragh did not consider that the complaint was a protected act.

150. The respondent refused to pay for the claimant's college fees in August 2020 long before the claimant had submitted his complaint dated 15 January 2021. The Tribunal concluded that the refusal to pay the claimant's college fees had nothing to do with his complaint dated 15 January 2021.

151. The respondent conducted a cursory investigation into the claimant's complaint by Mrs. Harrington asking managers and Mr. Collins, the health and safety person visited the site to check on the paperwork. The Tribunal having heard all of the evidence concluded that this was a result of a chaotic business with a failure to recognise the serious allegations the claimant was raising and nothing whatsoever to do with the fact the claimant had done a protected act.

152. Both the claimant and Seamus were sent back to the site where the claimant and Seamus had complained of ill treatment. Mr. Pugh made this decision and was not asked at the Tribunal hearing for his reasoning or whether he was aware of the compliant dated 15 January 2021. The Tribunal determined that Mr. Pugh's decision was unrelated to the claimant's protected act.

153. Both the claimant and Seamus were late for work and were warned about their lateness. The Tribunal determined that this had nothing to do with the protected act.

154. The Tribunal has already summarised the conduct of Mr. Kelly. He was unimpressed with the claimant as a worker and took the view he was lazy from his observations of the claimant. The Tribunal has already found that it is likely Mr. Kelly was aware that the claimant had complained about Darragh but was not aware of the full detail of the complaint or that the complaint could amount to a protected act. The Tribunal determined that Mr. Kelly treated the claimant in a brusque manner because he considered the claimant was lazy from his observations of the claimant on the site and had nothing to do with the protected act.

155. It was a contractual term that the claimant provide medical certificates when absent from the workplace for more than two days for sickness. The claimant was absent from the workplace for more than 2 days. Mrs. Harrington requested sick notes from the claimant because he was off sick and in accordance with the contract of employment; it has nothing to do with the protected act.

156. The claimant was placed under investigation after it transpired he informed his employer he was at college when in fact he was not; he was at home studying. He was also claiming wages for this period. David Alexis, the claimant's tutor was contacted and he stated that the college did not require the claimant to complete his studies outside his employment. The claimant was invited to an investigation meeting on 23 February 2021 (page 368) to discuss and the claimant accepted in his evidence that the respondent was entitled to investigate this issue. At pages 380-381 sought to ensure the claimant's performance be improved in the following areas (a)compliance with health and safety (b)to request absence via the whosoff site; (c)ability to complete works instructed by site manager and (d)timekeeping and attendance. The claimant also accepted that he had not utilized the whosoff tool to book his non attendance at work on to the system. The claimant objected to the performance improvement plan (save for the whosoff point) in his email dated 16 March 2021 because he said they do not relate to absence from work and there had not been issues in the past with any of the objectives. The claimant accepted in his evidence before the Tribunal that he had been warned about his timekeeping.

157. Mrs. Harrington's evidence to the Tribunal which was accepted is that the respondent used performance improvement plans as a management tool and it was not unusual for employees to be placed on one. There were concerns that the claimant was not complying with health and safety in respect of the incident when the claimant was seen not wearing his PPE after the accident in the canteen and was not complying with site manager's instructions. The content of the improvement plan was far wider than actual lateness and failure to attend work but the tribunal determined it did encompass other areas of concern that the Respondent had. The Tribunal concluded that the imposition of the improvement plan was related to concerns the respondent genuinely held about the claimant's performance and were unrelated to the protected act.

<u>Constructive Unfair dismissal</u>

158. The claimant relies upon the same matters in his constructive unfair dismissal complaint to his direct race discrimination complaint. When considering the complaint for constructive unfair dismissal the Tribunal must consider (a)whether the respondent's conduct had the purpose or the effect to seriously damage the relationship of trust and confidence between employee and employer and (b)there is any just cause for it.

159. The respondent failed to provide the claimant with a handbook at the start of his employment despite the contract of employment requiring the claimant to have to sign for it. Failing to provide a handbook that an employee is required to sign for pursuant to the contract may seriously damage the trust and but the tribunal has found that there was an explanation namely there was not an up-to-date version of the handbook in existence at that time for British employees. By 29th of July the claimant had received a copy of the respondent's handbooks and the claimant did not further raise this as part of an ongoing complaint to his employer.

160. The respondent failed to pay the claimant for travel time prior to January 2021 but from January 2021 there was nothing owing to the claimant because the respondent introduced a consistent company wide policy. Failing to provide travel time claimed could seriously damage the trust and confidence an employee has in his employer where others are paid. However, the respondent's explanation which was accepted by the Tribunal was that it had no consistent policy prior to January 2021 and whether it was paid depended on the position of the site and the amount of travel. It took on board the inconsistency of payments amongst its employees and applied a new consistent policy. The Tribunal determined that there was a reason for the respondent's failure to provide the claimant's travel costs in that it did not have a proper policy. However, the claimant waived any alleged breach by failing to raise any concerns about this post January 2021 as he continued to work for the respondent and by his actions accepted he had no outstanding sums due from the respondent.

161. The failure to give the claimant a pay rise or pay back pay are matters which could seriously destroy the trust and confidence an employee has in its employer. On the factual analysis of the case once the claimant clarified his qualifications the claimant's job title and rate of pay was changed. The fact that the claimant thought he was worth more than what he was actually paid taking account of the JIB rates is not a breach of the implied term of trust and confidence. The respondent was not JIB registered; it did not strictly apply JIB rates but used them as a guide individually assessing the employee as against experience and qualifications. In the Tribunal's determination the claimant was paid in accordance with the respondent's assessment of him.

162. The failure to pay the claimant's college fees but pay another employees college fees is a matter which could seriously damage the trust and confidence between an employee and employer. However, there was just cause because the respondent usual provider was BETS; the However the Tribunal finds that there was a material difference between the claimant and his comparator. The claimant came to the respondent from another employer. Seamus had always been with BETs; the claimant had not. Seamus was enrolled with BETS at all material times and the respondent was required to pay BETS upfront for all college fees which included 18th edition reg course and exam. The claimant enrolled with XS Training. Their payment structure was different to BETS; as a provider BETS raised a separate invoice for the 18th edition. The invoice department of the respondent did not understand the invoice. At the time that the claimant wanted to complete his 18th edition with XS, the respondent had already paid for the course and 18th edition ahead of time for Seamus. The management determined it did not have in its budget a further payment for the additional cost for the claimant doing 18th edition with another provider. The Tribunal was satisfied that there was a material difference between the claimant

and Seamus situation in respect of different billing of different providers at different times and when the billing fell in respect of the respondent's budget. The claimant had to pay for the fees out of his own pocket. He included as part of his grievance the non-payment of his college fees and the respondent did eventually pay them (but he was not paid for the AM2 course because this was not required as part of his qualification).

163. In respect of the respondent's treatment of the claimant following an incident on site 14 January 2021 the claimant relied upon the same matters for his direct race discrimination claim. The Tribunal determined that it failed to investigate his complaint dated 15 January 2021 could be a matter that could seriously damage the trust and confidence between the claimant and the respondent. The respondent conducted a cursory investigation into the complaint by Mrs. Harrington asking the managers about the incidents but she determined that there wasn't anything to the complaint. Further Mr. Collins as health and safety officer found all the paperwork to be in order. The respondent did not further investigate the issue because on its cursory investigation it was determined there was nothing to the complaint; it was not perceived to be a whistleblowing or protected act and the health and safety officer determined that the paperwork was in order. The fact that the investigation did not achieve the result desired by the claimant is not a breach of the implied term of trust and confidence; the respondent determined there was nothing in the complaint so did not progress it further.

164. Sending the claimant back to site when he did not want to be could be an act which could seriously damage the trust and confidence between the employee and the employer. Mr. Pugh was not asked why he made this decision and therefore there is no evidence before the Tribunal to determine whether or not the respondent had just cause or not.

165. The claimant being given a yellow card for lateness could seriously damage the implied trust and confidence in an employer. However both the claimant and the claimant's colleague were given yellow cards because they were both consistently late arriving at site. The respondent was entitled to warn the claimant and his colleague about their timekeeping.

166. Ill treatment of an employee by a manager is a matter which could seriously damage the relationship of trust and confidence between the employee and employer. However, the Tribunal did not find on the facts of the case that Mr. Kelly ill treated the claimant; Mr. Kelly has a direct approach and brusque character and was direct to the claimant in that he had from his observations of the claimant found him to be lazy and was not shy to express those views to the claimant.

167. Requiring an employee to provide sick notes whilst an employee was off sick when their contract dictated that an employee should provide medical certificates if off sick is not capable of amounting to a breach of the implied term of trust and confidence.

168. In respect of the claimant's allegation that the respondent treatment of the claimant requiring him to participate in investigation about his conduct and subsequently issuing him with a performance improvement plan could seriously damage the implied term of trust and confidence between the employee and employer. However, the claimant accepted that in the light of the evidence of his tutor that he did not have to carry out the study outside work; was stating he was at college whilst he was at home and was being paid by the company for working the respondent was entitled to investigate. Furthermore, the claimant

accepted he had not used whosoff to register he was not in work. The Tribunal determined there was just cause to investigate the claimant. The respondent took the opportunity to consider the overall performance of the claimant and impose as it does the management tool of a performance improvement plan.

169. The claimant confirmed in his evidence that the last act was the imposition of the PIP in March. The claimant was absent from work due to sickness from 9 July 2021 and did not return to work prior to his resignation on 20 September 2021. There were no incidents between July and September 2021 that the claimant relies upon. The tribunal does not find that there was a breach of the implied term of trust and confidence in the sense that any of the conduct was not intended or have the cause to undermine the trust and confidence between the claimant and its employer. In any event there was such a length of time before the claimant resigned that the tribunal considered that the claimant had affirmed the contract of employment. The claimant did not raise a concern about how he was treated following the outcome of the grievance hearing on 8 July 2021 or seek to appeal the outcome. In fact the claimant kept informing the respondent he was coming back to work. In his emails dated 21, 28 July and 6 August page 459 and 461 and page 467 the claimant was continuing to submit sick notes following the receipt of the grievance outcome. Furthermore, by email dated 27 August 2021 (page 470) the claimant informed the respondent he would be sending over sick notes as soon as he received them. The Tribunal concluded that the claimant by continuing to send in sick notes for a period from the date of the grievance outcome of 8 July 2021 until 20 September 2021 had waived the breach and his reasons for leaving at this stage were unclear.

<u>Protected interest disclosure detriment</u>

170. The claimant relies upon his email dated 15 January 2021. The Tribunal first considered what the claimant actually disclosed. The Tribunal finds that by email dated 15 January 2021 the claimant disclosed that he was being made to sign a form which inaccurately recorded that he was not wearing PPE at the material time of the accident and inaccurately recorded he had failed to barrier the area. The Tribunal is satisfied that the claimant's email which described a requirement to sign a health and safety record of an accident which was alleged to be untrue and inaccurate amounted to a disclosure of information in accordance with the case of **Kilraine v London Borough of Wandsworth (UKEAT 0260/15).**

171. The claimant gave evidence to the Tribunal that although he complained that the accident report form recorded inaccurate information about what he was alleged to have done or not done, the information he disclosed had wider ramifications for those on site (approximately 100 persons) and the general public; an inaccurate or false recording of the accident could lead to a failure to consider the real cause of the accident or take preventative steps to avoid another accident with a hammer falling onto an employee or other accident. The Tribunal was persuaded that the claimant held a genuine belief that the disclosure of recording inaccurate information in an accident form tended to show that the health or safety of any individual has been or is being or is likely to be endangered. The Tribunal determined that this belief was a reasonable one applying an objective standard to the personal circumstances of the claimant. Further, the Tribunal was satisfied from the claimant's evidence that

the claimant believed this at the time when he made the disclosure (as opposed to what he may have come to believe later on); **Dodd v UK Direct Solutions Limited (2022) EAT 44.** Furthermore, the Tribunal is satisfied that the claimant held a genuine belief and on reasonable grounds that the disclosure was in the public interest. In accordance with the case of **Chesterton Global Limited & others v Nomurhamed (2017) EWCA Civ 979** the claimant believed the disclosure of information was in the public interest because the inaccurate recording of an accident could potentially affect others on site (up to 100 individuals) and the general public if an accident of a falling hammer or other accidents were not recorded correctly. Inaccurate information recorded in an accident report may well not expose an unsafe working practice or may mislead health and safety to consider that site is safe when it is not. The tribunal determined that this belief was reasonable and it was made to the employer and is therefore protected.

172. However, the Tribunal was not satisfied having heard all of the evidence that as a result of making the public interest disclosure that the claimant was subject to a detriment. The Tribunal has already noted that the claimant did not allege at the grievance meeting on 25 June 2021 pages 433 to 435 that he was subject to a disadvantage by reason of making a public interest disclosure. His concern at that meeting for his treatment was the colour of his skin (page 434). The Tribunal considers the pleaded allegations.

173. <u>The respondent failed to pay the claimant's college fees in August 2020</u>. Prior to making the public interest disclosure, the respondent had already refused to pay the claimant's college fees on 25 August 2020 (see email from Dawn Sargent page 307). The reason for refusal to pay for college fees was unrelated to the claimant's public interest disclosure on 15 January 2021. In respect of the allegation that there was a non-payment of the college fees in February 2021 and in the email dated 15 July 2021 (page 453), this claim concerned the AM2 fees. The Tribunal accepted the evidence of Mr. Hanley that the respondent did not pay for the AM2 refresher fees because it was not part of the training required for the claimant to get his qualification. The Tribunal determined that the claimant's public interest disclosure did not have a material influence (in the sense of it being more than trivial influence) on the respondent's decision not to pay for the AM2 refresher course fees.

174. <u>The respondent's treatment of the claimant following an incident</u>

175. <u>(a) failure to investigate his complaint dated 15 January 2021 namely failed to investigate that there was inaccurate recording of an accident and less favourable treatment of UK employees</u>

176. The investigation conducted by the respondent into the claimant's email dated 15 January 2021 was fairly cursory. The Tribunal accepts that the respondent did not genuinely recognise the claimant's email as a potential public interest disclosure or a protected act or that it actually occurred to them that it should be fully investigated. The respondent's health and safety manager attended site and checked the paperwork with Mr. McDonagh. He found the paperwork in good order and then submitted the form at pages 463 to 464. It was determined that the root cause of the accident was "behaviour/risk taking." This was the conclusion in the absence of discussing the circumstances of the accident with the claimant. Mrs. Harrington's oral evidence was that she did have a discussion with managers and it was determined there was nothing in the complaint. The Tribunal has already found that the management of procedures by this employer was very disorganised, if not rather chaotic. The

Tribunal determined that the claimant's public interest disclosure did not have a material influence (in the sense of it being more than trivial influence) on the respondent's decision not to investigate the complaint dated 15 January 2021.

<u>(b)being sent back to the site</u>

177. The decision to send the claimant back to site was made by Mr. Jonathan Pugh. The claimant did not challenge Mr. Pugh about this decision under cross examination. The evidence was that Mr. Pugh determined that both the claimant and his colleague Seamus should be sent back to site (see Mrs. Harrington's witness statement at paragraph 57). The Tribunal determined that the claimant's public interest disclosure did not have a material influence (in the sense of it being more than trivial influence) on the respondent's decision to send the claimant and his colleague back to site.

<u>(c) being given a yellow card for lateness</u>

Although the claimant's and his colleague's contracted hours were 8 a.m. until 5 p.m. the contract of employment stated that the hours may vary from time to time and the claimant was required to be flexible with start and finish times. The respondent's expectations when the claimant and his colleague worked on sites is that they would attend the site when it opened; this permitted work to be allocated to the claimant and his colleague working as a team that day on the site. During the course of cross examination, the claimant was very reluctant to accept that he was late to the site at any time when the document at page 337 which showed the claimant and Seamus arriving after 7 a.m. to the site on 5, 7, 8, 12, 14, 15 and 19 January 2021 and despite the fact that he had signed the yellow card warning. The evidence before the Tribunal is that the site opened at 7 a.m. and as part of the need for employees to be flexible in terms of hours worked, there was an expectation that the claimant and his colleague would attend site at 7 a.m. The Tribunal determined that the claimant was late to site for the period at page 337. Thomas Tobin, electrical site supervisor served the claimant and his colleague Seamus with "yellow card" final warning for lateness (see pages 332-3). Darragh had spoken to the claimant and Seamus the previous week about lateness (see page 331) but both employees continued to be late. Mrs. Harrington emailed Darragh McDonagh and Thomas Tobin on 26 January 2021 (page 342) about the process to follow in respect of lateness. She noted that yellow cards do not apply to lateness; where lateness is an issue the employee should be spoken to and the conversation noted; if lateness continues the disciplinary procedure can be invoked. Mr. Tobin and Mr. McDonagh were unaware of the correct procedure to follow for lateness. Although Mr. McDonagh informed the Tribunal he was unaware that the claimant had made a protected interest disclosure the Tribunal accepts the claimant's evidence that there was some gossip on site that he had an accident and he had made a complaint. On the balance of probabilities, the Tribunal determined that it was likely that Mr. McDonagh and Mr. Tobin on site were aware that the claimant had made a complaint but were unlikely to

have been aware of the detail and did not recognise it as public interest disclosure. The Tribunal determined that the respondent believed that there was a real issue about lateness to site by both the claimant and his colleague, accordingly they were provided with yellow cards. However, the Tribunal found this was by reason of a failure to be aware of the appropriate procedure to follow where there was a genuine issue with lateness and the claimant's public interest disclosure did not have a material influence (in the sense of it being more than trivial influence) on the respondent's decision to provide a yellow card to the claimant and his colleague for lateness.

<u>(d)ill treatment of the claimant by Mr. Kelly</u>
The claimant's case is that Mr. Kelly treated him badly because he made a protected interest disclosure. This treatment consisted at being sworn at and being given unreasonable amounts of work/short timescales. The Tribunal have already found Mr. Kelly to be a straight talking no frills type of person. It is likely the Tribunal have found that if Darragh was aware of the claimant's complaint Mr. Kelly would be; they are good friends and Darragh was the apprentice of Mr. Kelly. Mr. Kelly was unhappy with the claimant from the claimant's late arrival on site on 24 May 2021. Mr. Kelly had messaged the claimant to attend site at 7 a.m. The claimant arrived late at 9 a.m. Mr. Kelly was annoyed because the claimant was to work in a pair and it was not feasible to have a pair working together with different hours. Further despite Mr. Kelly having sent paperwork onto the claimant to complete prior to arrival at site on 22 May 2021, the claimant arrived having not completed paperwork required. Mr Kelly had given the claimant instructions as to how to complete this site induction (page 411). The claimant had not read the site induction he had been asked to do. Mr. Kelly told the claimant to go to his office to do the K & M induction and not to sign into whosoff (the site's biometric attendance management system) until his induction was complete. However, the claimant ignored this request and went up and signed in. Once the induction was complete Mr. Kelly paired the claimant with Gaby. Mr Kelly was informed by other contractors working on site that the claimant was watching Gaby whilst using his phone. Mr. Kelly observed the claimant not doing much work and formed the view that the claimant was lazy. The claimant had been given instructions by Mr. Hanley to arrive on site at 7 a.m. but frequently arrived after 7.30 a.m. On 25 May 2021 Mr. Kelly asked the claimant what time he called this when he arrived after 7.30 a.m. and the claimant sniggered and walked away. Mr. Kelly informed the claimant not to laugh but believed the claimant to be rude and disrespectful. Mr. Kelly did not believe Seamus was pulling his weight either a week before and got him moved to another site. On 26 May 2021 the claimant arrived at site late at 7.22 a.m. and Mr. Kelly instructed the claimant to go up to the attic and clean. Mr. Kelly attended the work area and noted that there was still rubbish on the floor and he lost his temper with the claimant. He told the claimant to buck up his ideas.
On 27 May 2021 Mr. Kelly instructed the claimant to attend site at 8 a.m. on Monday. The claimant stated "maybe". The claimant covertly recorded a conversation between Mr. Kelly and himself (see page 414). The claimant asked whether he was back at the site tomorrow. There are

some interactions between the claimant and Mr. Kelly and Mr. Kelly is recorded as saying *"yeah, I've got no choice..I don't want to hear your shit. I've heard enough of you now just fucking get the fuck out of mu sight will you..look mate please do me a favour and just go for us before I say something I don't want to say."* The Tribunal found that Mr. Kelly regularly swore in this manner. The Tribunal takes into account the context of the working environment and the fact that the team were under pressure to ensure the mechanical plant was working by 4 June 2021.On 27 May 2021 Mr. Beasley the contracts manager emailed Mr. Hanley with concerns about the claimant's performance including his timekeeping; attitude; work out put and stated the claimant was to be sent to the Peterborough site. Mr. Kelly agreed with Mr. Beasley's comments.On 28 May 2021 the claimant attended the site at 7.33 a.m. The claimant has signed the Safe Plan of Action and wished to go back and sign it for other days when he had not signed it. Mr. Kelly would not allow the claimant to do this because that would have been dishonest. Mr. Kelly sent an email on 28 May 2021 (page 416-7) regarding his dissatisfaction with the claimant. He informed the respondent "good luck with him." Mr. Kelly corrected his view in an email page 418 that he did not think the claimant had carried out some of the bends but concluded that the claimant did not want to do the work and was bone idle. He informed the claimant that he would not be required in Huntington and it was left for him to contact Mr. Hanley for further instructions.
The Tribunal determined that Mr. Kelly was not impressed from the start with the claimant due to his lateness to site and failure to follow instructions. He perceived the claimant to have a poor attitude and was lazy. The Tribunal considers that Mr. Kelly's attitude to the claimant was based on these observations. The Tribunal did not accept that the claimant was given too much work or too short of a timescale. In the circumstances the Tribunal found that the claimant's public interest disclosure did not have a material influence (in the sense of it being more than trivial influence) on the conduct of Mr. Kelly towards the claimant.

<u>(e)the requirement to provide sick notes.</u>

178. The claimant was required to provide sick notes whilst he was off sick pursuant to his contract of employment (see page 137). Mrs. Harrington was informed by payroll on 9 July 2021 that the claimant's absence was not recorded on Whosoff. Mrs. Harrington requested the claimant to provide a fit note because his absence had exceeded 7 days (page 449). On 12 July Mrs. Harrington received the claimant's fit notes for the period 14 June to 11 July 2021.

179. On 14 July 2021 Mrs Harrington realised the claimant's last sicknote expired on 11 July 2021. She therefore contacted the claimant to check if he was still off work. She advised if the claimant was not at work he would need to obtain a further sicknote page 451. The claimant responded to say he would provide a fit note as soon as it was received page 452. On 21 July 2021 the claimant was issued a fit note stating low mood and stress for three weeks, covering the period 11 to 31 July 2021. On 6 August 2021 page 565/6 Mrs. Harrington mentioned claimant's fit note had expired on 31 July 2021. Mrs.

Harrington requested a fit note to cover his latest period of absence and any further absence. The claimant states that this letter made him feel harassed. The Tribunal finds that the respondent was entitled pursuant to the contract of employment to request a claimant to send fit notes in a timely manner. Later on 6 August 2021 the claimant contacted Mrs Harrington and Mr Hanley to state he was waiting for the fit note but would let the respondent know when he was feeling better so to return to work page 467. The claimant did not allege that he had found the email from Mrs Harrington as being harassment . The Tribunal determined that the claimant thought about this at a later stage on 13 August 2021 Mrs Harrington contacted the claimant advising that to look at the payslips he had sent which should show the pay he received cover the dates he had fit notes for. She also reminded him of the importance of submitting a fit note page 468. If a fit note was received late, the payment to the claimant would be late. On 20 August 2021 Mrs. Harrington wrote to the claimant page 470 reminded him that he had not submitted a fit note to cover the current period of absence and asked him to send one. The claimant confirmed he would send one over. The Tribunal did not find that Mrs. Harrington's requests for up to date fit notes were unreasonable but rather were in accordance with the employee's obligations to provide fit notes when absent from work. The Tribunal finds that Mrs. Harrington was entitled to request the claimant to provide sick notes when he was absent from work and that the claimant's public interest disclosure did not have a material influence (in the sense of it being more than trivial influence) for the request for fit notes.

180. <u>Placing the claimant on a performance improvement plan</u> The claimant was investigated because it appeared that the claimant had been wrongly claiming payments for time spent at college when he was not at college. The respondent's policy was to pay employees when they were physically in college. The claimant was invited to contact the respondent to seek clarification as to whether the claimant had attended college or not. An investigation meeting took place on 23 February 2021 page 368 which the claimant covertly recorded. The respondent explained that the investigated was triggered because the respondent pays when someone is physically in college not when studying online. Mr. Hanley stated it would be looking at the claimant's overall performance. Mr. Hanley said they would look into any similar situations and how they were handled. The claimant was suspended for one week. The claimant was placed on a PIP on 5 March 2021 for four matters. These were (a)health and safety; the claimant was required to comply with all EHSQ site requirements. This was based on the incident in Felixstowe on 14 January 2021 for the lack of PPE and barriers; (b)absence reporting; the claimant was required to record any absence because he had not been using it; (c)work completion; Mr. Hanley had received reports from site that the claimant was not completing the tasks set in the same time as others with the same experience and (d)timekeeping because the claimant had attended sites late. PIPS were regularly used by the respondent.

181. On 6 March the claimant objected to the PIP because he stated it was unfair. Further by email on 16 March 2021 at page 385 the claimant stated the targets were unfair because they do not relate to his absence from work and there had been no issues in the past about these matters. The claimant did not have an issue with the booking time off via whosoff because this was related to his absence. However, he objected to the objective about carrying out tasks in the time frame; working scheduled hours on the basis that the hours required

were unclear (he said his contract gave a start time of 8 although sites opened at 7 a.m.) and he felt the compliance with health and safety is unfair because although he accepted that this should be something complied with it did not relate to his absence.

182. Mr. Hanley responded to the claimant's objection at pages 388-9. He stated that the respondent had not said the PIP was just related to the college incident. The purpose of the PIP was to look at the claimant's performance and conduct as a whole since he joined the respondent and to give a clear direction on what is required of the claimant going forward. Further as the PIP is not just related to the college incident; the claimant was expected to be flexible with his start times in accordance with contract of employment. In respect of the issue of health and safety requirements, Mr Hanley stated this is non-negotiable and there is no connection to your absence. As advised he said the objective of the PIP is to give you clear direction of what is required.

183. The claimant contends that the imposition of the PIP was related to his public interest disclosure because of (a) the timing of the PIP (b)there had been no previous issues the breadth of the PIP which did not concern attendance at work. The tribunal heard all the evidence found that the respondent was entitled to investigate the claimant where an issue arose that he was being paid for time where he may not have been attending college. Following the investigation that issue the respondent took the opportunity to amalgamate issues of concern about the claimant in a performance improvement plan. The respondent was entitled to use the performance improvement plan as it frequently did to give the claimant clear direction as to what was required at work. The reference to health and safety arose due to the information provided to Darragh that the claimant was not wearing PPE. The issue regarding attendance and lateness was connected with the fact that the claimant had been late on site and been informed he would receive a yellow card for it. The reality is that the respondent did have some concerns about the claimant and his performance at work. The tribunal therefore found that the imposition of the PIP on 5 March 2021 was not materially influenced (in the sense of it being more than a trivial influence) by the claimant's public interest disclosure.

184. In respect of the issue of time and jurisdiction, the claimant's complaint had been the imposition of the PIP which he accepted in cross examination was the last detriment in time. The claimant has not asserted a positive case as to why it was not reasonably feasible to have issued a public interest disclosure complaint in time. The burden rests upon the claimant to establish this and he has failed to do so. For all these reasons the public interest disclosure detriment complaint is dismissed.

Unauthorised deductions

185. Did the respondent make unauthorised deductions in the claimant's wages in relation to pay for travel time a pay rise due together with backpay and reimbursement of college fees.

186. Travel time -In respect of the issue of travel time this matter can be dealt with fairly shortly. On the claimant's case he began to receive payment of travel time following a change of policy in January 2021. This means any complaint of unauthorised deductions for travel time is out of time. The claimant issued his first claim on 30 July 2021. Any matters which dated before 8 April 2021 were not in time. The claimant accepted no monies were owed to him for travel time from January 2021. He presented no evidence that it was not reasonably

practicable for him to have pursued this claim earlier and in fact he told the Tribunal directly that he has no reason for delaying in bringing his claim before the Tribunal. On the basis that the claimant has to prove that it was not reasonably practicable to have brought his claim within time pursuant to section 23 (4) of the Employment Rights Act 1996 and no evidence having been adduced, the tribunal finds his complaint out of time. This claim is not well founded and is dismissed.

187. Pay rise and back pay- The factual background of this complaint is that the claimant's case is that he should have been on a higher rate of pay and was entitled to back pay from the commencement of his employment with the respondent. However, the claimant accepted in his evidence that he is not entitled to the JIB rates and that he signed a contract where he was referred to as an "apprentice electrician". The respondent's evidence which was accepted by the Tribunal is that it is not a registered with JIB and although it may use pay rates as a guide it determines the appropriate rate from an assessment of an employee's experience and capabilities. Following the claimant raising his concerns about his job title and rate of pay having clarified his qualifications; the respondent increased the claimant's rate of pay. The Tribunal is satisfied that the respondent paid the claimant at a rate using the JIB rates taking account of the claimant's experience and competence. The claimant had initially agreed to be paid £7.34 per hour. He raised his concern about this and the respondent reviewed his pay rate and agreed to increase his pay rate to £13 per hour. This claim is not well founded and is dismissed.

188. The Tribunal does not find that the claimant was entitled to a greater wage or in fact back pay; the Tribunal determines that no further payment was properly payable to the claimant and he has no entitlement to a greater rate of pay or back pay. This claim fails and is dismissed.

189. Reimbursement of college fees, the claimant informed the tribunal that although his college fees were initially declined by the respondent on 25 August 2020 the respondent did in fact pay for these following the outcome of the grievance and the claimant received these in the payroll in. Therefore, this claim is no longer pursued and the Tribunal dismisses the claim.

190. All claims are dismissed.

Employment Judge Wedderspoon

3 April 2023

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