EMPLOYMENT TRIBUNALS

Claimant: Mr S Harper

Respondent: (1) Kieran Fisher
(2) KBF Enterprises Limited

Heard at: Manchester **On:** 23 to 25 August 2016; 28 February 2017
1 March 2017

Before: Employment Judge Holmes
Mrs P J Byrne
Mr W Haydock

Representation
Claimant: Ms N Foster, Counsel
Respondent: Mr Bealey, Consultant

RESERVEDJUDGMENT

It is the unanimous judgment of the tribunal that:

1. The claimant was constructively , and unfairly, dismissed by the second respondent. That dismissal was not automatically unfair under s.103A of the Employment Rights Act 1996.

2. The claimant's claims of protected disclosure detriment against both respondents are dismissed.

3. The claimants claim of breach of contract against the second respondent succeeds, and he is entitled to notice pay.

4. The second respondent's employer's contract claim is dismissed.

5. The claimant is entitled to a remedy for his unfair dismissal. The parties are to seek to agree the same, but in default shall notify the tribunal by **17 July 2017** that a judgment on remedy, or a hearing, is required. In the latter event they shall inform the tribunal what issues require determination, provide an estimated length of hearing, and dates to avoid.

REASONS

1. The claimant was employed as a warehouse and production manager by the respondent from 2011 until his resignation on 16 December 2015. By a claim form presented on 18 March 2016 he complains that his resignation constituted constructive dismissal , and was unfair. Further , the claimant claimed that he

had made protected disclosures, and had been subjected to detriment because he had done so. The claims and issues were identified at a preliminary hearing held on 9 May 2016

2. The second respondent, because the claimant had given only one day's notice, when he was contractually obliged to give one month, has brought a counterclaim seeking damages for that breach, in the form of additional staff costs incurred by it in covering the period of notice that should have been given by the claimant.

3. The claimant was represented by Ms Foster of counsel, and the respondent by Mr Bealey , a consultant. The claimant gave evidence first, but called no additional witnesses . For the respondent Kieran Fisher, Peter Fisher, Aaron Minshall, Caroline George and Christopher Monaghan gave evidence. There was an agreed bundle. The hearing commenced on 23 August 2016, and continued on 24 and 25 August 2016. There was insufficient time to conclude it, and it went part heard to 28 February and 1 March 2017. This was a far longer gap than the tribunal anticipated or wanted, but availability problems dictated that this had to be the case. The evidence was concluded on 28 February 2017, and submissions heard on 1 March 2017. The tribunal reserved its judgment which is now given, with apologies for the further delay occasioned by pressure of judicial business.

4. Having heard the evidence, read the documents in the bundle, considered the submissions of the parties, the tribunal finds the following relevant facts:

4.1 The second respondent is a manufacturer and distributor of sports supplements, and the first respondent is and was at all material times its Managing Director and major shareholder. The business was started in 2008, and in 2010 moved to Trafford Park, and in 2013 moved again to Unit 1, Guinness Road, Trafford Park. It traded under the name "Bodybuilding Warehouse".

4.2 The claimant was first employed on 1 February 2011, as a warehouse assistant. In July 2011 he was promoted to warehouse manager.

4.3 By 2013 the claimant had been promoted to warehouse manager and production manager, following the departure of the previous incumbent of that role. In that combined role he was based in the office upstairs at the unit, whereas previously he had had a desk in , or adjoining, the warehouse.

4.4 One of the respondent's products was Omega 3 fish oil, also sold under the brand "ALA". This was sold in capsules which were marketed in plastic tubs. The company's stock of this product carried "best before" dates on the labelling of the tubs. This form of labelling was not the same as the "use by" labelling that is also applied to foodstuffs. The former is a recommendation, but there is no health risk in consuming products of this nature after the "best before" date. "Use by" dates however, do mean that consumption of a product after that date is potentially injurious to health.

4.5 In August 2014 Kieran Fisher found some stock of fish oil products in the warehouse which were near their "best before" dates, and he asked the claimant to relabel them with a new "best before" date. The claimant was not happy about

doing this, and informed Kieran Fisher of this . He did not in fact carry out this instruction, but nothing further came of it.

4.6 In October 2015 the business was under considerable financial pressure, and Kieran Fisher was most anxious to increase its profitability and eliminate waste There was also concern that orders were not being sent out from the warehouse quickly enough. Around this time Kieran Fisher found more stocks of fish oil in the warehouse, and sent an email to the claimant (and others) which is at page 21 of the bundle, dated 17th of October 2015, in which he asked:

"Can we get the hundreds of tubs of ala and omega 369 relabelled and repackaged asap?

We've been talking about this for 6 months. Just do 60, 90 and 180 cap sizes.

Add a normal date aa (sic) *we normally would. This is exactly what myprotein do and the caps will be fine.*

When can we get this done for?"

4.7 Kim McIntyre replied to that email by an email following day (also page 21 of the bundle) in which she asked: *"Do they not go off? Can we check them and ensure they are all okay."*

4.8 Kieran Fisher replied to her, copying in the claimant and other colleagues, by email of 18 October (page 21 of the bundle) saying this:

"If they look fine, they are fine-capsules don't really go off. Perform a visual check and if they look good, they are. You can run these by me on Monday if needed."

His last sentence was ended with a "smiley" emoticon.

4.9 The claimant was concerned at this request, and although he was aware that health supplements did not usually "go off", he believed that fish oils were an exception , that they became rancid and began to smell when past their "best before" date. In addition to being concerned about any health risk, particularly to vulnerable customers, such as the elderly, he was also concerned at the potential misleading of customers if the packaging of these products were to be altered in this way.

4.10 Having carried out some research on the Internet, and opened some of the stock to smell it, the claimant sent an email to Kieran Fisher on 21 October 2015 (page 27 of the bundle), in which he expressed his concerns thus:

"I am really not happy about re-tubing out of date stock to sell on with a false best before date on it, everywhere I look states that fish oils go rancid after the expiration date (which was aug - 2014) here are just a couple of examples"

The claimant then went on to provide details of two websites that he had visited, and added that there was a site which, although generally stating that pills do not really go off, also stated that fish oils were an exception to this rule. He went on to refer to another website, and stated that the test of the quality of the product is in the smell. He said that he had smelt the current fish oil stock and there was no

smell whatsoever. The stock of the ALA and Omega 369, however, had a terrible smell which he considered that customers would pick up on. As an alternative he suggested trying to sell these products to pig farmers , but invited other ideas from his colleagues as to what other possibilities there may be to dispose of this stock.

4.11 The reaction of Kieran Fisher was an email to the claimant , and his colleague James Lavery , on 21 October 2015 in which he said that a pig farmer would pay nothing or next to nothing. He himself had just taken three of the Omega 369 capsules, and an ALA, and he believed they were fine, and that the "best before" date was very very conservative. He asked whether the claimant or James Lavery could find a lab that could test the remaining life of the pills and get samples sent off so that the company could find out if they were in good condition, and, if so, what date to put on the packaging. He went on to say that "myprotein" (a competitor) did this and that in the military the life even of pharmaceuticals was extended. He said that he appreciated the claimant's concerns and therefore suggested sending off samples to a testing company to find out how much longer they would be fresh. The sent a link to a website providing details of such testing facilities. He asked James Lavery if he could do this today, and this way they would get the actual scientific date for the products as opposed to someone's best guess.

4.12 By an email of 21 October 2015 (page 42 of the bundle) Tara Taaffe, the purchasing manager who had been copied into the previous email exchange, sent an email to Kieran Fisher and her colleagues saying that it was totally understandable to have reservations about re-tubbing the products, although she herself had been taking them for a few months and was alright. She did agree that this would not necessarily mean that it would apply to everybody that took them, and considered that having them tested was a great idea, as a reassurance to ensure that they were selling a product with no health implications.

4.13 Kieran Fisher replied to Tara Taaffe, copying in the claimant and other colleagues later on 21 October 2015 (page 43 of the bundle) saying this:

"Lets just test them-remember the open quote best before" date is someone's best guess. It's not a scientific figure.

James could you please send off the tubs on the desk next to you, to one of the testers today, and get them to see what life is left in them? If they say nothing, fine, if they say six months, fine, let's get the accurate date and maybe we can then push them out on ebay and get at least some of our £6000 back.

Heck… even selling them as an out of date tub on ebay for fuck all money is a good idea."

4.14 By email of 24th of October 2015 to Tara Taaffe (page 47 of the bundle), Kieran Fisher gave instructions for listing all damaged and out of date stock on ebay, and wanted to step up the company's efforts to sell out of date or damaged stock.

4.15 James Lavery made some enquiries for testing of the fish oil products, and sent Kieran Fisher an email 26 October 2015 (page 49 of the bundle) seeking

further information in relation to a product specification and associated methodology in order for them to test products. Kieran Fisher replied to that email on 26 October 2015 (page 49 of the bundle) asking how much the testing would be, and saying this:

"To be honest if we dump these at a stupid price in a sale or re-bottled at year ago NONE of this would be happening.

What is close to date now and we will dump the price on ebsy to site offer and clear it?

This is 6 grand on my money that goes to support my family. I don't care if this last line is demotivational to anyone as it is the fact.

I asked these to be rebottled a year ago and at several points in between from several people and nothing was done about it."

4.16 At this point Peter Fisher , the father of Kieran Fisher, who had no formal role or position in the business, but had invested in it, and had been copied into the email correspondence by his son, sent an email on 26 October 2015 (page 50 of the bundle) addressed to the claimant and Kieran Fisher, amongst others saying *"Why wasn't it done?"* , referring to the rebottling.

4.17 Kieran Fisher replied by email of 27 October 2015 (page 50 of the bundle), again copied to the claimant and his colleagues, saying:

"Because people didn't want to re-tub them and they were left downstairs in the office out of sight, out of mind.

With everything in the store we should sell it-getting £1 is better than getting £0. Everything ever buy should be sold for something."

4.18 Peter Fisher replied later the same day to Kieran Fisher, again copied to the claimant and his colleagues (same page of the bundle) , making the point that no business could afford to throw things away or throw them in the bin that this is one of the roads to ruin. He went on to refer to his own experiences in a company that he had previously run. He went on to say:

"We have to make sure that stock gets old… for whatever it is worth. I used to walk around the warehouse doing a "dust test" if something had dust on it, then it had been neglected and it needed sorting. Is this on your job description Steve?"

This was a reference to the claimant.

4.19 Caroline George, the General Manager, became involved in this email exchange , addressing a reply to Peter Fisher, copied to Kieran Fisher, the claimant, and everyone else involved, on 27 October 2015 . In this email she explained how the details of what had not sold, either at all, or within the last three months, was included in an Excel report that was normally provided on a monthly basis by the claimant. She explained how this enabled various members in the team to check prices, put on promotions, and confirm that the stock is listed correctly.

4.20 This prompted a reply from Peter Fisher to all the recipients in this email chain in these terms:

"So everyone screwed up? Does nobody specifically have responsibility for making sure that the spreadsheet is actioned upon?"

(see pages 50 to 51 of the bundle for this exchange of e-mails)

4.21 During the course of 27 October 2015 there were a number of emails between the claimant and his colleagues in relation to stock. There was discussion as to how stock levels could be better monitored to avoid overstocking and the reporting system the claimant had for monitoring the movement of stock.

4.22 On 28 October 2015 claimant was working in the office with James Lavery when Kieran Fisher came in the office and spoke to the claimant and James Lavery. They were both sitting down at the time. He asked which of them was going to relabel the fish oils , and that he wanted these put into plain bags, labelled as "Omega Fish Oil", and that a date should be put on them that would normally be used in the circumstances. The claimant explained that he was not willing to do this, as he thought it was both illegal and a health risk and reiterated the information that he found from his Internet researches. Kieran Fisher became angry and started to shout, asking whom did the claimant or James Lavery expect to pay for the testing. The claimant said he expected the business to pay, whereupon Kieran Fisher asked if the claimant would be prepared to pay the £4000 that he would lose if he had to dispose of the capsules. The claimant said that he would not.

4.23 At this point Kieran Fisher became increasingly irate, banging his fists upon the table, and then tipping up a table or desk in the office shouting "you can get this done or you can leave".

4.24 The claimant and James Lavery at that point left the office, and James Lavery went home. The claimant did not leave, but telephoned his girlfriend, and subsequently saw Caroline George who asked him not to leave. The claimant was very shaken up by Kieran Fisher's behaviour, and Caroline George told him to take the rest of the day off , and to return the following day.

4.25 The claimant did return to work the following day, 29 October 2015. Caroline George informed him that she had arranged a meeting between herself, Kieran Fisher, and the claimant. Ken Fisher arrived around about 2 p.m, and walked past the claimant's desk without saying anything. Thereafter the meeting that had been arranged took place with Caroline George leading it. Kieran Fisher did apologise in this meeting for losing his temper, but said that he felt that he was right, and the reason he got angry was because it felt that the claimant (and presumably James Lavery) were taking the food off his child's plate. He maintained that relabelling the tubs of omega fish oil was something all his competitors did and he did not think that it was a problem. The claimant explained he still felt that it was misleading, illegal, and potentially damaging to the health of customers. Kieran Fisher at the end of the meeting stated that there was no personal problem with the claimant and that the pills would be tested before relabelling.

4.26 Later that day , at 17.34, Peter Fisher sent an email (page 54 of the bundle)

to the claimant. In it he says:

"I have talked with Kieran and Caroline after the problems yesterday.

I want to have a greater involvement in the business and to help Kieran. I have also spoken to James.

I have asked Caroline to ask you to base yourself in the warehouse rather than upstairs in the office.

You are responsible for 13 people.. a large part of the workforce of company. I think it is important that you are available to them most of the time in the warehouse rather than upstairs in the office.

It's my way of doing things.

I will be in tomorrow at some point and will be happy to talk with you if you would like."

4.27 Later that day, at 22.15 Kieran Fisher sent an email (page 55 of the bundle) to the claimant, copied to Caroline George, to which he attached a number of pictures (pages 56 to 84 of the bundle) that he had taken of the warehouse that evening. In this email he stated that "the place is a tip" and then set out some 12 instances of what he had found. In this email he uses some coarse language, referring to things as "shit", and "crap", being "fucked" and the expression "Wtf" for "what the fuck?". He expressed how he wanted people to take pride in their workplace, and to be able to show customers around a clean and tidy warehouse. He ended by asking if this could be rectified without impacting on orders.

4.28 As these emails were sent to the claimant's work email account, he did not see them until he came back into work the following day, 30 October 2015.

4.29 Later that day the claimant had a meeting with Peter Fisher. This was at the end of the working day, and in the downstairs office. Peter Fisher explained to the claimant how Kieran Fisher was close to having a nervous breakdown , and how everyone needed to work together to avoid this happening. The claimant considered that Peter Fisher was blaming him for this situation. They did discuss in this meeting claimant's move from the upstairs office to the warehouse, and he objected to this and said that it felt like a demotion.

4.30 After this meeting the claimant went home , sought legal advice, and decided to submit a grievance. The claimant prepared a formal grievance document and delivered it to Caroline George on 3 November 2015. This document is at pages 85 to 87 of the bundle. In it the claimant sets out the history of the relabelling of the "best before" dates on the fish oil products, and the incident in the office on 28 October 2015 when Kieran lost his temper and threw over a desk or table. He also referred to the emails he received on the morning of 30 October 2015. In the section entitled "In summary" , the claimant refers to the issue in relation to the relabelling of the fish oil products and contends that his response to Kieran Fisher amounted to a "qualifying disclosure". He said that he considered that he had been unlawfully and unreasonably victimised for making a protected disclosure. He also said that this was an unreasonable instruction. He

went on to complain that Peter Fisher appeared to be determined to blame him for the whole episode, marginalising him within the management team, if possible, to demote him.

4.31 The claimant ended his grievance by saying that because of the behaviour of Kieran Fisher as director of the company and Peter Fisher as an investor in it he had a real concern about his grievance being investigated adequately and asked that the company consider bringing in an independent person to hear his concerns.

4.32 Caroline George dealt with claimant's grievance and arranged a meeting with him on 9 November 2015. The notes of that meeting are at pages 88 and 89 of the bundle. In the course of this meeting Caroline George invited the claimant to elaborate upon his grievances, but in a number of her responses she actually put to him what could be seen as the management perspective in relation to the issues that he raised. For example, in relation to the two emails that the claimant received from firstly Kieran and then Peter Fisher about the state of the warehouse, she said this:

"Do you think and accept that the issues highlighted & spotted by Kieran needed to be sorted out especially in light of the focus that is needed in the business given the potential issue with stock?"

4.33 Similarly, in the next exchange dealing with Peter Fisher's requirement that he base himself in the warehouse rather than the office she said this:

"Did you see the link here with the stronger process for managing stock that was needed and we had spoken about with Kieran the day before?"

She went on to say : *"Isn't you being based in the warehouse the same as me being in the office to overview the customer service and other functions I manage?"*

4.44 Caroline George did raise with the claimant the possibility of finding an amicable way forward , which he was agreeable to. He did, however, point out that she had not covered a lot of the other points in his grievance document, but she said that she wanted to find out more details to allow her to investigate. She said that the other detail in his document would be taken into account. The claimant went on to say that he thought that Kieran was looking for things to get him out of the business and that he did not think his position was tenable if Kieran was acting in this way.

4.45 On 10 November 2015 a meeting was held between Caroline George the claimant and Peter Fisher. This was convened by Peter Fisher, and he led it. Notes of this meeting at pages 90 to 91 of the bundle. In this meeting Peter Fisher acknowledged that Kieran Fisher had been wrong to request the claimant to relabel the fish oil. He explained why this had caused a problem and Kieran had apologised. He said if ever this happened again the claimant should refer the matter to Peter Fisher or Caroline George. The claimant did ask why photographs were taken of the warehouse and Peter Fisher explained that he had asked Kieran to do this. There was further discussion, in particular about the claimant being moved into the warehouse and how he felt that it was a demotion. Peter Fisher said that it was not and that he was being asked to do a different

role from that which he'd carried out before the incident. Peter Fisher explained his rationale and the role of the claimant, as he saw it, managing 13 people in the warehouse and production teams.

4.46 By letter of 13 November 2015 (pages 92 to 93 of the bundle) Caroline George wrote to confirm the outcome of what she described as the grievance hearing held on 9 November 2015. She stated that her investigations had found that what the claimant had been asked to do by Kieran in relation to relabelling the fish oil capsules was an unreasonable request. She went on to say that this been made "in the heat of the moment" and had been withdrawn the following day by Kieran Fisher. This had been confirmed subsequently by Peter Fisher. She confirmed the claimant would not be asked again to carry out the same or a similar request. She told the claimant that if there were any further concerns regarding this he should raise them directly with herself or Peter Fisher.

4.47 In relation to the claimant's concerns about his job and future in the business being threatened, and of victimisation, she went on to say that she was unable to uphold this other element of his grievance. She referred to the discussion held with herself and Kieran Fisher on 29 October, the apology by Kieran Fisher, and the retraction of his request. She referred to the need for a stronger process to avoid stock going out of date, and the issues that Kieran had highlighted in relation to the warehouse. She said that his email to the claimant was written in a clear manner and was not in any way threatening to him or his role in the business. She went on to refer to the meeting with Peter Fisher (wrongly described as taking place on 9 November when it was in fact the 10th) and how there was a necessity for new processes to be carried out. In relation to Peter Fisher's request he base himself in the warehouse, she said she found this request was reasonably made, and reasonable in nature given that he was responsible for managing a team of people who are based in the warehouse. She rejected any suggestion that the claimant's role had been changed, and this had been further discussed and clarified in the meeting with Peter Fisher and herself.

4.48 In conclusion she found his grievance only partially upheld , and advised him of the right of appeal against this decision. She did not say who would hear any such appeal, but said that the claimant should write to her setting out the reasons was appeal within five working days of receipt of her letter.

4.49 The claimant did appeal, and his appeal document which is undated appears to been received on 20 November 2015 addressed to Caroline George, is at pages 94 and 95 of the bundle. In this document he questioned what Caroline George meant by her reference to Kieran Fisher acting "in the heat of the moment". He also made reference to Peter Fisher's decision to move him to the warehouse which he still considered was a punishment for his refusal to carry out an unreasonable instruction. He said the company was refusing to accept that he had suffered detriment, and the underlying suggestion appeared to be that he was not carrying out his duties properly, or cooperating with his colleagues. He pointed out how there were no questions over his performance until he raised reasonable questions about instructions were being given to him. In conclusion he said that the refusal to uphold his grievances in full was unreasonable, and he asked them to be reconsidered , and repeated his request that his complaints be heard by an independent person.

4.50 Caroline George responded by letter of 24 November 2015 (page 96 of the

bundle) acknowledging his appeal and informing him that Geoffrey Littman, a solicitor who had carried out work to the business a number of occasions previously, had been asked to hear the appeal. This was arranged for 30 November 2015.

4.51 The claimant replied to Caroline George in an undated letter (page 97 of the bundle) expressing that he was unhappy with the appointment of Geoffrey Littman as he did not regard him as independent. He understood that he was connected with both Kieran and Peter Fisher, and could not understand how he could be regarded as independent in the circumstances. He also questioned his experience of employment law or HR.

4.52 Caroline George replied by letter of 26 November 2015 (page 98 of the bundle) in which she stated she did not understand the claimant's objections, but said that the company was happy to appoint a totally independent person to hear the appeal provided that such a person would be appointed by the President of the Law Society. This would, however, take some time. In response to the claimant's complaints in his letters of detriment and threat to his employment, she reminded him that he had been promoted to warehouse and production manager only the previous year, and at no stage had he received any disciplinary warning of any nature. She also could not understand why requesting him to carry out his role based in the warehouse could be seen as an attempt to marginalise him or impact upon his future with the company.

4.53 The claimant replied by letter of 27 November 2015 (page 99 of the bundle) in which he reiterated his position, and his concerns as to the treatment he had received from Kieran and Peter Fisher.

4.54 Caroline George wrote back on 1 December 2015 (page 100 of the bundle) informing the claimant that she would hear his appeal on 3 December 2015.

4.55 She duly did so, and the notes of that appeal hearing are at pages 101 to 105 of the bundle. In the appeal meeting the claimant and Caroline George largely went over matters that had already been discussed. Again at times this appeared to be a dialogue with Caroline George making comments and responses which sought to reiterate and justify management's behaviour and her own previous decision.

4.56 By letter of 15 December 2015 Caroline George wrote to the claimant with the outcome of his appeal, which was that the decision to reject his grievance was correct for the reasons that she set out in five bullet points in that letter. In the final bullet point, she explained how following the issue on 28 October the business had increased focus on the processes for stock issues and stock rotation. The focus had been on identifying and making improvements to the processes rather than questioning the claimant's abilities. She added:

"I would like to assure you that your capabilities are not being brought into question."

4.57 By letter of the same date, 15 December 2015 the claimant resigned with effect from 5p.m. on 16 December 2015. His resignation letter is at pages 107 to 109 of the bundle.

4.58 Caroline George responded to the claimant's resignation letter by letter of 18 December 2015 (page 110 of the bundle) in which she expressed that she was saddened that he believed that to resign was the only option as she had hoped that the company grievance procedure would have resolved his concerns. She had asked him to take five days to think his resignation through but he had declined this, saying that he was resigning with immediate effect. She nonetheless did ask him to consider the company's offer to reconsider over the five day period and to revert back to her on before 23 December 2015. She did advise the claimant that the company may seek to recoup any losses incurred as a result of his failure to work his notice. If, however, he did not change his mind by 23 December 2015 she would respect his decision and regrettably accept his resignation.

4.59 The claimant replied by email of 22 December 2015 (page 113 of the bundle) saying that he was sad to be leaving the company but had resigned because he felt there was no other option in the light of the treatment he had received. He made reference to the fact that his central complaints had not been addressed by the company, but that on the contrary the company had sought to question his capability and had avoided responding to the complaints of detriment he had raised. This, he pointed out had occurred as late as his appeal hearing when questions were still being raised about his capability. He concluded that in the light of the company's refusal to back to deal with the issues he had raised in the light of the treatment it received from both Kieran and Peter Fisher he had lost all trust and confidence in his employers, and had no option but to resign.

4.60 The claimant was not immediately replaced, until the end of February 2016, when Sean Fisher, Kieran's brother, became warehouse manager. The claimant was contractually obliged to give one months notice, under the terms of his contract of employment (page 2 of the bundle), but only gave one day. The respondents managed his absence during the notice period by other employees working overtime and managers working additional hours for which they received time off in new. The second respondent seeks by way of its employer's counterclaim to recover those costs from the claimant in these proceedings.

5. Those then, are the relevant facts as found. There was not a great deal of dispute on the facts, and much of the evidence was well documented. The respondents did seek to impugn the claimant's credibility by reference to an application that he made for a Visa to work in Australia in October 2015 when he in fact had no intention of doing so. The respondents attempted to argue that this demonstrated a willingness to deceive the Australian authorities, from which the tribunal should find that the claimant's evidence to the tribunal was unreliable. The tribunal does not make any such finding. The tribunal is unable to characterise the claimant's application made in the context of a personal relationship in which he made preparations to live and work in Australia which ultimately he did not wish to pursue as being any form of deception of the nature that the respondents suggest. Further, in any event, the context in which the claimant did so is very different from the context in which the tribunal was considering his evidence in these claims. The tribunal does not therefore accept that this evidence significantly undermines the claimant's credibility in these proceedings, and, by and large, the tribunal has accepted the claimant's evidence as being firstly truthful, and secondly, reliable.

The Submissions.

6. The parties made submissions. For the claimant Miss Foster had prepared a Note for use in the resumed hearing also contained submissions to which she spoke in conclusion. For the respondent Mr Bealey had similarly prepared written submissions, to which he spoke. It is not therefore proposed to rehearse the parties' submissions again in this judgement, as they are on the tribunal file. In any event the parties' submissions will be apparent when the issues are discussed by the tribunal in its findings set out below.

The Law.

(i)Constructive Dismissal.

7 The relevant statutory provisions are not in issue, as the respondent has not argued in the alternative that, if there was a constructive dismissal, it was for a potentially fair reason. Hence the only legal issues that arise are confined to whether the claimant was constructively dismissed, the burden of proving which rests on his.

8. The caselaw on constructive dismissal is well established. It has its origins in the classic statement of Lord Denning in the case of ***Western Excavating (ECC) Limited v Sharp 1978 ICR 221*** in which he held that in order for an employer's conduct to give rise to a claim of constructive dismissal it must involve a repudiatory breach of contract. As Lord Denning MR said "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employers conduct. He is constructively dismissed". Thus in order to succeed the claimant must establish that there was a fundamental breach of contract on the part of the employer, that that breach caused him to resign, and that he did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

9. It is clear that in order to establish that there has been a fundamental breach of contract it is not necessary to show one fundamental act or omission. There does not need to be one event, there can be a series of events which cumulatively amount to a breach of an implied term. In such circumstances, where there is not one individual act or omission relied upon, but a series of actions that are alleged to amount to that breach, where they culminate in one particular act that is known as the "last straw", and in order to establish that a claimant has been constructively dismissed there has to be a last straw. Indeed in the leading case which the Tribunal has considered on this issue, ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35,*** a decision of the Court of Appeal and the judgment of Lord Justice Dyson, it is clear from the discussion in that case of the nature of constructive dismissal, that in order for there to be a constructive dismissal where there is a series of acts, the final straw must be there, and although the final straw may be relatively insignificant, it must not be utterly trivial. There must be a final straw, otherwise there can be no constructive dismissal. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and

confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. The judgment goes on to say:

"A claimant cannot subsequently rely on those acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

Moreover, and this is an important part of the judgment:

"An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whethis the employee's trust and confidence have been undermined is objective."

10. So to the extent that the claimant might have perceived that as being the case, the Tribunal cannot rely solely on that, it must look objectively on the act complained of.

11. This doctrine is well established. One important element of it is that, while that which is alleged to be the last straw must be related to the preceding course of conduct, it need not in itself be fundamental enough to be repudiatory. However, the case of ***Vairea v Reed Business Information UK Ltd UKEAT/0177/15*** (3 June 2016, unreported) adds an important gloss to that basic rule, where it abuts on to the equally well-established rules on affirmation by the employee. The facts of the case were complex, concerning allegations of international financial misconduct, but the important element was that the employee claimant appeared to have affirmed his contract (by staying on) in spite of what was later alleged to have been a series of detriments imposed on him in breach of the implied term of trust and respect. An issue arose as to whether a later (non-repudiatory) action by the employer could in effect 'revive' that earlier conduct and be the 'last straw' to it, permitting the employee to leave and claim constructive dismissal. Judge Hand points out that that the position that:

(1) a later non-repudiatory action (normally capable of being a last straw) does not revive previous misconduct that was subject to affirmation;

(2) there cannot be a series of last straws; and

(3) in these circumstances what the employee has to show is new (post-affirmation) repudiatory misconduct by the employer.

This is put very clearly in the following paragraphs of the judgment:

''83 I think when a contract has been affirmed a previous breach cannot be "revived". The appearance of a "revival" no doubt arises when the breach is anticipatory or can be regarded as "continuous" or where the factual matrix of the earlier breach is repeated after affirmation but then the real analysis is not one of "revival" but of a new breach entitling the innocent party to make a second election. The same holds good in the context of the implied term as to mutual trust and confidence. There the scale does not remain loaded and ready to be tipped by adding another "straw"; it has been emptied by the affirmation and the

new straw lands in an empty scale. In other words, there cannot be more than one "last straw". If a party affirms after the "last straw" then the breach as to mutual trust and confidence cannot be "revived" by a further "last straw".

84 In my view, this is not in any way unfair to an employee, who has elected to go on with the contract. On the contrary, that is the whole point of an affirmation. Affirming the contract obviously involves its continuance and that continuance is on the basis that the remedy for past breaches will be purely monetary. The result is that a further "entirely innocuous" action on the part of the employer cannot entitle the innocent party to revert to the pre-affirmation breach. That is just as much the position where the pre-existing breach comprised a "bundle of straws" amounting to a breach of the implied term as to mutual trust and confidence as it is with a "unitary" repudiatory breach."

12. In terms of the fundamental breach of contract alleged, the claimant does not rely upon any express term, he is relying upon the manner in which the respondents dealt with him, particularly between August and December 2015 , when they acted in a way which constituted a fundamental breach of what is known as the "implied term of trust and confidence". That term is one which is well-known to the Tribunals, and which is frequently relied upon by claimants in these circumstances. Properly understood the formulation of that term was best put in the judgment of Mr Justice Browne-Wilkinson in ***Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347*** which effectively is that "the employer will not, without reasonable and proper cause, conduct himself in a manner which is calculated or likely to seriously destroy or damage the relationship of trust and confidence between the parties". That is known as the implied term, in shorthand, of trust and confidence, but that is the full legal definition.

(ii)Protected Disclosure.

13. The law on protected disclosure is derived from statute, in this context from sections 43B and others of the Employment Rights Act 1996. The relevant statutory provisions are set out in the annex to this judgement. In addition to the statutory provisions, the tribunal has been referred to case law of what constitutes protected disclosure, and the tests of causation for both detriment and dismissal claims based upon it.

Discussion and Findings.

(i)The protected disclosure claims, other than dismissal.

14. The first issue is whether the claimant made any protected disclosures at all. He relies upon principally his email of 21 October 2015 to Kieran Fisher, and, to a lesser extent, what he said, in a similar vein, when they spoke on 28 October 2015.

15. The respondents (for these claims are against both of them) take a number of points. Firstly, whilst they accept the content of the disclosures would be capable of being qualifying disclosures within the meaning of section 43B of the Employment Rights Act 1996, and that the disclosures were made to the category of persons contemplated by the Act, they challenge that the claimant can satisfy the test of whether he reasonably believed that to make the

disclosures was in the public interest , a requirement introduced into the legislation by the amendments of 2013.

16. In support of this contention that the claimant lacked the requisite reasonable belief, the respondents point to the research that the claimant carried out on the Internet, and set this against the expert knowledge of Kieran Fisher, which they say the claimant ignored. “Best before” dates are simply that, they are not “use by” dates, and there was no actual risk to public health of fish oil capsules which were past their “best before” dates being consumed by the public. The claimant could not therefore reasonably (this has to be viewed objectively) have believed that this was the case. The respondents invite the tribunal to prefer the evidence of Kieran Fisher that the capsules when he smelt them did not have a fishy smell, to that of the claimant that they did.

17. The tribunal accepts that both the claimant and Kieran Fisher may be right on this point, in that people’s senses of smell vary considerably, and much would depend upon the condition and storage circumstances of the particular capsules that were smelt by the claimant, Kieran Fisher, or anybody else. This was not a scientific exercise, and it is quite possible, the tribunal considers, that some capsules smelt by the claimant had in his perception a fishy smell, but others smelt my Kieran Fisher or other persons did not. That does not lead the tribunal to conclude that the claimant’s evidence on this point is not honest or correct.

18. Quite apart from whether there was a risk to public health, the claimant also believed that in relabelling the tubs in this manner and then offering them for sale the public were being deceived. The range of subject matter for potential protected disclosures is quite wide, and the various specific categories set out in section 43B may often overlap. The claimant believed the tribunal finds that there was a risk to public health, and further that in relabelling the product in this way the public were at risk of being deceived, and consequently that the respondent would be in breach of a legal obligation. That may not be the same as committing a crime, but in the tribunal’s view a belief that a retailer had a legal obligation not to mislead the public would potentially be a reasonable one. At the very least changing “best before” dates could reasonable be regarded as a potentially actionable misrepresentation.

19. The tribunal’s conclusion is that the claimant’s belief, which it is perfectly satisfied he honestly held, that to offer such products for sale would be likely to endanger the health or safety of any individual, and/or that in doing so the respondent was failing or was likely to fail to comply with any legal obligation was a reasonable one. In relation to the former the claimant had carried out some research some of which, but not all of which, led him, as it would the unqualified observer, to believe that fish oil potentially “goes off” after its “best before” dates. That he had smelt some products and noticed a rancid smell, the tribunal accepts, would further support the reasonableness of that belief. Further, in relation to misleading of the public tribunal would also find that the claimant’s belief that this would be breach of a legal obligation would be a reasonable one.

20. The tribunal accordingly finds that the claimant’s disclosures, which are admitted, do satisfy the test under section 43B of the Employment Rights Act 1996, and that he reasonably believed that to make them was in the public interest.

The detriment claims.

21. The claimant makes two types of claim in connection with his protected disclosures. One is of dismissal, such a dismissal being an automatically unfair dismissal, and the second is of detriments to which he was subjected (other than dismissal) by reason of having made such disclosures. The former claim will be discussed below, as there is an issue as to whether the claimant was dismissed at all. This discussion therefore relates solely to the detriment claims.

22. The respondents' secondary defence to these claims is one of limitation. In terms of the detriments relied upon in the claimant's List of Issues these are set out in seven bullet points, which may be summarised thus:

28 October 2015 - Kieran Fisher's loss of temper and tipping up of a table

29 October 2015 - Kieran Fisher's email about the state of the warehouse

29 October 2015 - Peter Fisher's email moving the claimant into the warehouse

9 November 2015 - Caroline George criticising the claimant's performance during the grievance

3 December 2015 - Caroline George criticising the claimant's performance during the grievance appeal

3 November 2015 to 15 December 2015 - the respondents' handling of the claimant's grievance and appeal

28 October 2015 to 15 December 2015 - the respondents' failure to discipline Kieran Fisher

23. The dates of these alleged detriments are important, as by the provisions of section 48 of the Employment Rights Act 1996 any complaint to tribunal of detriment for having made a protected disclosure must be presented within three months plus one day of the detriment complained of.

24. The claim form in this case was presented on 18 March 2016, and consequently the respondents submit that the cut-off date for any detriment claims would be 15 November 2016 (by the tribunal's calculations it would be 17 November 2015, but nothing turns on this).

25. Section 48(3)(b) of the Employment Rights Act 1996 provides that any such claims for detriment by reason of having made a protected disclosure are to presented within the relevant three month time limit or, where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within that time limit, within such further period as the tribunal considers reasonable.

26. The claimant has not really advanced any argument that it was not reasonably practicable for him to have presented the pre-15 November 2015 detriment claims within the relevant three month time limit. Indeed, it would be difficult for him to do so, given that in his grievance letter sent on 3 November 2015 (pages 85 to 87 the bundle), after he had taken legal advice, he says in

terms that he believes that he has made a qualifying disclosure, and that he had "been unlawfully and unreasonably victimised for making a protected disclosure". He has advanced no argument why, given that he had that knowledge, he did not present any claim of detriment within the relevant three month time limit.

27. Consequently the tribunal does indeed find that his protected disclosure detriment claims which predate 15 November 2015 (i.e. the first four in the claimant's list of issues set out above were presented out of time, and it was reasonably practicable to them to have been presented within time .The tribunal cannot therefore consider them.

28. Moving on to the remaining three detriments set out above, these are within time, at least in respect of part of the detriment which is said to arise in respect of the respondents' "overall handling" of the claimant's grievance which must cover the period from 3 November 2015 when it was first presented to 15th of December 2015 when it was determined finally on appeal.

29. In essence , these are really criticisms of Caroline George and her handling of the claimant's grievance. It was not, of course, to her the claimant made his protected disclosures, though she was clearly aware of them. In terms of causation, the test in relation to detriment claims is that the burden of proof, once a protected disclosure has been established, falls on the respondent to prove on the balance of probabilities that the treatment was in no sense whatsoever on the ground of the protected disclosure (see ***Fecitt v NHS Manchester [2012] IRLR 64***) .

30. In this case the tribunal accepts that the respondents have discharged that burden. The tribunal accepts the Caroline George's handling of the claimant's grievance was in no way influenced by the making of the protected disclosures, it was as a result of her genuine attempts to resolve the claimant's grievances and an appreciation by her of the points made by, in particular, Peter Fisher relating to the warehouse and other issues. The tribunal accepts that where Caroline George appeared to accept the rationale of the actions taken by Peter Fisher, and have agreed to some extent with management's proposals in relation to the conduct of stock control, warehouse efficiency and other matters going forward, she did so for the perfectly genuine and acceptable reasons that she believed that this was right, and was uninfluenced by the fact that the claimant had made any protected disclosures. Thus, whilst these claims are in time, the tribunal considers that the respondents have discharged the burden in respect of them and they must fail. In relation to the final detriment claim, that Kieran Fisher was not disciplined, the tribunal again accepts that there were perfectly good reasons for this and that they had nothing to do with the claimant having made a protected disclosure. The simple reason why he was not disciplined is that he was the managing director and major shareholder of the second respondent. There was no one to discipline him, that situation had nothing whatsoever to do with the fact that the claimant had made any protected disclosure. That would have been the position whatever the claimant had said or done, and the tribunal is again accordingly satisfied that the respondents have discharged the burden of proof upon them, and this claim too must fail. Finally, that none of the claims that are in time succeed also precludes any argument that any of the earlier , out of time claims, can be saved by the application of the "act extending over a period of time" provisions in s.48(4), even if the facts would potentially have warranted such a finding.

The constructive dismissal claim.

31. The starting point has to be the issue of what acts or omissions of the respondent the claimant relies upon to establish his complaint of constructive dismissal. During the relevant period, on the claimant's case he:

a) Was subjected to an unreasonable request to change the "best before" dates on fish oil products ;

b) Was subjected to an angry and potentially violent outburst by Kieran Fisher in reaction to his refusal to carry out this instruction;

c) Was , without consultation, moved from his office upstairs back onto the warehouse floor;

d) Was heavily and rudely criticised for the state of the warehouse;

e) Was questioned as to his performance.

32. The question for the tribunal is whether by this course of conduct the respondent (that is the second respondent, as the employer company) behaved in a manner that constituted a fundamental breach of the implied term of trust and confidence as explained above. It will be noted that the requirement of the implied term is that the employer will not conduct itself in an unacceptable manner "without reasonable and proper cause". The respondents have sought to argue that although Kieran Fisher's behaviour on 28 October 2015 was inappropriate, and he has apologised for it, that in itself, or indeed when coupled with the other matters complained of does not satisfy the test of fundamental breach. Tribunal cannot agree. The tribunal's view is that the course of conduct that began with the (admittedly) unreasonable instruction to alter the "best before" dates on fish oil products and led to the claimant being heavily, and intemperately, with bad language, criticised for the state of the warehouse, and without consultation being removed from the office that he had previously occupied as warehouse and production manager back onto the warehouse floor did indeed constitute conduct which, if not intended, was certainly likely to destroy or seriously damage the relationship of trust and confidence between the claimant and his employer.

34. Whilst appreciating Peter Fisher's understandable desire to assist his son in the business in which he himself had made some investment, and his equally understandable concerns about the effects of the pressures in the business upon his son's mental health, it is difficult to avoid the conclusion that his intervention in the business at the end of October 2015 (which, as it was condoned and permitted by Kieran Fisher, must be regarded as the act of the second respondent, notwithstanding Peter Fisher's lack of formal position in the company) was high-handed and inappropriate.

35. The tribunal appreciates that in certain circumstances, and carried out in an appropriate manner, it may well have been perfectly legitimate for the second respondent to raise issues with the claimant about the condition of the warehouse, and even, after due consultation, to alter the location within the business from which the claimant was to be required to carry out his duties. It is

not, therefore, so much the decisions that the second respondent sought to implement that have contributed to the breach of trust and confidence, but more rather the manner in which they have been carried out. When, further, this followed upon the giving of an unreasonable instruction to the claimant, which when met with resistance, then led to an angry, and potentially violent, altercation in the workplace, the trust and confidence between the parties at that stage was already somewhat fragile. Peter Fisher's interventions thereafter only served to increase the pressure upon that fragile edifice beyond breaking point.

36. The tribunal, however, does not consider that the breach ceased at the point in early November 2015 when the claimant was moved back onto the warehouse floor, but was rather than further compounded by the manner in which the second respondent dealt with, or rather failed to deal with, the claimant's grievance. Tribunal has some considerable sympathy with the position of Caroline George, who was clearly somewhat caught in the middle of these events, and was doing her level best to obtain some form of amicable resolution. To that extent the tribunal considers that she approached her role more like that of a mediator than of someone charged with determining a grievance.

37. In that role she was somewhat handicapped, firstly, by the fact that the grievance was about the managing director, and did his father, who was not even an employee of the company, and secondly by a lack of appreciation of the difference between seeking to mediate between the parties and making determinations of the claimant's complaints. Further, and this is not to criticise her , for the tribunal suspects that this is not a role for which she has received any or much training, as is apparent from the way in which she conducted both the original grievance and the subsequent appeal, she did not merely carry out an investigation and neutral interview with the claimant, but rather "descended into the arena" in that at several points she can be seen to be putting the management case and to be questioning the claimant's grievances from the point of view which appeared to support the action taken against him of which he was complaining.

38. Thus, whilst accepting that her efforts were entirely genuine, the manner in which she set about this task did nothing to remedy the breach of trust and confidence that had by then occurred, and added to it.

39. Of further and indeed potentially greater significance is the, frankly, inexplicable intervention again of Peter Fisher in the grievance process. Given what the claimant had said in his grievance, and the absence of any formal role or authority on the part of Peter Fisher to be involved in it at all, other than, perhaps, as an witness to be interviewed by Caroline George, the meeting he held with the claimant on 10 November 2015, following on from Caroline George's grievance meeting with him the previous day, was wholly unwarranted,and again can only have contributed yet more to the breach of the implied term of trust and confidence for which Peter Fisher had himself already been largely responsible. Whilst Caroline George tried to reassure the claimant that is capabilities were not being questioned, Peter Fisher's view was , as was repeated before the tribunal, very much that they were.

40. Thus the tribunal was quite satisfied that there was, on the part of the second respondent in its actions and omissions between 21 October 2015 and 10 November 2015, a fundamental breach of the implied term of trust and

confidence which entitled the claimant to resign and claim constructive dismissal.

41. In terms of any conduct thereafter, whilst the fact that Caroline George heard an appeal against her own decision is regrettable, and she again in that appeal appeared to be seeking to justify the management position, this probably does not add very much to the substantial breach which had by then already occurred. At the very least, however, it did nothing to rectify that breach.

Affirmation.

42. Given that the claimant resigned in response to that breach, as to which no real argument to the country has been advanced (at least in this hearing, it had been pleaded that he resigned because he intended to change job and location, but that has not been pursued by the respondents), the only remaining issue is the alternative argument that the claimant lost the right to complain of constructive dismissal by reason of delay on his part in resigning. The respondent's argument is that by waiting until 15 December 2015 the claimant delayed too long and should therefore be held to have affirmed the contract.

43. The law of constructive dismissal is based on contractual principles. As the authorities , particularly ***Vairea*** most recently, are clear, if an employee who has grounds to resign and complain of constructive dismissal delays, and does not do so with sufficient expedition, he or she risks being held to have affirmed the construct and thereby waives the breach. Affirmation is a question of fact, and all the circumstances are relevant. Delay is not in itself fatal, it depends upon the circumstances. What the tribunal must look at is not only the period of the delay, the reasons for it, and what the claimant was doing during that period (see ***Chindove v William Morrison Supermarkets plc UKEAT 0201/13*** .)

44. The claimant first raised the grievance in response to the events of 30 October , and what had preceded them, on 3 November 2015. That grievance showed that he was not accepting the changes that the respondents were seeking to impose upon him, and was clearly complaining about his treatment. Continuing to work in those circumstances cannot amount to affirmation, as the claimant was clearly working under protest. His grievance was determined by letter from Caroline George on 13 November 2015 . He was advised of his right to appeal, and there ensued some discussion as to how and by whom his appeal should be heard. That took up until late November, and Caroline George it was who eventually heard the appeal on 3 December 2015. Her outcome letter is dated 15 December 2015, and this is the day upon which the claimant resigned, giving one days notice.

45. In these circumstances the tribunal does not find that the claimant affirmed the contract so as to lose the right to complain of constructive dismissal. He clearly was working under protest, and was exhausting the second respondent's grievance process. The totality of the period from what could be regarded as the last of the particularly significant events giving rise to the breach, the claimant's removal from his office upstairs back into the warehouse took effect from 3 November 2015. From that date to the date of his resignation is only some six weeks, and when one adds to that the respondents' further additions to the breach of the implied term that arose during the course of the grievance process itself, the delay point becomes even weaker.

46. In the circumstances the claimant was, the tribunal is perfectly satisfied, constructively dismissed. No alternative plea is pursued (thought it had been pleaded) by the respondents that, if the claimant was constructively dismissed, his dismissal was nonetheless fair, so it must follow that his dismissal was also unfair, and he succeeds in this claim.

47. The second respondent, however, does argue in the alternative for reduction from any compensatory award on the basis of contributory fault. It is presumed (for this is not expressly stated in the respondents written submission) that this reduction is sought in the compensatory award, pursuant to section 123 of the Employment Rights Act 1996. The basis for such reduction is that the claimant allowed stock to linger in the warehouse and let it to get into the state it was in when it was photographed on the might of 29 October 2015. The tribunal cannot agree there should be any such reduction. In a complaint of constructive dismissal, in order to succeed in establishing contribution, the respondent would have to show that the claimant's conduct contributed to the breach of contract on the part of the respondents which resulted in the constructive dismissal. In other words his conduct must have caused their breach. It is difficult, if not impossible, to envisage situations where that might have some application, the tribunal certainly can see no such application on the facts of this case. Taken at its highest, it could be the case that if the claimant was responsible for either excessively high levels of stock, or indeed an untidy warehouse, that may have given rise to the respondents taking some action to remedy those situations. That did not, however, cause them to act in the inappropriate way that they did, firstly in relation to the now admittedly unreasonable instruction to relabel the out of date fish oil products, the angry outburst from Kieran Fisher, and in relation to the inappropriate and intemperate email criticisms, and subsequent demotion of the claimant at the end of October 2015. Even if such matters on the part of the claimant were capable of amounting to conduct of such a nature as to entitle the tribunal to consider making such a reduction, the tribunal would not consider it just to do so. The tribunal makes no reduction for contributory fault.

48. On page 12 of Mr Bealey's submissions there is a contention that as the claimant had made so many errors, which he refused to acknowledge, formal steps would have been taken to remove him over the next two or three months. This appears to be a plea for a reduction pursuant to ***Polkey***. It had not previously been pleaded, or identified as an issue in the preliminary hearing held on 9 May 2016. Mr Bealey accepted this was so. Whilst, strictly speaking , the tribunal could refuse to consider it, tribunal will do so. It is a point with no real merit. When no formal procedure has been followed at all, and the various criticisms and issues raised with the claimant about his performance have not been considered in the context of a formal capability or disciplinary procedure, it lies ill in the mouth of the second respondent to argue the claimant would have been fairly dismissed in any event at some point in the future. The respondents have tried to suggest (and indeed called evidence) that since the claimant's departure there has been an improvement in the warehouse, and how orders and stock are dealt with. That may well be so, and there may well have been legitimate performance issues which the claimant could have been required to address. That, however, would have taken some time, and may not have resulted in his dismissal. Many factors may have be relevant, not least the combination of the two roles that the claimant had as both warehouse manager , and production manager. All this is pure speculation, given that up until October 2015 when he legitimately objected to carrying out an unlawful instruction he had no prior

disciplinary or capability record. Further, in any event, the claimant, having obtained better paid employment on 7 March 2016, is only seeking his losses up to that date. Give that is only 12 weeks from the date of his resignation, even if the respondents are right, any reduction in compensation on this basis is unlikely to be relevant until the expiration of a reasonable time for completion of a fair capability process. The respondents are therefore a long way from being able to establish, the burden being upon them to do so, that the claimant's employment would have ended in any event at some point in the not too distant future, and in any event before 7 March 2016. The tribunal accordingly makes no ***Polkey*** reduction.

Was the dismissal automatically unfair as the reason for it was that the claimant had made a protected disclosure?

49. When the claimant has, as here ,qualifying service the burden of proof that the dismissal was not by reason of his having made a protected disclosure, once that is established, rests with the respondent (see ***Kuzel v Roche Products [2008] IRLR 530)***. The tribunal has, in relation to those detriment claims which were found to be in time, found that the respondent discharged the burden upon it in those circumstances. The position in relation to the constructive dismissal, however, may be different. Where there is a constructive dismissal, the reason for the dismissal is of course the breach on the part of the respondent, and so the tribunal has to look for the reasons for the relevant breach.

50. Whilst the matters in respect of which the claimant made the detriment claims which the tribunal would consider were largely in the hands of Caroline George, by far the most significant aspects of the breach of the implied term of trust and confidence were perpetrated by Kieran Fisher and Peter Fisher. The tribunal therefore must look at their actions which constituted the breach of the implied term, and consider whether it can be said they were influenced by the making of the protected disclosures by the claimant. The wording of ERA 1996 s 103A adopts the usual unfair dismissal formula that the whistleblowing must have been the reason or principal reason for the dismissal. It is important to note that, although this *looks* like ERA 1996 s 47B on detriment for whistleblowing, they pose two *different* tests and it was held in ***Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] IRLR 64*** that, being contained in different parts of the 1996 Act, this is deliberate. In a detriment case the test is whether the detriment was 'on the ground that the worker has made a protected disclosure', which has been interpreted as meaning that the disclosure must have been 'a material factor'. In a dismissal case, however, the test is more stringent, namely whether the whistleblowing was '*the* reason (or, if more than one, the *principal* reason) for the dismissal' (emphasis added). Thus, in ***Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT***, where a tribunal had found automatically unfair dismissal under s 103A because it was satisfied that the whistleblowing had been 'on the Respondent's mind' when dismissing, the EAT held that it had applied the wrong test (ie the s 47B test) and allowed the employer's appeal.

51. The tribunal has considered carefully this issue. It is satisfied that the claimant's protected disclosures were not the reason, or the principal reason, for his constructive dismissal. In other words the tribunal is satisfied that the respondents did not treat him in the manner that they did, in breach of the implied term of trust and confidence in his contract of employment, because he had made protected disclosures. Whilst he had undoubtedly done so, the

overwhelming impression from the evidence that the tribunal gained was that the reason that the respondents treated him this way is that they considered (and in this both Kieran and Peter Fisher played a role) that he had indeed been responsible for this stock going out of date, thus presenting this problem to respondents, and, from the point of view of Kieran Fisher, was then compounding the problem by refusing to participate in remedying it by changing the "best before" dates on the packaging. That obviously caused Kieran Fisher considerable frustration and anger, and he behaved in an entirely inappropriate manner, as indeed did his father thereafter. That, the tribunal is quite satisfied, however, had nothing to do with the protected disclosure the claimant made. The disclosure, as such was not important. Of far greater influence was their belief in his responsibility for the situation arising and their irritation at his, as they saw it unreasonable, refusal to rectify it. As observed, the test of causation in dismissal is rather stricter than that for detriment claims, and on this rather strict application of the standard of proof, the tribunal is satisfied that the respondents have discharged that burden as well. It follows therefore that the claimant's constructive dismissal, whilst unfair, was not automatically unfair. That may, in any event, be of only minor significance, given that he has qualifying service, is seeking compensation well within the statutory cap, and cannot recover injury to feelings for protected disclosure dismissal.

The breach of contract claims, and employer's contract claim.

52. It follows that, as the claimant was constructively dismissed, he was entitled to resign without giving contractual notice, and his claim for notice pay (recognised as being included in the claims in the preliminary hearing) must succeed. It must also follow therefore the second respondent cannot succeed in its claim for damages for breach of contract on his part. The second respondent's employer's counterclaim is accordingly dismissed.

Remedy.

53. There is a Schedule of Loss from the claimant before the tribunal, not in the bundle, but filed with the tribunal on 23 May 2016. Whilst no real submissions were made in relation to remedy, save for the reduction points discussed above, the tribunal, in accordance with para. 10 of the Orders made at the preliminary hearing on 9 May 2016, proposes to deal with remedy . The claimant, having succeeded in his breach of contract claim is entitled to 4 weeks notice, which would, of course, extinguish the first four weeks of any award for loss of earnings made under the compensatory award for unfair dismissal. (For some reason the claimant's schedule suggests that he can only claim this if he does not receive a basic award, which cannot be right) The award for breach of contract will therefore potentially be:

4 x £364.62 **£1458.48**

As this is based on the claimant's net loss, the respondent is responsible for accounting for any tax and national insurance payable upon it.

54. Turning to the unfair dismissal claim, the claimant is entitled to a basic award, and the tribunal notes from his claim form that he found alternative, better paid, employment by 7 March 2016. On the basis that there has been no issue taken with the figures provided by the claimant (the ET3 at para. 5.2 confirming

that the earnings details given in the ET1 by the claimant are correct) , the tribunal will deal with remedy on the basis of that Schedule. In relation to the unfair dismissal claim, the claimant is entitled to a basic award in respect of 4 years' service, all between the ages of 22 and 41. His gross weekly wage was £480.77, and applying the statutory cap on a wage's pay then in force of £475 produces a calculation of:

4 x £475 **£1900.00**

55. In terms of the compensatory award the claimant seeks loss of earnings from the date of his resignation to 7 March 2016 when he found alternative employment which totally mitigated his loss. That is a period of 12 weeks. His net weekly earnings were £364.62, his loss is therefore :

12 x £364.62 £4725.44

Of this period, however, the first 4 weeks are covered by his notice pay, so the compensatory award for loss of earnings will accordingly be:

8 x £364.62 £2916.96

The claimant additionally seeks an award for loss of statutory rights, in the sum of £350. No issue has been taken with that, and the tribunal considers it reasonable, and will award it

Loss of Statutory rights £ 350.00

Total compensatory award: **£3266.96**

56. The claimant's List of Issues does refer to the ACAS code of practice, and an uplift is sought. Given, however deficient in some respects it was, that the respondent went through a form of grievance procedure , albeit one where there was really no effective avenue of appeal open to it, this may be somewhat academic issue which would be unlikely to warrant any significant percentage uplift. Had Kieran Fisher conducted either the grievance or the appeal, this would have been objectionable as well, so it is hard to see what more, absent a suitable external grievance officer (which the ACAS Code does not require) could have been done. In all the circumstances, the tribunal's view is that no uplift pursuant to s.207A of the 1992 Act should be awarded.

57. The position as to benefits is unclear. If relevant benefits were received after the claimant resigned during the period of his notice, they would be deductable from the award of damages for breach of contract, as sums in mitigation. If thereafter, the claimant received such benefits during the rest of the period for which the tribunal proposes to award compensation for loss of earnings, the Recoupment Regulations would apply. The tribunal has not, however, been provided with that information , so cannot make any final determination on the issue.

58. The tribunal therefore makes no formal awards at this stage. The parties are invited to consider the judgment and the provisional assessment of remedy set out above, and to seek to agree remedy without any further judgment. The claimant would also, of course, be entitled to recover the tribunal fees that he has

paid. If a formal award is sought, the tribunal will need to be provided with details of the claimant's position on benefits, and to consider the effect of recoupment or mitigation on the award for breach of contract and compensatory award. If necessary a further hearing can be convened, or the matter dealt with on paper, without a hearing. The parties are to notify the tribunal by the date set out in the judgment above of the position. If nothing further is heard by that date, the tribunal will close its file.

Employment Judge Holmes

Dated: 12 June 2017

RESERVED JUDGMENT SENT TO THE PARTIES ON

20 June 2017

FOR THE TRIBUNAL OFFICE

ANNEX
THE RELEVANT STATUTORY PROVISIONS

43B Disclosures qualifying for protection

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

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

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

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

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

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

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

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

47B Protected disclosures

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

48 Complaints to employment tribunals

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

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

(3) An [employment tribunal] shall not consider a complaint under this section unless it is presented—

> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
>
> *(b) 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 to be presented before the end of that period of three months.*

(4) For the purposes of subsection (3)—

> *(a) where an act extends over a period, the "date of the act" means the last day of that period, and*
>
> *(b) a deliberate failure to act shall be treated as done when it was decided on;*

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if)—

> *(a) (n/a)*
>
> *(b) (n/a)*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

123 Compensatory award

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

> *(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and*
>
> *(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.*

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

> *(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or*
>
> *(b) any expectation of such a payment,*

only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(5) (n/a)

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.[(6A) Where—

> *(a) the reason (or principal reason) for the dismissal is that the complainant made a protected disclosure, and*
>
> *(b) it appears to the tribunal that the disclosure was not made in good faith,*

the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the complainant by no more than 25%.

(7) (n/a)
