EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR S BILNEY	**AND**	**MBDA UK LTD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 7TH / 8TH / 9TH / 10TH SEPTEMBER 2020

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS:**

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MS A NIAZ DICKINSON**

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claim that he was constructively unfairly dismissed is not well founded and is dismissed.

2. The claimant's claim that he was automatically constructively unfairly dismissed pursuant to s103A Employment Right Act 1996 is not well founded and is dismissed.

3. The claimant's claim that he suffered detriment on the grounds of having made public interest disclosures is not well founded and is dismissed.

4. The claimant's claim of direct age discrimination is not well founded and is dismissed.

5. The claimant's claim of breach of contract is not well founded and is dismissed.

Reasons

1. This has been the final hearing of the claimant's claims. With the consent of the parties it has been conducted by an Employment Judge sitting alone via Kinley CVP (cloud video platform.) The tribunal is extremely grateful to the parties for their co-operation which allowed the case to proceed to final hearing.

2. By a claim form presented on 27 August 2019 the Claimant brought complaints of constructive unfair dismissal, detriment and automatic unfair constructive dismissal on the grounds of public interest disclosure, discrimination on the grounds of age and breach of contract (relating to notice pay), all of which the Respondent has defended.

3. The tribunal has considered a bundle in excess of some 600 pages of documents and has heard evidence from the claimant himself; and on behalf of the respondent from Mr Andrew Lambourne (Head of Electro Magnetic Compatibility (EMC)), Mr Vipul Patel (Head of Environmental Engineering) Mr Raj Badiani (Head of Software Engineering) and Ms Nicky Cameron (HR Client Facing for Engineering).

4. At a case management hearing held by EJ Livesey on 20th January 2020 the issues in relation to the various claims were set out as follows:-.

Constructive unfair dismissal

4.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence and/or the express terms relating to the Respondent's disciplinary, performance management and/or grievance procedures. The breaches were as follows;

4.1.1 Breach of the implied term;

4.1.1.1 Instigating performance monitoring;

4.1.1.2 Issuing a first performance warning;

4.1.1.3 Issuing a second performance warning;

4.1.1.4 Inviting the Claimant to a performance hearing;

4.1.1.5 Failing to adopt and/or incorporate the particular methodology which the Claimant had written into a procedure for Test Engineers (see paragraph 4 of the Claim Form);

4.1.2 Breach of the express terms;

4.1.2.1 Failing to reconvene the first formal hearing after the Claimant had submitted more evidence;

4.1.2.2 Failing to provide responses to the first formal hearing and the appeal within the prescribed time scale of five days (the Claimant alleges that the responses were 10 days and 6 weeks respectively);

4.1.2.3 Failing to take into account mitigating circumstances when the first warning was issued and/or at the appeal;

4.1.2.4 Failing to agree objectives at the informal performance management stage;

4.1.2.5 Failing to deal with the Claimant's grievance rather than, instead, listing a further performance meeting.

The breach referred to in paragraph 4.1.1.5 above was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law.

The Respondent does not accept that its procedures/policies were incorporated as express terms of the Claimant's contract.

4.2 Did the Claimant resign because of the breach? The Respondent alleges that the Claimant indicated that he wanted a job which was better paid when he resigned.

4.3 Did the Claimant tarry before resigning and affirm the contract? The Respondent asserts that many of the allegations set out above took place a substantial period of time before the Claimant resigned and it will allege that there was affirmation and/or waiver.

4.4 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

Public interest disclosure claim/s

1.1. What did the Claimant say or write?

1.1.1. *In late March or early April 2016, Claimant raised a 'non-conformance' with his manager, Mr Duncan regarding a test engineer's work on 1 March 2016 which resulted in a fire. Concerns were raised orally and in writing;*

1.1.2. *In February 2017, the Claimant escalated the complaint to Mr Patel in writing;*

1.1.3. *In or about February 2018, the Claimant raised concerns orally to his manager, Mr Lambourne, about the lack of consideration given to equipment which was to have been used in conjunction with a high-power amplifier.*

1.2. In any or all of these, was information disclosed which in the Claimant's reasonable belief tended to show that the health or safety of any individual, his colleagues, had been put at risk.

1.3. If so, did the Claimant reasonably believe that the disclosure was made in the public interest? The Claimant relies on the following as going to show the reasonable belief: he asserts that, when alarms went off as a result of equipment overheating and/or a fire, the local fire brigade always had to attend. It was in the public interest that fire crews were called unnecessarily in light of the Respondent's failure to adhere.

1.4. If so, was that disclosure made the employer? Although no formal concession was made, Mr Chalmers recognised that the three alleged recipients of the disclosures were likely to have been part of the 'employer' within the meaning of s. 43C.

Detriment complaints

1.5. If protected disclosures are proved, was the Claimant, on the ground of any protected disclosure found, subject to detriment by the employer or another worker in that;

1.5.1. *Instigating performance monitoring;*
1.5.2. *Issuing a first performance warning;*
1.5.3. *Issuing a second performance warning;*
1.5.4. *Inviting the Claimant to a performance hearing.*

Unfair dismissal complaints

1.6. Was the principal reason for the treatment which the Claimant suffered as set out in paragraph 11.5 above the making of any proven protected disclosure and did the Claimant resign as a result?

Section 13: Direct discrimination on grounds of age

1.7. Did the Respondent subject the Claimant to the following treatment falling within section 39 Equality Act, namely:

1.7.1. *Instigating performance monitoring;*
1.7.2. *Issuing a first performance warning;*
1.7.3. *Issuing a second performance warning;*
1.7.4. *Inviting the Claimant to a performance hearing.*

1.8. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon hypothetical comparators. He was 59 years of age at the date of his resignation. He places himself in the over 50s age group and relies upon hypothetical comparators of below that age group

1.9. If so, are there primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

1.10. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

1.11. The Respondent does not rely upon the defence of justification.

Breach of contract

1.12. The Claimant accepts that he was paid his notice pay but believes that he did not receive pension contributions and/or a payment in lieu of the loss of his mobile telephone during that period.

1.13. The Respondent alleges that it was an express clause of the contract that, during periods of notice, employees were to be paid salary only.

5. It will be apparent that the claims in respect of breach of the implied term of mutual trust and confidence (constructive dismissal), public interest disclosure detriments, and age discrimination detriments are identical save in respect of 4.1.1.5 above. There are in addition alleged breaches of the express terms of the claimant's contract also relied on in respect of the constructive dismissal claim.

Facts

6. The respondent's business is the design and construction of missiles and missile control systems. The primary dispute is between the claimant and Andrew Lambourne. Mr Lambourne commenced employment in January 2015 as a level 5 Senior Principal Engineer. He became the claimant's line manager in June 2017 and was promoted to Head of Electro Magnetic Compatibility (EMC) in 2018. The EMC department is responsible for testing components and products to ensure that they neither cause nor are affected by electro-magnetic interference. Most of these components are for use in missiles fixed to and deployed by aircraft. It is safety critical as self-evidently any failure in testing which resulted in unsafe components being used could have catastrophic results.

7. The claimant was employed as Principal Engineer and Quality Officer from April 2001 until his resignation in May 2019. For the period with which I am concerned the claimant was a level 4 Principal Engineer. Mr Lambourne's evidence is that from the start of his employment he did not view the claimant as having a great deal of technical knowledge and that he did not regard him as operating at the required standard of a Level 4 engineer, which was confirmed when he became the claimant's line manager.

8. The claimant's case is that this is not true and that the concerns as to his level of performance were not genuine but were concocted and began because of a dispute

over the MMP Actuator test. On his case this is the single event of the greatest primary importance in the case in that the dispute caused everything that followed. It should be said at this stage that respondent generally expresses considerable bafflement as to the significance the claimant places on this episode. The respondent's witnesses, and Mr Lambourne in particular, were of the view that this was at heart a technical dispute as to the performance of a particular test which is not unusual; and that in notifying the non-conformance the claimant was correct as the data relating to the test was not recoverable. Viewed from their perspective it was a very minor incident, a "non-event" in Mr Lambourne's words, with no consequences or ramifications and they are mystified as to the significance the claimant places on it.

MMP Actuator Test

9. The first protected disclosure on which the claimant relies arose from testing an actuator for an MMP missile (the MMP actuator). Put simply the actuator had already been tested in France and had passed. The power supply used was a four-quadrant power supply. However, in England a different type of four quadrant power supply was used which tripped out meaning that the test could not be conducted. This problem was solved by installing a PSU capacitor in the power supply. Despite having passed in France, with the test being conducted in this way the MMP Actuator overheated and failed, the problem being an issue with an internal capacitor. In consequence the MMP actuator failed the test in England. The claimant took the view that the test should have been replicated essentially using the same power supply as had been used in France which would allow the MMP actuator to pass the test. However, the claimant's position was not generally supported, and it was decided that the test should be, and was subsequently, performed again with the same result.

10. The claimant conducted an audit of the first test and sent a non-conformance report to three recipients, including Mr Lambourne and Mr Colin Lawrence, on 20th April 2016. This is the document relied on as the first protected disclosure. The non-conformance identified was that no record had been kept, or could not by that time be found, of the calibration or testing during the test described above with the result that it was not possible "..*to compare the UK test with the French test. The test will have to be repeated*." Thus, the disclosure was in fact about a failure of record keeping during the test, with the resulting requirement to repeat it. Mr Lawrence replied at 9.17 a.m., approximately an hour after the claimant's original email, confirming that it had not been possible to recover the data and that he agreed that this was a non-conformance; which he confirmed in an email to Iain Donaldson the following day. In fact, the test was subsequently repeated in July 2016 with the same result.

11. As is set out in the issues above the claimant contended that he also disclosed the same information to Mr Patel in February 2017. However, he makes no mention of this in his witness statement and there is no documentary evidence supporting it. Mr Patel denies ever having received any such information. His evidence is that he had no involvement with the MMP actuator testing; would not have been the correct person to raise any non-conformance with as he had no involvement in the MMP actuator tests or the EMC anomalies register; and has reviewed his emails for the

period and has not discovered anything from the claimant raising the issue, which would explain his having no recollection of the claimant having done so. It must be said that this is compelling evidence, and in my judgement there is no evidence at all that any such disclosure was made to Mr Patel.

Third Disclosure

12. It is convenient, although it is out of order chronologically, to deal with third alleged disclosure at this stage. The allegation is that "*In or about February 2018, the Claimant raised concerns orally to his manager, Mr Lambourne, about the lack of consideration given to equipment which was to have been used in conjunction with a high-power amplifier".* Mr Lambourne has set out an explanation of the events themselves in his witness statement, but his evidence is that he had no recollection of any such conversation as that described above with the claimant. From the claimant's perspective, it is not mentioned in his witness statement and he too stated that he had no specific recollection of it in evidence. It follows that there is not before me any evidence from anybody that any such conversation took place.

Performance Reviews

13. As is set out in paragraph 1 of his witness statement the claimant's case in summary is that the respondent behaved unreasonably in instigating and continuing disciplinary proceedings against him which justified his resignation. Even if he is wrong to attribute the performance concerns to the dispute over the MMP actuator test, they were not in any event justified. Mr Lambourne's evidence is that they were genuine and more than justified. Thus, the primary question is whether I accept the claimant or Mr Lambourne's account of the claimant's performance. For the reasons set out at paragraphs 50 and 51 below I have concluded that I accept Mr Lambourne's evidence. In his witness statement has given a very detailed account of all of his interactions with the claimant in respect of performance management. It is not necessary for me to refer to all of that evidence in this judgment but for the avoidance of doubt I accept all of Mr Lambourne's evidence.

14. Given that this is the primary focus of the claim it is convenient to set out at this point the structure of the respondent's performance management policy. Members of staff receive both performance reviews and development reviews with and from their line managers. In the event that performance is or remains unsatisfactory they may be made the subject of the "Managing Unsatisfactory Performance Policy". It firstly sets out the overall principles to applied which are that an employee not performing to acceptable levels will be given the opportunity to improve, but that in the absence of adequate improvement their employment may be terminated on the grounds of capability. No formal action will normally be taken (save in respect of gross incompetence) unless there has been an opportunity to improve via an informal process. The first stage is the informal performance agreement (IPA) which only requires a meeting between the manager and employee and "where possible" agreement as the current performance level. Any areas of improvement should

recorded and confirmed via email or memo. If the IPA does not result in satisfactory improvement the next stage is the first formal performance management hearing, which is the first stage of three formal stages which are first written warning, final written warning, and dismissal. At each stage there is a right of appeal.

15. In February 2017 prior to Mr Lambourne becoming his line manager the claimant received a performance review from his then manager Peter Duncan in which he was awarded "good with scope for improvement." The claimant did not accept this and in his own comments refers to the dispute over the MMP actuator, which he believes led to the unjust and inaccurate assessment. He lodged a grievance in respect of the performance review, which was heard by Martin Hadley in July 2017. Whilst he accepted that Mr Duncan had not documented his concerns clearly in the one to one meeting, he accepted that he had grounds for awarding the grade that he did, and he upheld the award of the original grade. In August 2017 the claimant appealed against the grievance outcome. This was heard by Raj Badiani in February 2018 when he again upheld the original outcome.

16. In the meantime, in June 2017 Mr Lambourne had become the claimant's line manager. Mr Lambourne's evidence is that even before he became the claimant's line manager he did not have a very high regard for his technical ability and he refers in his witness statement to the preparation of UKAS document (an accreditation uplift) in preparation for a UKAS Inspectors visit on 24th March 2016. He states that the claimant did not begin work on the document until the day before the meeting and that the document he prepared was deficient. He describes this as " *a common theme in Stephen's employment: his failure to complete tasks in a timely manner and also his apparent inability to complete work to the standard of a Level 4*" He refers to issues with an EMC risk analysis process; a TAC IMU route Map; and in particular work on updating the quality manual which was ongoing from 2016, throughout the period covered by Mr Duncan and Mr Lambourne's management and which was eventually removed from him late 2018 and completed by another employee in early 2019.

17. The first one to one development meeting between the claimant and Mr Lambourne took place on 13th October 2017. Mr Lambourne's view was essentially that the claimant was failing to accept any need for improvement in his performance. He was looking towards a level 4+ grade when he was not working at level 4 and was blaming the failings on the MMP Actuator testing which Mr Lambourne regarded as a "non-event". Mr Lambourne decided to invoke the respondent's Managing Unsatisfactory Performance Policy and commence an Informal Performance Agreement (IPA). There was a delay in securing HR involvement which meant that it did not commence until after the claimant's performance review period from January to March 2018.

18. There was a further one to one performance review meeting held between Mr Lambourne and the claimant on 8th March 2018. Mr Lambourne's evidence is that his conclusions as to the claimant's underperformance were reasonable and accurate. In the section summarising achievement objectives met in the previous twelve months, where they have not been achieved but for reasons beyond the claimant's control

that has been specifically recorded. However he refers specifically in his witness statement to three objectives, which should have been within the claimant's competence and ability, which had not been achieved ("provide overall EMC plan"; "TAC IMU- Provide a route Map"; and the EMC Risk analysis). Going forward, one objective in particular, to update the Quality Manual is specifically referred to by Mr Lambourne. His evidence is that it should have been completed by July 2017, had been pushed back to September 2017 and was sixty- five percent complete by March 2018. The claimant was given the objective of completing it by July 2018 along with four other objectives. Overall, he awarded the claimant, as in 2017, a grade of "good with scope for improvement".

19. The claimant again lodged a grievance as to this grade. It was heard by Dave Gilbert Head of Weapon Communications Systems. He concluded that the score was a fair reflection of the claimant's performance and did not uphold the grievance. This decision was not appealed.

20. The specific objectives the claimant was expected to achieve during the 8 week IPA were set out in an attachment to an email of 23rd April 2018. It was initially expected to finish on 15th June 2018, but in fact the timescale was extended to 2nd July 2018 at the claimant's request. One of the claimant's allegations of an express breach of contract is that these objectives were not set with his agreement. He alleges that this is a breach of section 4 of the MUP which provides that the manager and employee "will discuss and where possible agree the employee's current performance level and any areas for improvement". The respondent firstly submits that the policy is non contractual (which is discussed in greater detail below) but that in any event in this case there was no agreement as to current performance given that the claimant never accepted that he was failing to achieve level 4 standard, and did not of necessity accept the need for improvement. This is therefore a factual situation in which it was not possible to reach agreement. On any analysis there was no breach of contract in the imposition of an IPA without full agreement. In my judgement this must be correct.

21. Following the conclusion of the IPA, there was a meeting on 5th July 2018. Mr Lambourne took the view that a number of the objectives had not been met, and by a letter of 11th July, setting out eight objectives he had failed to meet, the claimant was invited to a Formal Performance Management Meeting on which took place on 20th July 2018. The claimant attended with a trade union representative and initially contended that he had achieved all of the objectives although Mr Lambourne did not accept this. One of the specific objectives that was unfulfilled was the Control of Activities document. Mr Lambourne's evidence is that this was first allocated to the claimant in the first quarter of 2017, had been specifically identified as an IPA objective and was still not complete. The claimant during the meeting referred to attempts he had made to chase up relevant individuals and progress projects. He did so by email on 23rd July 2018. Mr Lambourne concluded that he had failed to meet the objectives and on 3rd August 2018 issued the claimant with a first written warning. The letter also set out the performance objectives the claimant was required to meet going forward. On 7th August 2018 the claimant appealed the decision. The appeal was heard by Peter Hall, Head of Aerodynamics but was not upheld.

22. Three of the claimant's allegations of express breaches of contract relate to the conduct and outcome of this stage of the performance review process. Firstly, he contends that after he supplied further information by the email of 23rd July 2018 that Mr Lambourne should have reconvened the meeting rather than make his decision. This is derived from part 5.4 of the policy which provides that the manager may adjourn the hearing if further investigation is required, and that the employee will be given a reasonable opportunity to consider any new information obtained before the hearing is reconvened. The claimant asserts that Mr Lambourne did adjourn the meeting, did obtain new information but did not reconvene the meeting before making his decision. The respondent submits that the policy does not have contractual force as it does not form part of the claimant's contract of employment, and it is correct that there is no evidence before me that the policy has contractual force. It is not referred to in the contract of employment nor in the policy itself. Moreover, and in any event even if contractual I cannot identify any breach. The new information was not information that the claimant had not seen, but information coming from the claimant himself which he had been given the opportunity to provide. There was therefore nothing that required the meeting to be reconvened, as the situation was not that contemplated by the part of the policy set out above where a manager obtained further information which an employee had not seen or had the opportunity to comment on. The claimant himself had simply supplied further information.

23. The second is the failure to comply with time limits. The claimant alleges that the policy provides for an outcome within five days whereas he did not receive the initial decision until ten days later, and the outcome of the appeal until some six weeks later. Again, the respondent makes the same point (which appears to me to be correct for the reasons given above) that the policy has no contractual force. Again even if there is any contractual right the policy itself (clause 5.4 (meeting) and 5.5 (appeal)) provides that the outcome will be provided as soon as possible, but normally with five working days, so that here is no absolute obligation to achieve the five day objective. On either basis the time in which the meeting and disciplinary outcome were provided cannot in my judgement amount to an express breach of contract.

24. The third is the failure to consider mitigating circumstances when issuing the first written warning and/or on appeal. In the appeal he contended that they were that he had not been told that he was underperforming prior to the imposition of the IPA. Mr Lambourne's evidence, supported by the events set out above, is that this is simply not true and that the claimant could not have been under any illusion prior to the imposition of the IPA that his performance was acceptable. In my judgement it was clearly reasonably open to both Mr Lambourne and Mr Hall not to accept this and again factually, therefore I cannot identify any express breach of contract.

25. Following this Mr Lambourne monitored compliance with the objectives on a monthly basis; and there was a further one to one meeting on 26th September 2018 at which Mr Lambourne again expressed the view that although there had been some improvement in some areas the claimant was not working to level 4.

26. At the performance review meeting on 13th November 2018 Mr Lambourne concluded that there had been a failure to complete a number of objectives and the claimant was invited to a further performance review meeting on 26th November 2018. At that meeting Mr Lambourne expressed the view that the claimant had failed to meet the majority of the objectives set for him. On 30th November 2018 he was issued with a final written warning. This was based primarily on the failure to achieve objectives 4 and 5 the Quality Manual and Control of Activities document. The letter set out the agreed objectives for the next stage. There were review meetings on 9th January and 7th February 2019 by which point Mr Lambourne had formed the view that far from progressing that the claimant's performance had worsened. At the end of the latter meeting he noted that the claimant was still not performing to level 4.

27. There was a further performance review meeting on 7th March 2019 at which the claimant was graded "poor" for 2018.

28. On 26th April 2019 Mr Lambourne reviewed the claimant's performance in respect of the objectives set in the formal improvement agreement; he concluded that he had failed to meet the objectives and the claimant was invited to a further formal performance review meeting on 8th May 2019. The letter identified four objectives that he had failed to complete. On 29th April the claimant replied. He did not accept that he failed to achieve the objectives and described calling a formal performance review meeting as unethical and unfair. On 2nd May 2019 the claimant emailed Mr Lambourne to indicate that he wished to have a representative at the meeting in order to make an informed decision as to whether to resign. On the following day, 3rd May 2019 he resigned.

29. One of the claimant's allegations is that the performance review meeting should not have been scheduled until after his grievance had been considered. There is no evidence before me that the claimant ever lodged a formal grievance as he had done in relation to the earlier performance reviews; and there was at that stage no decision to appeal in respect of performance management. Even had the claimant lodged a grievance in relation to the grading at the performance review on the face of it that would not have had any bearing on the ongoing performance improvement arrangement. Accordingly, on the evidence before me there was no grievance lodged at the time the claimant was invited to the meeting on 8th May 2019; and no factual basis for asserting that there was any reason not to proceed with the meeting.

30. The final straw as set out in the list of issues above (4.1.1.5) references paragraph 4 of the attachment to the claim form and alleges that from April 2018 the claimant was assigned to work on documents which contained roles and responsibilities for test engineers. He alleged that Mr Lambourne re-assigned this work to other personnel which removed roles and responsibilities from test engineers. This incident appears to be referred to in the claimant's witness statement in the context of objective 4. He states that in April 2019 he had informed Mr Lambourne that it would be necessary to suspend objective 4 (Test method) until he could determine the inclusion of a high voltage requirement. On 10th April 2019 the claimant emailed Mr Lambourne saying that his latest test method objective was due on 19th April and that he wished to include induced electric field tests specified in DO160 but they are not current to

other standards. Mr Lambourne replies saying" I am keen to include DO160 where it aligns well with other standards .. However if you feel that this may compromise the delivery date of the document, do not include DO160 and include a statement that it should be considered for the next iteration." The claimant replied highlighting an issue about voltage coupling for which he was yet to get a response. Mr Lambourne agrees with the claimant that the test he wishes to include is becoming more relevant and that it should be considered for the next iteration but not at that point if compromised the delivery date.

31. This is difficult to understand as comprising the last straw firstly as it predates the issues surrounding the invitation to the performance review meeting; and secondly as it simply involves Mr Lambourne giving a very clear instruction as to how to complete the document.

Breach of contract

32. A set out above the claimant accepts that he was paid notice pay but contends that it did not include either pension contribution or payment in lie for the loss of his mobile phone. The respondent contends quite simply that this reflects the express terms of his contract and not therefore a breach. They rely on a paragraph at page five of his contract under the heading Termination of Employment which provides that the respondent has the right to pay salary in lieu of notice and that "This will be paid at the basic rate exclusive of bonus, overtime and any other allowances which are paid above basic salary" and they contend that the claimant was paid exactly in accordance with his contractual entitlement.

Conclusions

33. Before considering the individual allegations, the respondent submits that in general its evidence should be preferred to that of the claimant. Firstly, its evidence, particularly in relation to the performance concerns which are at the heart of the claim, are supported by a wealth of documentary and contemporaneous evidence. Secondly, and acknowledging that the claimant is a litigant in person, a large number of the factual claims are not set out in his witness statement despite the issues being precisely set out in the case management order, and his therefore knowing exactly which factual issues which he would need to address. Thirdly a number of the allegations are either unsupported by any evidence, or demonstrably false. By way of example, dealing only with the public interest disclosure claim, there is no evidence any disclosure was ever made to Mr Patel and the claimant has not suggested there was despite making a very precise allegation that he made the disclosure in February 2017; and the actual disclosure he made in March 2016 bears no relation to the description of it either in the claim form, or the case management order, or his witness statement. As a matter of fact he made no disclosure about any health and safety issue at all, only the failure to keep data in respect of the test; and the fire he refers to was actually the predicted failure of the component overheating in the repeated test after the disclosure had occurred and necessarily cannot have been the

subject matter of the disclosure. Put simply the claimant is extremely casual in his evidence as to the factual basis of his claims and is prepared to make allegations for which he has attempted to bring no evidence and for which there is no support.

34. In my judgement there is a good deal of truth in this observation. In particular it is true that at each stage the respondent's evidence is backed by very significant amounts of contemporaneous documentary evidence setting out in detail the matters now before the tribunal which provides very significant and compelling support for its case. The specific findings of fact are set out below but in principle in my judgement for that reason the respondent's evidence is significantly more reliable than the claimant's.

35. As is set out above a number of the complaints are said to form the basis of the claims for constructive dismissal, age discrimination and whistleblowing detriment.

36. It is sensible therefore to deal with the whistleblowing detriments and age discrimination detriments first as, if any of those claims are proven the likelihood would be that the claimant would succeed in his constructive unfair dismissal claim.

Public Interest Disclosure/ Whistleblowing

37. The first question is whether the Claimant was an individual (employee or worker of the respondent) who is capable of being protected under the PIDA provisions. This is not in dispute and it is not therefore necessary to set out the law.

38. The second is whether there was a qualifying disclosure within the meaning of S.43B Employment Rights Act 1996. This requires a) a disclosure of information that b) is in the reasonable belief of the worker making it c) in the public interest and d) tends to show that one or more of the six relevant failures has occurred or is likely to occur. The relevant failure relied on in relation to each disclosure in this case is that the health or safety of any individual has been, is being or is likely to be endangered (s43B (1)(d) ERA 1996).

39. As is set out above the first disclosure was clearly a disclosure of information, the information being that the records of the test had not been kept, or at least were no longer able to be found. However, that self-evidently is not information tending to show that the health and safety of anybody was endangered. The claimant asserted in evidence that if the retest was conducted in the same way as the first time the MMP actuator risked catching fire, which is precisely what occurred, which itself would create a risk to those involved. That may be true, although the respondent disputes it, but unfortunately for him this is not the subject matter of the disclosure relied on which simply that there was no data available in respect of the first test, and there is no evidence that he ever made any such disclosure.

40. In my judgement the disclosure relied on does not disclose any information relating to endangering health and safety and the claimant could not on any analysis reasonably have believed that it did. Indeed, the claimant appears at least tacitly to accept this

given that the matter he says he was primarily concerned about was the risk of fire which the disclosure does not refer to at all. For that reason, in my judgement this is simply not a qualifying disclosure within the meaning of s43B (1) (d) Employment Rights Act 1996.

41. In respect of the second and third disclosures I have held that on the balance of probabilities that they did not take place. It follows that the claimant's claims of detriment for having made public interest disclosures and of automatically unfair dismissal must be dismissed.

42. For the avoidance of doubt even had I found that any of the alleged disclosures were protected disclosures, for the reasons set out below I accept the respondent's evidence as to the reasons for the performance concerns and the performance management steps take. On that basis I would not have found any causal link between any of the alleged disclosures and any of the alleged detriments.

Age Discrimination

43. The claimant alternatively alleges that the detriments were less favourable treatment on the grounds of his age, and he has identified the relevant age group as being the over fifties, he being fifty nine at the relevant time. He relies on no actual comparators and invites the tribunal to draw the inference that he was treated less favourably than a hypothetical younger comparator.

44. Whilst in discrimination claims the tribunal is obliged to draw appropriate inferences from the evidence, the evidential burden lies on the claimant to produce in the first instance primary evidence from which it could draw such an inference in the absence of an explanation from the respondent (stage 1 of the Igen v Wong test). In other words, there must be some primary evidence which would allow that inference to drawn. Nothing is set out in the claimant's witness statement that relates to age at all and this allegation was not put to any of the respondent's witnesses.

45. In my judgement there is simply no evidence before me from which I could draw any inference, in the absence of evidence from the respondent that any of the detriments, all of which relate to the performance management process were in any way causally related to the claimants age. Even if there had been, for the reasons set out in greater detail in respect of the claim for constructive dismissal which is based in part on the same detriments, I accept the respondent's evidence that all of the performance concerns were genuinely held. Thus, even if the burden of proof had transferred, I would have found that the respondent had satisfied it and that age played no part in the detriments.

Constructive Dismissal

46. Before dealing with the specific allegations the respondent makes the point that the claimant's allegation that there were no genuine performance concerns is inherently improbable given the period over which they were found to exist, and the number of people involved. Even before Mr Lambourne became the claimant's line manager he had been given a grade of "good with scope for improvement", in relation to his 2017 performance by Peter Duncan. His grievance was heard by Martin Hadley and the appeal by Raj Badiani and the grading was upheld as being a reasonable assessment of the standard of his performance. When he received the same grade for 2018 from Mr. Lambourne he again lodged a grievance which was heard by Dave Gilbert but dismissed. When Mr Lambourne issued the first warning as part of the performance improvement process the claimant appealed and his appeal was heard, but dismissed, by Peter Hall. Thus, six managers were either involved in making or reviewing assessments of the standard of his performance none of whom accepted his complaints. Other than the effectively unpursued allegations of age discrimination and the contention that this all stemmed from the dispute about the testing of the MMP actuator in 2016 no reason at all has been advanced as to why all these people should essentially have formed the same view if the evidence did not support that conclusion. In my judgement there is a great deal of force in that submission.

47. The claimant's claim is for constructive dismissal; that the respondent was in fundamental/repudiatory breach of contract entitling him to resign. He relies on breaches of the implied term of mutual trust and confidence and express breaches of the Managing Unsatisfactory Performance Policy.

48. Dealing first with the alleged breaches of the implied term there are two fundamental points to make. The relevance of the term is that it is a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. Clearly the instigation of a performance management process which may end in dismissal is capable of seriously damaging the relationship of trust and confidence. Thus, the question for me is whether the respondent had reasonable and proper cause to act as it did.

49. Secondly as is set out above the claimant relies on the allegation at 4.1.1.5 as the last straw. The leading authority on the application of the "last straw" doctrine is Omilaju v Waltham Forest LBC [2005] ICR 481. At para 14.5 of the Judgment Lord Dyson held "*A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents (he goes on to set out with approval a passage from Harvey*), and at paragraph 16 states ""*Although the final straw may be relatively insignificant it must not be utterly trivial…"* As set out above the incident relied is not chronologically the last event, and on the description given by Mr Lambourne, whose evidence I accept, would appear to fall exactly within the description of an utterly trivial incident. If this is correct the claimant's claim, at least insofar as it is based on a breach of the implied term is bound to fail. However,

in case I am wrong in that analysis I have gone on to set out my conclusions as to the other alleged breaches.

Breach of the Implied Term of Mutual Trust and Confidence

50. All of the matters set out at 4.1.1.1 to 4.1.1.4 and relied on as breaches of the implied term are decisions made by Mr Lambourne at a time during which he was the claimant's line manager. The claimant's case is that the performance concerns are concocted. The fundamental question is therefore whether I accept Mr Lambourne's evidence. The claimant contends that I should not. His fundamental point is the respondent's position is inconsistent. A grade of good with scope for improvement which he was awarded by both managers must mean that he was working to a satisfactory standard; and is inconsistent with the contention that he was not working to grade 4 standard, and inconsistent with the need for any performance improvement plan. If this is correct the performance improvement plans cannot have been merited or properly implemented. Whilst there may be some force in this argument the central difficulty for the claimant is that at each stage Mr Lambourne was explicit in the objectives he wished the claimant to achieve, and gave very specific reasons as to why he thought that the objective had not been achieved. Looked overall the contemporaneous documentary evidence overwhelmingly supports Mr Lambourne and for the reasons set out below I accept his evidence.

51. I have concluded that I do accept Mr Lambourne's evidence for the following reasons. Firstly, the underperformance was first identified by the previous line manager prior to the involvement of Mr Lambourne. Secondly the reasons for Mr Lambourne's concerns are supported by a wealth of contemporaneous documentation. Third Mr Lambourne's conclusions were supported by other managers. Fourth there is in my judgement no persuasive explanation as to why Mr Lambourne should invent performance concerns that did not exist. A dispute over the conduct of one test is in my view an inherently improbable reason for Mr Lambourne to embark on an unjustified campaign against the claimant and, in reality no other reason has been advanced. Looked at overall the evidence in my view overwhelmingly supports the respondent in general and Mr Lambourne in particular. It follows that in respect of each of the allegations that I find the respondent did have reasonable and proper cause to act as it did and that in consequence I cannot identify any breach of the implied term of mutual trust and confidence. It equally follows that I can deal with the individual allegations relatively briefly.

52. The first allegation is of instigating the performance monitoring process. As set out above the evidence is that before the Informal Performance Agreement was implemented the claimant received "good with scope for improvement" both for 2017 and 2018 and had not, according to the evidence of Mr Lambourne made any, or any sufficient improvement. Mr Lamboune's first formal involvement was the performance review of 13th October 2017. In that document Mr Lambourne set out his concerns with the claimant's performance. Because of delays with HR the Informal Performance Improvement plan was not implemented until after the performance

review period from January to March 2018, and the performance review of 8th March 2018, which again resulted in a "good with scope for improvement "award. I accept Mr Lambourne's evidence as to the extent of the performance concerns and accept that he had reasonable and proper cause to instigate the process.

53. I have reached he same conclusions in respect of the issuing of the first and second warning, and the invitation to the performance management meeting on 8th May 2019. Once again each of the decisions is supported by a wealth of evidence, Mr Lambourne's decision was upheld on appeal; and in my judgement he had reasonable and proper cause in respect of each of them.

54. The final issue is the "last straw" which is dealt with above.

Breach of the express terms of the Managing Unsatisfactory Performance Policy

55. In addition to the alleged breaches of the implied term of trust and confidence the claimant alleges express breaches of the Managing Unsatisfactory Performance Policy. For the reasons set out above I accept the respondent's submission firstly that the policy is not contractual and that even if they have not adhered to the terms these cannot by definition be express contractual breaches. That appears to me to be correct.

56. Secondly, again for the reasons set out above in my judgement none of the matters complained of are in breach of the policy in any event (see para 20-23 and 29 above).

Breach of contact.

57. For the reasons set out above in my judgement the payment of basic pay as payment in lieu of notice was in accordance with the claimant's contract of employment; and I cannot identify any breach.

58. It follows that all of the claimant's claims must be dismissed.

Judgment entered into Register
And copies sent to the parties on

.....7 January 2021.....

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for Secretary of the Tribunals

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EMPLOYMENT JUDGE

Dated: 17th December 2020