EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102822/2016

Held in Glasgow on 13, 16, 17, 18, 19, 20, 24, 25, 26, 27, January 22 February and 4 April 2017

Employment Judge: **Ms L Doherty**
Members: **Mrs P McColl**
Ms M McAllister

Mr S Pearson — **Claimant**
Represented by:
Mr Hardman - Advocate

LTM Group Ltd — **Respondent**
Represented by:
Mr Bealey – Consultant

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that;

(1) the Tribunal does not have jurisdiction to consider the claim of unfair dismissal under Section **94(c)** of the Employment Rights Act 1996 (the ERA) on the grounds that the claimant does not have the requisite qualifying length of service;

(2) the claim under Section **47B** of the ERA is dismissed;

(3) the claim under Section **103A** of the ERA is dismissed'

(4) the claim under Section **23** of the ERA is dismissed as withdrawn;

(5) the claim under Section **38** of the Employment Act 2002 succeeds; the parties should indicate within **14 days** of the date of this judgment whether they consider a remedy hearing is necessary, to enable the Tribunal to consider further procedure.

REASONS

1. The claimant presents complaints of unfair dismissal under Section **94** of the Employment Rights Act 1996 (ERA); automatically unfair dismissal under Section **103A** of the ERA; that he suffered a detriment under Section **47B** of the ERA; failure to pay holiday pay, and/or breach of contract; and failure to provide a written statement of terms and conditions of employment. All of the claims are resisted.

2. In determining the claim before it, the Tribunal will have to consider a number of issues.

3. **Section 47B claims.** The Tribunal will firstly have to consider if the claimant made any disclosures which can be relied upon for the purposes of a Section **47B** claim. The disclosure relied upon by the claimant for the purposes of the Section **47B** claim are as follows:-

(1) On 5 September 2015 the claimant raised what he considered was an unsafe working practice on the part of a sub contractor, Murphy Brothers Ltd in pouring a cement foundation without steel mesh strengthening and then "*chucking in the steel mesh while concrete was being poured".* This issue was said to be raised by the claimant on 7 September 2015 with Mr Steven Laing, the respondent's Director.

(2) The second disclosure relied upon is said to have taken place on 24 September 2015, when it is said that the claimant was concerned

about unsafe working practices of the employer's sub contractor Enviroscaff, who were working at height without safety harnesses, and he reported these concerns to Mr Laing by telephone. It is said by the claimant that he repeated these disclosures on 30 September, 13 October and 14 October 2015.

(3) The next disclosure relied upon by the claimant is said to have taken place on 7 November 2015 when he brought concerns about the muddy and slippy state of the site which he considered was dangerous to those working there. This is said to have been brought to the attention of Mr Laing on 7 November and also on 12 November via a Mr Derek Prain, and on 18 November 2015.

(4) The claimant is said to have made a protected disclosure on 15 December 2015, in that it is said that the claimant raised with Mr Laing the fact that he was required, without machinery, to move stone into place for building purposes. He is said to have advised Mr Laing that to move the stone without the appropriate machinery constituted an unsafe working practice. The claimant was said to have raised the issues with Mr Laing in January/February 2016 and his concerns were ignored.

4. The disclosures are all said by the claimant to be qualifying disclosures in terms of Section **43B(d)** "*that the health and safety of any individual has been, is being or is likely to be endangered".*

5. There is a factual issue as to whether the disclosures alleged by the claimant were made. It is the respondents' position that no such disclosures were made by the claimant. The respondent's position is that in the event the disclosures were made, it was not in the reasonable belief of the claimant that they were being made in the public interest.

6. The detriment which the claimant is said to have been put to as a result of having made those disclosures, is that he was upset by the incidents, and

he felt demeaned and bullied and he considered his role had been undermined. The claimant sets outs Paragraph 3, 4, 5, 6, 7 and 8 of his further particulars what is said to be unacceptable conduct, which made him feel demeaned and bullied and his role undermined.

7. The respondents deny the claimant was demeaned or bullied as alleged.

8. The issues for the Tribunal will therefore be whether or not on a factual and legal basis there were relevant disclosures, and whether or not the claimant was subjected to a detriment on the grounds of having made the disclosures.

Section 103A Claim

9. The claimant is said to have been dismissed in terms of Section **95(1)(c)** of the **ERA**

10. The protected disclosure which the claimant relies upon in connection with the Section **103A** claim, is said to have occurred on 4 February 2016, when he reported to Mr Laing that there were no qualified Scaffolders on the site and he was concerned that works were becoming unsafe; he was instructed by Mr Laing to employ bricklayers on site to move the scaffolding. It is said the claimant did so, but having examined the scaffolding he considered this was an unsafe work practice, and on 22 and 23 February 2016 the claimant completed a scaffold inspection check and brought these matters to the attention of Mr Laing. These reports confirmed the claimant's reasonable concern that the scaffolding on the site remained unsafe. Mr Laing held a meeting on 29 February 2016 where the claimant specifically raised the issue, but Mr Laing refused to address the claimant's concerns. It is said that the claimant reported his concerns again to Mr Laing on 4th March 2016 but received no acceptable response, and he therefore decided to resign, and intimated his resignation on 8 March 2016.

11. The reason why the claimant is said to have resigned is because the respondent gave no indication that it would address his concerns about

health and safety of the scaffolding on site, and their refusal to address his concerns are said to be a material breach of the implied term of mutual trust and confidence in the claimant's contract of employment, which entitled him to resign.

12. The respondents deny there was any such disclosure, and therefore there is a factual and legal issue as to whether or not there was a disclosure.

13. The respondent's position is that there was no material breach of the claimant's contract of employment, and that the reason for his dismissal was that he intended to set up business on his own account.

14. the issue for the Tribunal in considering a Section **95(c)** dismissal claim under Section **103A** is whether the protected disclosure was the reason or principal reason that the employer committed the fundamental breach of contract which perpetrated the claimant's resignation.

15. The issues in this case will therefore be whether or not there was a protected disclosure; whether or not that disclosure perpetrated a fundamental breach of the claimant's contract of employment; and if so, whether or not the claimant resigned in response to that breach.

Constructive Unfair Dismissal

16. In addition to bringing a complaint under Section **103A,** the claimant also brings a complaint under Section **94** of the ERA. There is a preliminary issue in relation to the claimant's length of service, and whether he has the requisite qualifying service to present this claim. There is a factual dispute in relation to this, the claimant's position being that he was employed continuously from 2012, and the respondent's position being that the claimant was employed for less than 2 years.

17. In the event the Tribunal is satisfied that the claimant has the requisite qualifying service to present a complaint under Section **94,** then the issue is

whether or not there was a fundamental breach of the claimant's contract of employment by the respondents, and whether he resigned in response to that breach.

18. The term of the contract which is said to have been breached is the implied term of mutual trust and confidence, and it is said that this was breached by a series of events, culminating in a "*last straw*". The series of events, relied upon, is the bullying and intimidating behaviour which is said to have amounted to a detriment, culminating in a "*last straw*", which is Mr Laing's response to the issues raised by the claimant in relation to scaffolding on site.

19. There are factual issues, identified above, in relation to these matters, and a legal issue as to whether or not these matters constituted a fundamental breach of contract, and whether the claimant resigned in response to that breach.

Holiday Pay Claim

20. The claimant has a complaint of failure to pay holiday pay, for a three week period at the end of March 2015. This claim is pled as one of failure to pay wages in breach of Section **23** of the ERA, and in the alternative, a complaint of breach of contract. Mr Hardman accepted that in the event the claimant did not have continuity of employment for the period between 6 and 27 April 2015, then the holiday pay claim would fall away.

Breach of Contract Claim

21. The claimant presented a claim of breach of contract in respect of alleged failure to pay a bonus payment of £5,000. This was said by the claimant to have been agreed at some point at September 2012 or thereafter, but this is in dispute and the issue for the Tribunal will be whether or not there was a term in the claimant's contract of employment entitling him to receive

payment of a bonus of £5,000, which has been breached by the respondent. This claim was withdrawn at the point of submissions.

Claim under Section 38 of the ERA

22. The issue is whether the claimant was issued with terms and conditions of employment as required by Section 1 of the ERA.

The Hearing

23. After discussion, it was agreed in this case that remedy and merits should be separated. The Tribunal will therefore deal with the merits of each of the claims, but will not deal with any issue of remedy.

24. The claimant gave evidence on his own behalf, and evidence was given on his behalf by Robert Pearson, a stonemason and the claimants brother; Ross Oaks and Gary Clifford both stonemasons working with Robert Pearson; Graham Ross, Architect, and Mr Alf Gordon, owner and occupant of Aiket Castle, and partner in Unity Partnership LLP, which company entered into a contract with the respondents for the performance of building works at Aiket Castle.

25. For the respondents evidence was given by Mr Steven Laing, the Managing and Sole Director of the respondent company; Gordon Gibb who provided a report on issues arising from the building contract on the instructions of the respondents (his evidence in his witness statement was not challenged subject to certain agreed deletions); and Derek Prain, Quantity Surveyor with the respondents.

26. A joint bundle of documents was produced.

Findings in Fact

27. From the information before the Tribunal it made the following findings in fact.

28. The respondents are a construction company providing multi-trade contractor services. Mr Steven Laing is the Managing Director and the sole Director of the company. The respondents have around 80 employees, and carry out work for a range of clients across a number of sites in Scotland.

29. The claimant, whose date of birth is 4/01/1969, is a Stonemason to trade. He was first employed by the respondents approximately 12 years ago, when he worked as a Stonemason. The claimant left the respondents employment but was subsequently re employed by them, commencing in July 2012, in the position of Site manager. On the commencement of his employment in July 2012 the claimant was issued with a Contract of Employment, and an Employee Handbook (Documents 3 to 27).

30. The claimant's salary details were incorrectly recorded in his contract in that it states he would be paid an annual salary of £26, 888, when he in fact he was hourly paid. The contract was said to be for a period of one year.

31. Under the Heading *Position* the claimant's contract stated:-

> *"You are employed as a site Manager for the Stirling Region for a 6 month Contract with opportunity to extend. This job title is not definitive and you may be required to carry out any other duties which are necessary to meet the needs of the business and are within your capabilities*

32. The offer letter accompanying the contact (page 7) stated that the offer was for the position of Stonemason

33. At some point in 2013 the claimant intimated his resignation from the company, but retracted it.

34. On 15 March 2015 the claimant intimated his resignation by way of an e-mail timed at 1.09pm to Mr Laing (page 38).

35. Mr Laing responded to that e-mail at 9.30pm on the same date, sending an e-mail to the claimant at his LTM e-mail address, stating:-

> "*Regrettably I will accept your resignation however I do thank you for all your efforts over the last few years. You need a minimum of 2 weeks' notice, however I see no point in you continuing employment past Kilbirnie so if you are happy to leave after the completion of Kilbirnie that would mean you could leave earlier if desired.*
>
> *Let's discuss this tomorrow so we can agree on an amicable departure that suits both parties.*
> *Kind regards."*

36. On 17th March, Mr Bennie, a manager with the respondents, e-mailed the claimant, copying this into Mr Laing (page 39) stating *inter alia*: -

> "*I have been passed a copy of your e-mail dated 15 March 2015 to Steven Laing being your lodging of notice to terminate your employment with LTM Group Ltd. As discussed and agreed with you the effective Notice period we would view as being 2 calendar weeks based on circa 2 years employment however confirm having mutually agreed with you and reached an agreement with you your effective date of termination will be Friday 27 March 2015."*

37. The respondents issued the claimant with a P45 (Page 42). His last day at work was 2 or 3 April.

38. The claimant was re-employed by the respondents commencing on 27 April 2015. The claimant approached Mr Laing and told him that he had gone to work for his brother, but had made a mistake and wished to return to the

respondent's employment. Mr Laing agreed to this. The claimant was not issued with another Contract of Employment but his Employee Number changed to 402.

39. In March, April and May the claimant was issued with pay slips indicating payment of his basic monthly salary (£2,426.66). However on April's pay slip a deduction of £2,128 was noted under' *sick pay'* and the claimant was only paid £948.26 that month, as he was only working for the respondents up until 3 April, and then recommenced working for them from 27 April.

40. The claimant had not been off ill in April and the deduction was noted under *sick pay* as the respondents systems had no other way of recording the payment due for the work done by the claimant over two separate periods in April.

41. On 28 August, Ms Casey Mr Laing's secretary emailed him (page 61) asking about the claimants annual leave. The email from Ms Casey to Mr Laing states:- "*He (*the claimant*) asked how many holidays he has left – and I wasn't sure what the agreement was as he left this year and then came back'*

42. Mr Laing replied that the claimant had 22 days leave entitlement and 8 annual days leave. This was the leave entitlement which all employees had on an annual basis, and which is provided for in the contract which the claimant was issued with in 2012.

43. The claimant was employed by the respondent as a Site Manager. In March 2014 the respondents organised and paid for the claimant to attend a 5 day Site Management Training Safety course (SMTS) for which he obtained a certificate in the United Kingdom Contractors Group (UKCG) recognising this course as meeting the required standards for all managers working on UKCG sites. The core instruction includes *inter alia* the Health and Safety at Work Act, Risk Assessment/Method Statements, recent changes in

accepted working practices, behaviour of safety, working at height, and Scaffolding.

44. The respondents offered the claimant the opportunity to become a Trainer; however the claimant did not take this up.

45. The respondents have generic health and safety materials which they use on their construction sites. These include site induction sheets, onsite health and safety checklist sheets, an accident book, a site diary and a scaffolding safety check sheet.

46. In his role as Site Manager the claimant was responsible for the organisation of the workforce activities on site, and the organisation of the workforce on a daily basis.

47. As Site Manager, the claimant also had overall responsibility for health and safety on the site. This was one of his most important functions. He had authority to stop work which was not being conducted in a safe manner, or if there was a risk to health and safety. In such circumstances it was the expectation of Mr Laing that the claimant could stop work immediately without reference to him, and would inform Mr Laing thereafter.

48. At some point in 2015 the respondents obtained a contract to perform work at a site known as Aiket Castle (hereinafter Aiket). The Aiket contract was with Unity Partnership Ltd, in which Mr Alf Gordon was a partner. The contract entered into was a standard form used in the construction industry known as a SBCC 211 Standard Building Contract with Approximate Quantities for use in Scotland. The Architects used were Fleming Muir and their principal was a Mr Graham Ross.

49. The respondents first entered the Aiket site on or around 13 July 2015. The contract was due to start on 20 July, although much of the work began in August.

50. The claimant was appointed by the respondents as Site Manager for the Aiket project. Two other Site Managers, Mr Rob and Mr Daly, attended as and when required and over the weekends, and covered for the claimant when he was on holiday. Mr Laing initially visited the Aiket site about once a fortnight, however his visits increased in frequency and by the beginning of 2016 he was visiting around once a week**.**

51. On his appointment as Site Manager at Aiket, the claimant went through a process of setting up the site. He did this in around August 2015. The claimant was provided with the Bill of Quantities for the job, which included the scope of the works, the site drawings and the generic risk assessment and method statements (RAMS). The claimant completed the initial RAMS for the site.

52. The claimant obtained the necessary health and safety materials to set up the site from the respondents head office (page 59). These included site induction sheets, onsite health and safety checklist sheets, an accident book, a site diary and a scaffolding safety check sheet.

53. When Mr Laing visited the site he did not inspect these documents, but he walked round the site with the claimant or the site manager in charge, if the claimant was not there.

54. The respondents supplied the claimant with a laptop computer, an i-Pad, and an i-phone. The claimant could take these off site if he needed to. The claimant received mail sent to his LTM work email address on these devices.

55. Once these initial RAMS were completed the claimant met with Mr Laing, to work out a programme of works, including timescales, what staff would be needed and when, and what subcontractors were needed.

56. The claimant hired the majority of subcontractors engaged on the site. Some of the subcontractors were friends or family of the claimant.

57. The respondent's normal practice, which was followed at the Aiket site, was that the claimant as Site Manger obtained authority from Mr Laing for the purchase of materials, or to engage a subcontractor to perform a particular job at the site. He generally did this by first obtaining a price for the materials, or the job from the subcontractors, and having obtained quotes for the material/work he asked Mr Laing for authority to go ahead with the purchase/hire. Mr Laing then made a decision as to whether to authorise the expenditure.

58. Once the claimant had obtained this authorisation and engaged a subcontractor, he did not require to go back to Mr Laing in order to arrange the attendance of the subcontractor on site to carry out the job they were hired to do, as it was part of his role to organise the subcontractor's attendance at the site as and when they were required.

59. On some occasions the claimant used the respondent's internal resources' for work at Aiket (e.g. Slater's), in which case he told Mr Laing when they were needed on the site and asked him to provide them.

60. The method statement (RAMS) is a live document, and is developed as new work begins. When subcontractors arrive on site, their RAMS should be checked by the Site Manager, and then incorporated into the site RAMS. It was the claimant's role as Site Manager to carry out this task at Aiket.

61. The RAMS, accident book and health and safety checklist sheets, and scaffolding check sheets and site dairy, were all kept at Aiket site and were not forwarded to the respondents head office.

62. The generic Site Information and Rules (pages 46 to 50), examples of Risk Assessment form (page 57, 51, 52) and examples of Method Statements (pages 53 to 57) are produced in the bundle. Method statements are completed by the Site Manager, and were completed by the claimant for Aiket, for a range of different tasks which were carried out on site.

63. The Site Information and Rules in force at Aiket provide that all PPE must be supplied by the worker's employer. Subcontractors working on the site were responsible for supplying their own PPE.

64. There was a site induction questionnaire, which it was the Site manager's responsibility (or someone appointed on his behalf) to take workers (including those engaged by subcontractors working on the site) through. The claimant performed this task at Aiket. The person who administered the questionnaire checks that the worker has given the correct answers and then signs it off. The worker has to sign a declaration to the effect that he will work safely and report any unsafe practises to the site Management.

65. The risk assessment completed for Aiket by the claimant contained a section under *manual handling*. It listed four preventative measures, one of which was "*block and tackle will be implemented for large stones*". The risk assessment (page 52) under the hazard of *operative/object fall from height* identified *inter alia* as a preventative measure:-

> "*5. Any scaffold amendments (guardrails, toes board e.g) must be carried out in liaison with SRM by competent person.*
>
> *6. Where it is not possible to utilize scaffold for safe access, trained operatives are to implement a harness and fixed lengths lanyard.*

66. The claimant completed a method statement for the Aiket site which includes a section "*Working at Height*". This stated:-

> "*1. Scaffold erected by qualified scaffolders in line with manufacturer's instructions and or Eng Design.*

2. *LTM to carry out checks of all scaffold personnel qualifications.*

3. *Scaffolders to use fall arrest harnesses during construction.*

4. *All operatives to be made aware of dangers of working at height during regular toolbox talks.*

5. *Scaffold to be inspected daily and hegemony recorded inspection weekly.*

6. *Alterations to scaffold only to be carried out by qualified personnel*."

67. Included among the health and safety materials which the claimant had at the Aiket site were scaffolding inspection checklists.

68. As Site Manager it was the claimant's responsibility to inspect the scaffolding in order to check it was safe for use, and complete a scaffolding checklist. This should have been done on a weekly basis. The claimant completed this task between once a week and once a fortnight.

69. The scaffolding inspection checklists completed by the claimant were not sent to Mr Laing, but were retained at the Aiket site.

70. The respondents also engaged AC Safety Services Ltd as independent health and safety consultants. The claimant had access to their services.

71. AC Safety Services Ltd inspected the Aiket site at regular intervals and produced reports, which were provided to the claimant and Mr Laing.

72. It was the claimant's responsibility to put right Health and Safety issues identified on the site by AC's inspections and reports.

73. Progress reports were produced for the work done at Aiket, which were signed by the claimant or one of the other site managers. Mr Laing and Mr Gordon received copies of the progress reports (pages 70 to 75).

74. There were no limitations put on the claimant's budget for purchasing health and safety equipment at Aiket. The claimant was not restricted in spending on Scaffolding at the Aiket site.

75. On 27 July 2015 the claimant emailed Mr Laing providing him with 4 quotes for the hire of a telehandler (page 58) for the Aiket site. He advised Mr Laing that that the telehandler was needed *ASAP.* He stated "*no we do not have a trained driver we can do the same as the museum and get out men trained on site*."

76. Mr Laing replied stating "*Look into getting a driver trained but not sure why you need ASAP?*"

77. On 28 July 2015 the claimant hired a telehandler for use at Aiket site.

78. The claimant allowed unqualified drivers to drive a telehandler on site. When Mr Laing discovered this he arranged for forklift truck driver training to be organised.

79. An extract from the site diary for Aiket dated 13 August (page 60) contained an entry made by the claimant which noted under the heading *Health and Safety;* "*roofers on roof without harness*", and in *Diary Notes* noted; "*slaters were working on the roof v unsafe stopped them got phone call from SL and told to let work carry on."*

80. In August 2015 the claimant wrote directly to the client Mr Gordon confirming the costs of the installation of a new electrical cable. Mr Gordon replied to the claimant sanctioning the claimant to go ahead with this (copying Mr Laing into this). The quote in this email contained provision for a payment of 10% of the price to the main contractor.

81. Mr Gordon visited the site on a regular basis, and communicated directly with the claimant. By September 2015 Mr Laing was concerned about the lack of A.I.'s (Architect's instructions) on the project, and changes made by Mr Gordon to the job

82. On 2 September 2015, following a meeting with the claimant and Mr Gordon, Mr Laing emailed the claimant with a list of actions which had arisen from the meeting to get the programme of works back on track (page 64 of the bundle).

83. Under the heading *Progress to programme*, Mr Laing set out a number of matters which the claimant needed to deal with. The email noted that it was evident from the meeting that there was little or no A.I.'s received for additional works, and he set out what the claimant had to do in order to deal with this.

84. Murphy Brothers Ltd (Murphy's) were instructed as subcontractors by the respondents to carry out ground works at the Aiket site.

85. A site diary entry completed by the claimant dated 5 September (page 65) notes that "*client stopped work on site as Murphy`s were chucking in mesh as concrete was being poured. Spoke with S Laing regarding methods of work*". Under the heading *health and safety* is noted; "*no water for site huts*"

86. On 7 September 2015 Mr Gordon stopped Murphy`s pouring concrete at the castle foundation as he believed that it was on the wrong site. The site diary (page 66) dated 7 September contains a note from the claimant to the effect that he was called to the site as Mr Gordon had stopped a pour of concrete as Murphy`s were putting the foundation in the wrong area' the surveyor had checked measurements and *it' had to be set out again . Have informed Steven'.*

87. Mr Laing was told by the claimant that the client had stopped the concrete pour.

88. The claimant obtained approval from Mr Laing to engage scaffolding subcontractors for Aiket. Enviroscaf were one of three companies providing scaffolding at the Aiket site. The claimant booked the scaffolding companies as and when they were required.

89. It was the responsibility of the scaffolding company which erected the scaffolding to sign it off as completed, and fix a scaffold tag to it. As the Site Manager it was the claimant`s responsibility to carry out an inspection of the scaffolding and complete a scaffolding checklist.

90. AC Safety carried out inspections of the site on a regular basis in the period between September 2015 and February 2016.

91. A site inspection report produced by A C Safety on 22 September 2015 (67/68) contained criticisms about the scaffolding and a statement to the effect that scaffolding inspections should be weekly. The claimant was the Site Manager when that AC Safety inspection was carried out, it was signed by him. It was his responsibility to put things identified in the report as needing attention right. The claimant put right defects identified in this report.

92. A site inspection report produced by AC Safety (produced in the bundle at dated 21.12.15 (80)) contained some criticisms including some observations about the scaffolding. The Site Manager who was on duty when that inspection was carried out was Mr Daly.

93. On 24 September the claimant saw employees of Enviroscaf working on the site without harnesses. The claimant recorded in the site diary for (page 69) under the heading Health and Safety; '*Enviroscarf no harnesses'.* Under Notes is recorded;*'Scaff working on Castle main no harness- email S.L.'*

94. In the progress report for the Aiket project dated 30 September 2015 the claimant recorded that scaffolders were on site not wearing harnesses and

they had been told any future complaints could result in the loss of their contract. It was noted at point 6 under 'Health and Safety'; '*Scaffolders on site not wearing harnesses have been told any future non compliance will result in loss of contract'*.

95. A copy of AC Safety's report of 22 September was also attached to the progress report.

96. Mr Laing was aware from the progress report of 30 September 2015 that scaffolders had been told they would be put off site if they did not wear harnesses. He considered this to be an appropriate response.

97. In November the site conditions at Aiket became muddy, because in part of a burst culvert and water from it running down into the site.

98. On 7 November the claimant contacted Mr Laing and told him about the burst pipe and that water was streaming into the site making the conditions muddy.

99. It was apparent to Mr Laing from his visits to the site that this was an issue, and that working conditions were made difficult because of the muddy conditions. There were discussions between the claimant and Mr Laing as to how they could deal with this issue.

100. On 12 November 2015 a meeting took place at the site between representatives from Murphy`s, Derek Prain, Mr Ross, and Mr Beveridge (the respondents surveyor). There was a discussion at that meeting about monies which had been withheld.

101. After the meeting the claimant spoke with Mr Prain and asked if he could carry out works to the access roads at the site. It was Mr Pain's understanding that such work was not included as part of the work for which the respondents tendered, and he expressed the view to the claimant that

he would not carry out this work, as the likelihood was that the respondents would not be paid for it.

102. A meeting took place on 18th November between the claimant, Mr Laing and Mr Prain. Mr Laing continued to be concerned about the fact that Mr Gordon was changing plans for the site, as the main contractors they were not getting A.I.'s for the work. The claimant came to the meeting with a completed set of RFIs, which Mr Lang found useful. The fact that the job was demanding was discussed at that meeting. The claimant told Mr Laing that the Mr Gordon wanted bigger stones for use on the project. Mr Prain and the claimant did some work together on the RFIs.

103. Mr Laing wrote to Mr Ross (the architect) on 30 November (77 to 79) highlighting the problems and advising that muddy condition of the site, were making the site "*a real challenge'.* Mr Laing queried if he or Mr Gordon had a temporary solution to the problem with the burst pipe, pending the involvement of the Council.

104. By December 2015 Mr Laing considered that the respondents were not obtaining sufficiently detailed instructions and this was hindering the job. On 7 December, he arranged for his Commercial Surveyor, a Mr Norman, to attend the site to give the respondents advice on how to proceed on site. The claimant was in attendance at the site on that day and met with Mr Laing and Mr Norman. He had been advised by Mr Laing that Mr Norman was going to attend the site.

105. At the site visit on 7 December Mr Laing discussed the issues at the site with the claimant, including the muddy conditions and the difficulties these caused. Mr Laing instructed the claimant to take steps to alleviate the conditions. Mr Laing showed the claimant where to dig trenches to divert the water flow.

106. On 8 December Mr Laing emailed the claimant with a note of actions from the visit on 7 December (page 79) which included "*dig sump pit and buy*

small pump to remove surface water – discharge on grass". The instruction to the claimant also stated:-

> "*Ensure all lifting plant is in place for Masons (use Gordon Lewis pins).*
>
> *Organise lifting Beams/Blocks/slings for installing Dormer Stonework. Install low lying scaffold around chapel for masons to cart round stonework*."

107. On 20 November 2015 Mr Laing authorised the purchase of a Lewis Pin for Aiket Castle to move heavy stone blocks. There was a hoist on site for lifting 200 kilograms of weight.

108. The claimant recruited a squad of stonemasons to work on site. They commenced work on 15 December 2015 The squad was headed up by the claimant's brother Robert Pearson, and included his nephew Robert Pearson Jnr, and Mr Oakes, one of the witnesses in this case.

109. Around 16 December Mr Laing met with Mr Robert Pearson and members of his squad, and discussed the works which had to be done. This was a civil exchange between Mr Laing and Mr Pearson.

110. In March 2016 Mr Laing approved the hire of a crane when he was asked to by the claimant (pages 113, 115).

111. By early 2016 the project was becoming an increasingly challenging one for the respondents. Mr Laing began to visit the site more regularly, and his visits increased to about once a week. From the respondents perspective by early 2016 the lack of instructions was making progress on the job difficult.

112. By January 2016 Mr Laing was also beginning to experience concern about what he though was the claimant's lack of management of the project at Aiket, and he expressed this to the claimant.

113. Part of the claimant's responsibility as Site Manager was to ensure that any scaffolding on the site was erected or moved safely, by an approved subcontractor. It was the claimant's responsibility to organise the attendance of scaffolders on site. Once he obtained authorisation to engage the Scaffolders, he did not require to obtain Mr Laing's approval on each occasion when they needed to attend site. It was the claimant's responsibility to arrange for scaffolders to attend the site as they were required.

114. Scaffolders provided scaffolding services at Aiket in July (page 179) ;and over a number of days in September (page 184) ; and December (pages 202, 204, 206, 214).

115. On 12 October (Monday) a scaffolding supplier confirming to the claimant that they would deliver a load of scaffolding on Thursday, with the balance on Friday, of that week. The claimant replied on 14 October, acknowledging this, and asking that the scaffolding be sent to the site at Aiket (page 409 and 408). The claimant emailed a member of staff on site on 16 October asking if scaffolders were on site yet, and the response confirming that they were on site from 9am to 5pm that day.

116. The claimant emailed Mr Laing on 27 November giving him prices to buy scaffolding for Aiket Castle (188). The price was £5,558.50. Mr Laing emailed back on 1 December "*purchase have got quotes from others more expensive".*

117. Scaffolders were on site at Aiket on 17, 24, and 31 January 2016.

118. A Scaffolding checklist (part of the respondents generic Health and Safety documents referred to above) was completed by the claimant on 22

February 2016 (pages 101/102). This identified issues with the scaffolding which required attention, and which it was the claimant's responsibility to put right. The scaffolding checklist was kept at the Aiket site, and not forwarded to Mr Laing.

119. A C Safety carried out a site inspection on 29 February 2016, and produced a report, which contained a number of criticisms in relation to the scaffolding (page 106).

120. Mr Laing was on site on 29 February 2016 when AC Safety were carrying out their inspection. It was his impression that the condition of the site had deteriorated and he was concerned about this. Mr Laing had a discussion with the claimant that day about the organisation of the site, and the issues which in Mr Laing's view the claimant had to attend to.

121. Mr Laing raised health and safety matters with the claimant in the course of that meeting, and advised the claimant that he needed to get the project organised more efficiently

122. Mr Laing emailed the claimant on 29 February picking up on elements which had been discussed at their meeting, and he followed this up again, in an email to the claimant on 3 March (page 116 /117) with directions for work at the site.

123. The AC Safety report was emailed to Mr Laing on 29 February. When he received the report Mr Laing emailed the claimant and instructed him to put right issues identified in the report (page 111). His email stated' '*Please make sure this is all made good immediately. '*

124. The claimant completed a Scaffolding Inspection checklist dated 29 February noting some matters which he considered needed attention, and in the comments noted "*need scaff ASAP – SL not helping*". The claimant did not forward this to Mr Laing.

125. Mr Gordon attended the site office at Aiket on 29 February. Mr Laing, Mr Prain, and the claimant were present. Mr Gordon intimated to Mr Laing that he had one chance to get the project right.

126. On 3 March 2016 the claimant completed a further scaffolding inspection checklist in which he noted under the heading "*scaffolding not safe*".

127. On 4 March 2016, the claimant emailed Mr Laing stating "*Alf was on site today asking about the scaffold report and for a copy of the report. He then asked who was certified on site to do the alteration to the scaffolding. What do you want me to do*" (page 119).

128. On receiving this email Mr Laing telephoned the claimant and told him to let Mr Gordon see the AC's report of 29 February and told the claimant that it was necessary for the respondents to rectify the issues before Mr Gordon returned to the site. Mr Laing asked the claimant whether the problems with scaffolding had been rectified in accordance with his instructions to make good the issues in the A C Safety report. The claimant responded he had no time to contact the scaffolders.

129. By 7 March 2016 the claimant had decided to resign from his employment with the respondents. He emailed Mr Gordon advising him of this (page 122). His email stated:-

> "*As you are aware LTM performance on site has been poor. But I have been under financial constraints from head office on what I can spend and what I can't. However we received this report last Monday I asked for a scaffolder to which Steven Lain told me to get the job done without the expense of a scaffolder. He says one thing in emails and contradict that via the phone it is now putting me in a tricky place. I will be handing in my notice on Friday I wish you all the best with Aiket Castle in the future*."

130. The claimant met with Mr Gordon at the Aiket site on 8 March 2016.

131. The claimant wrote to Mr Laing on 8 March tendering his resignation (page 127). This letter states:

132. The claimant met with Mr Gordon at the Aiket site on 8 March 2016. Acting on acting a recommendation from Mr Gordon, the claimant obtained advice from a company in which Mr Gordon has an interest, on 8 March and set up his own construction company.

133. On 8 March 2016 Mr Gordon's architect, Mr Ross, also attended the Aiket site, and appended his name as a witness to the conversation that was said to have taken place between the claimant and Mr Gordon.

134. Mr Ross wrote to the respondents on 8 March 2016 raising a number of issues, including health and safety compliance, and advising further work on the site should cease.

135. By 9 March 2016 the respondents were denied access to the Aiket site by Mr Gordon. When they did obtain access to the site all their health and safety paperwork, including scaffold inspection sheets for the Aiket site, risk assessments, and site diary had been removed.

136. Mr Laing contacted the claimant on 9 March 2016 asking him to reconsider his decision, and offering a grievance hearing in respect of the issues he raised (133). He wrote to Mr Ross on the same day indicating he had received an email from the claimant which was totally out of character and strongly refuting the accusation that the respondents had not been supporting the claimant (134).

137. No grievance hearing took place, with the claimant's representatives writing to Mr Laing on 21 April 2016 (page 168) advising that the claimant had lost faith in the grievance process and that the claimant would not be attending a grievance procedure.

138. The claimant and Mr Gordon entered into an agreement said to be effective from 14/03/2016 (page 146) in the following terms:-

> "*This to confirm that an agreement has been reached for Sean Pearson as an individual or through another company or his own company will take up the role of Interim Manager of the Aiket Castle Project for the duration as specified from time to time by FMA the Architect.*
>
> *The fee will be £45,000 plus Van on an annual basis.*
>
> *This receipt will form the basis of a contract and records initial state payment of £10,000.*
>
> *This is effective as of 14/3/2016*"

139. Unity Partnership terminated their contract with the respondents and there is ongoing litigation in relation to this.

140. The claimant's company carried out work at a site owned by Mr Gordon, at Aiket Mill shortly after his company was formed, and the claimant's company subsequently instructed to carry out the work at the Aiket Castle site.

141. The claimant took legal advice in March 2016 form a company owned by Mr Gordon.

Note on Evidence

142. Essentially this case turns on the facts, and there were significant issues of credibility which the Tribunal had to determine.

143. The evidence on a number of occasions strayed into matters which were not relevant to the issues before the Tribunal, but which were contested. The Tribunal considered some of these issues as they went to credibility. It

did not consider them all however (e.g. allegations about Mr Laing's behaviour towards the claimant prior to April 2013, or his alleged treatment of Mr Robert Pearson when he worked at Inverness, or the allegation that Mr Laing instructed the claimant to send materials from the site at Aiket to his own home) as to as they were not relevant to the issues before the Tribunal and to do so would have been disproportionate.

144. There is ongoing litigation between the respondents and Unity partnership Ltd, and the Tribunal formed the impression that a considerable amount of the evidence it heard may be considered to be relevant to that dispute, but not necessarily relevant to the issues which this Tribunal had to determine. It is not the function of this Tribunal to make determinations which may be relevant elsewhere, but which are irrelevant or unnecessary in order for it to reach it's conclusions in this case.

145. In determining the matters which were an issue, and which were relevant to the determination of the claim, the Tribunal took into account the credibility and reliability of the witnesses generally, and their particular evidence on the point which was an issue.

The Claimant

146. Firstly the Tribunal considered the evidence given by the claimant. The Tribunal did not form the impression that the claimant was credible or reliable in a significant amount of the evidence he gave. It formed the impression that he misrepresented the position on numerous occasions and that his evidence was tailored to suit his own ends in pursuing this claim. There were a number of elements which contributed to this impression.

147. The Tribunal took into account the extent to which the claimant was prepared to make unsubstantiated, serious, prejudicial allegations. For example, he stated in cross-examination, that the Surveyor engaged by the respondents was "*half blind/half drunk..,* and.. *that a man was paid to go to his house to get him up every morning and out of bed and bring him to site*".

148. This was a statement which had no evidential basis other than the claimant's opinion, and his willingness to make such serious prejudicial allegations, unsubstantiated by anything other than this impacted adversely on the Tribunal's view of his credibility and reliability.

149. Another example of this is the claimant's making unsubstantiated allegations was his assertion in his evidence in chief that the site at Aiket was put "*on stop*" in August 2015 for lack of materials, and that in February 2016 the respondents were *on stop* with all building merchants.

150. The claimant explained further in his evidence that in August it was not the Aiket project that was put on stop, and he had intended to say that the respondents company was *on stop* with their suppliers, and because of this he was unable to purchase key equipment including safety equipment.

151. In cross-examination the claimant was taken through a list of the respondents` suppliers, whom he had to accept were not *on stop* with the respondents; he also had to accept that a number respondents` suppliers were not on stop with the respondents, when he referred to various invoices in the bundle.

152. The claimant's readiness to make statements which were patently untrue impacted adversely on the Tribunal's impression of his credibility.

153. Another element which impacted adversely on the Tribunal's assessment of the claimant's credibility was his unwillingness to accept a number of invoices or email correspondence produced in the bundle as '*valid*', again on an unsubstantiated basis. The two most acute examples of this were in relation to email correspondence sent by Mr Laing. The first was an email to the claimant accepting his resignation (page 38). The Hearing was adjourned on the claimant's application, to allow an expert to carry out investigations on the basis that there was a suggestion this document did

not exist. After the instruction of the expert, his report was produced, but beyond that no evidence was led to substantiate this position.

154. The second instance was in relation to an email of 1 December (188/192) by Mr Laing approving the purchase of Scaffolding. An adjournment was sought of the Hearing again to allow an Expert to be instructed and the allegation was on this occasion that this was a fraudulent document. The allegation was withdrawn after the instruction of the Expert, although the claimant continued to maintain he had not received the email. The claimant in explaining this position advanced no plausible explanation as to why he would not have seen e-mails sent to his work address (as this email was), and which he accepted would have been received on his i-pad, laptop and i-phone.

155. The claimant also refused to make appropriate concessions. An example of this was his refusal to accept invoices from scaffolding companies in the bundle, which were put to him (for example page 184). He said in cross-examination that he was "*querying all the scaffolding invoices*". When pressed on this, he accepted that he had approved payment of the invoices, then adding a caveat that on some occasions he did not see the invoices. This reluctance on the part of the claimant to make appropriate concessions impacted adversely on the Tribunal's view of the claimant's credibility.

156. Another element which impacted adversely on the Tribunals assessment of the claimant's credibility was his evidence in relation to his dealings with Mr Gordon at the point when he resigned. For reasons which are apparent below it is not necessary for the this Tribunal to reach the conclusion that the reason why the claimant resigned was because he was in league with Mr Gordon and wanted to take over the Aiket contract (the position advocated by the respondents).

157. There were however some elements of the claimant's evidence about this which were so incredulous that they impacted adversely on his overall credibility. The most significant of these was his evidence that he was in an

extremely stressed state when saw Mr Gordon on 8 March, however notwithstanding that, he decided on Mr Gordon's recommendation, to contact a company owned by Mr Gordon that day for tax and accountancy advise, and somehow, 'by a mistake', they managed to set him up with his own company by the end of the day.

158. Such a position was so far fetched, particularly in the context of the claimant setting up his own company (as he accepted he did) and subsequently taking over the work at Aiket, that the fact the he was prepared to advance it impacted adversely on the Tribunal's overall assessment of his credibility.

Mr Alf Gordon

159. A good deal of Mr Gordon's evidence was not strictly relevant to the issues before the Tribunal. The Tribunal formed the very strong impression that Mr Gordon's evidence was motivated by his acrimony towards Mr Laing and his litigation with the respondents. In forming this impression the Tribunal take into account gratuitous comments made by Mr Gordon throughout his evidence suggested that Mr Laing was guilty of various forms of fraudulent behaviour, and on one occasion citing the risk of perjury as a benefit to the ongoing Court of Session proceeding. This impression impacted aversely on the Tribunals assessment of his credibility generally.

Mr Ross

160. Mr Ross was engaged as the principal architect on the contract by Unity partnership. A good deal of Mr Ross's evidence was not relevant to the issues before the tribunal. There was one area where the Tribunal did not find his evidence reliable which is dealt with below.

Mr Robert Pearson/ Ross Oakes/ Gary Clifford

161. **Mr Robert Parson** is the claimant's brother and is the organiser of squad of stonemasons engaged by the respondents through the claimant, to work at the Aiket site. He and his squad subsequently worked at the Aiket site after the respondent's contract with Unity Partnership was terminated.

162. The Tribunal formed the impression that his evidence, in so far as it was relevant, was designed to assist his brother's cause, and reflect his animosity towards Mr Laing. The Tribunal formed a similar view of the evidence given by **Mr Oakes,** who although not related to the claimant worked in Robert Pearson's squad. Neither witness provided a credible explaination as to why, if the respondents were acting in significant breach of Health and Safety regulations as they claimed, they elected to continue working with them not just over Christmas, but until well into the New Year.

163. **Mr Clifford** was also engaged by the respondents to work at the Aiket site. The Tribunal did not find him to be credible or reliable, and again formed the impression his evidence was designed only to assist to claimant.

164. In reaching its conclusion, it takes into account firstly, that Mr Clifford gave evidence to the effect that Mr Laing was regularly on site, and gave him instructions to carry out work in an unsafe condition. The evidence was to the effect that while Mr Laing visited the site, that was once a fortnight, moving up to once a week after Christmas. The Tribunal therefore did not find Mr Clifford's evidence to the effect that he was directed by Mr Laing on a daily basis to carry out work on an unsafe manner convincing. Furthermore, when pressed on how Mr Laing could have done this, his answers were evasive.

165. The Tribunal's impression that Mr Clifford's evidence was designed to assist Mr Pearson's cause was further fortified, in that he initially said he could not recall being given any site induction when he started work at Aiket Castle, but when it was put to him that he would then not be able to recall Mr

Pearson carrying out any risk assessment, his evidence changed and he said that clearly that Mr Pearson had done so.

166. The Tribunal did not find any of these three witnesses to be credible and accordingly found itself unable to attach significant weight to their evidence.

Mr Steven Laing

167. The Tribunal found Mr Laing to be in the main a credible and reliable witness. He gave his evidence in a calm, straightforward, manner and the Tribunal formed the impression that he did not seek to embellish or exaggerate his evidence, which in the main was consistent with the documentary evidence before the Tribunal. The various matters where his evidence was in dispute are dealt with below.

Mr Prain

168. Mr Prain is employed by the respondents as a Quantity Surveyor. The Tribunal formed the impression he was a credible and reliable witness. From time to time he was unable to recall events in great detail (e.g. the meeting in 18 November with the Claimant and Mr Laing), however the Tribunal drew no adverse inference from this, but rather formed the view that he was prepared to made appropriate concessions. The fact that he was prepared to do so enhanced his credibility in the Tribunal's view.

<u>Disputes in Fact</u>

169. A very great deal turns in this case on the credibility of the witnesses and the resolution of factual disputes. The **Findings in Fact** set out the Tribunal's positive factual findings; however this section of the Reasons explains the reasons why the tribunal has made those findings, or has

failed to make findings which were contended for. The Tribunal has aimed to do this by dealing with relevant disputes in fact under separate headings.

170. **Terms and Conditions of Employment.** The first matter which the Tribunal had to determine was whether or not the claimant received a Contract of Employment, from the respondents. The claimant claimed that he never received a written Contract of Employment or a letter of appointment, both which are produced in the respondent's bundle. He accepted however that he had given Contracts of Employment and Staff Handbooks to other members of staff.

171. The Tribunal did not find it credible that the claimant, having given these documents to other members of staff, would not have made sure he had one, and against the background of its general impression of the claimant's credibility, it was satisfied that the claimant had received the contract of employment produced in the bundle when he commenced work with the respondents in 2012.

172. The Tribunal was fortified in its conclusion in that the documents in the bundle contained a number of errors, and had the respondents manufactured the documents for the purpose of this Hearing, as it appeared was being suggested, it was unlikely that these errors would have appeared in them.

173. **Continuity of Employment.** The second dispute in fact which the Tribunal had to resolve was whether the claimant's resignation in an email (Page 38 – 15 March 2015) was accepted by the respondents.

174. The claimant's position is that because of stresses at work he decided to resign, and he emailed Mr Laing informing him of his intention. His evidence was that the following day Mr Laing telephoned him and told him that he did not want him to leave, and that he understood that the claimant had been under a lot of pressure. The claimant's evidence was that Mr Laing said that if the claimant agreed to stay he could take annual leave

and Mr Laing promised that when he returned to work after the holiday things would be better, including health and safety, and relevant resources would be provided. The claimant's evidence was that Mr Laing persuaded him to stay. The claimant denied seeing any emails from Mr Laing regarding his resignation.

175. Mr Laing's evidence was that the claimant resigned in March 2015, and he accepted his resignation, and at no time did he or anyone else within the respondent's company agree to preserve the claimant's continuity of employment, and the matter never arose. The claimant subsequently contacted him around three weeks later to say he had gone to work with his brother but things had not worked out and he asked for his job back, which Mr Laing agreed to.

176. The claimant sought to support his position that he had not left the respondent's employment with reference to his pay record for the months of March, April and May. The claimant accepted that the April payslip showed a deduction of £2,128 under *sick pay*. He accepted he was not off sick.

177. The respondent's explanation of a deduction under *sick pay* was that they had no other means of reflecting the claimant's April salary as he stopped working on 3 April and commenced working on 27 April.

178. While the claimant accepted there was a deduction, he refused to accept that this deduction was made because he had left on 3 April and was re-employed on 27 April.

179. The Tribunal was satisfied that notwithstanding the incorrect noting of a deduction under *sick pay*, April's salary was consistent with the claimant only having worked from 27 April onwards and supported the conclusion that there was a break in the continuity of his employment with the respondent. The claimant explaination that the wages slips for March, April, and May indicated that the respondents had not paid him 3 weeks holiday

pay he was due, was difficult to follow to the point that it was rendered implausible.

180. The claimant also placed particular reliance on a document produced at Page 61, which was an email between the Mr Laing and his secretary in August 2015, in which Mr Laing advised that the claimant had 22 days leave entitlement and 8 annual days leave. The claimant's position was that this would not be the case if he was a new employee in 2015,

181. The email referred to by the claimant from Ms Casey to Mr Laing states:-

> "*He (the claimant) asked how many holidays he has left – and I wasn't sure what the agreement was as he left this year and then came back, which, supports the finding that the claimant had indeed left the respondent's employment."*

182. The Tribunal however drew nothing from the fact that Mr Laing responded to this saying that the claimant had 22 days holiday and 8 days public holiday. This was consistent with contractual the documentation issued to the claimant when he stared with the respondents in 2012, and which were the respondents standard terms and conditions for new employees.

183. Further the contemporaneous documents, which the Tribunal was satisfied had been sent, supported the position that the claimant had resigned, and that that resignation had been accepted. Firstly, there was the email from Mr Laing, (Page 38) accepting his resignation. The claimant denied having seen this. There was an adjournment of these proceedings to allow an Expert to examine the respondents IT system in order to determine if this email had been sent, however after this enquiry had been made the Experts report was lodged, no evidence was led before the Tribunal to allow it to conclude that the email had not been sent.

184. Secondly, there was a letter from Mr Bennie (Page 39) to the claimant dated 17 March advising the claimant he had been passed a copy of the

claimant's resignation email, and confirming arrangements for the termination of employment.

185. The claimant's evidence was that when he received this email he telephoned Mr Bennie and explained that he had come to an arrangement with Mr Laing, and Mr Bennie laughed and said something to the effect that "*what are you two like."* Mr Hardman criticised the respondents for not calling Mr Bennie; however the tribunal did not draw any adverse inference from this, in light of the terms of his letter to the claimant, which the claimant accepted he received.

186. There was no plausible explanation as to why Mr Laing would have emailed the claimant as he did, why Mr Bennie would have sent the letter which he did to the claimant on 17 March, and why the claimant's Employee Number would have changed the way which it did, why he would have received only a proportion of April's pay and why Ms Casey would have emailed Mr Laing saying she knew the claimant had left, if Mr Laing as alleged by the claimant had agreed with the claimant that he would remain in employment, and take holiday leave.

187. The Tribunal was satisfied in light of the claimant's salary for April; the email from Ms Casey and Mr Laing's reply; the fact that the claimant had been allocated a new Employee Number; and the terms of the contemporaneous correspondence between the claimant and Mr Laing and Mr Bennie; and the evidence of Mr Laing, that the claimant had resigned, and some weeks later been re-employed, and that the claimant's continuity of employment had been broken.

188. **Documents.** The Tribunal was satisfied that a risk assessment form for Aiket Castle (pages 51 to 52) was completed and held at the Aiket Castle site. When this document was put to the claimant in cross-examination he accepted that it was similar to the one which was held at Aiket Castle. When asked what the difference was, he said only that the risk assessment

which he held at the site did not say Aiket Castle on it. He confirmed this position twice in cross examination.

189. Although the claimant later in his cross-examination departed from this, and sought to suggest he had not seen some of the items in the risk assessment, the Tribunal was satisfied, having regard to his initial response on two occasions, that the risk assessment in the bundle in all material respects contained the same information as the risk assessment carried out for Aiket Castle by the claimant, and kept in the site office at Aiket, including the provisions on manual handing and working at height.

190. **Purchase of Health and Safety materials.** The claimant sought to suggest that he was prevented by Mr Laing from purchasing materials necessary for the site, including health and safety materials. The Tribunal did not conclude as a matter of fact that this was correct.

191. The claimant's evidence about a lack of health and safely equipment was backed up by the three stonemasons who gave evidence on his behalf, however the tribunal did not find their evidence added any weight to the claimant's evidence, and the Tribunal did not find any of this evidence to be credible or reliable.

192. There was no documentary evidence to support the conclusion that the claimant sought permission to purchase equipment necessary to the health and safety of workers on site, which had been refused by Mr Laing.

193. The claimant was taken in cross-examination to a number of invoices, and approved requests to purchase goods for the Aiket site, which included the purchase of health and safety equipment (e.g. page 177, 210, 211, 212, 213, 230, 231, 236, 239, 240, 241, 242, 243, 244, 247, 254, and 263). When it was put the claimant in cross-examination that his evidence that there was no spending on Aiket was incorrect, he agreed that was the case.

194. The claimant's credibility was further damaged, in that in evidence in chief he alleged that as at 27 August the Aiket Castle project was placed '*on stop*" for lack of materials. He said in cross examination that he did not mean the project was stopped, but that the respondents were *on stop* with their suppliers and he said he was unable to purchase key safety equipment in particular gloves, glasses, ear defenders and safety harnesses for scaffolding; he stated that he contacted the respondent's office regarding this. It was the claimant's evidence that the respondents were *'on stop'* with their supplies on numerous occasions.

195. The claimant went on to allege that because of his inability to purchase the materials there was a delay in work, and that he had warned Mr Laing by telephone about this but was told to "*get on with it*" and "*make do*". He stated that equipment was provided eventually but men were working without necessary safety equipment for a period of time.

196. In cross-examination the claimant was taken to numerous invoices from suppliers to the respondents, demonstrating that the respondents were not on "*stop*" (prevented from purchasing goods) and the claimant accepted that his statement in evidence in chief to the effect that the respondents were on stop with their suppliers was incorrect.

197. There was no explaination for this inconsistency between the claimant's evidence in chief and cross-examination, and the Tribunal did not accept the claimant's evidence that he was prevented from spending on health and safety equipment.

198. The claimant he said in evidence in chief that he specifically requested equipment for outside lighting from the respondents but was told that this was not required as the workmen could use their own phones or provide their own headlights. There were *2' speedy' lights* supplied but this was not adequate lighting for Aiket.

199. The claimant was taken to a document in the bundle (page 186) which is an email from him asking for a purchase order for 2 *speedy lights*, which was approved (15 October). There were no other documents in the bundle which suggested the claimant had made requests for lighting, which were refused.

200. The claimant was taken to another email dated 13 November sent by Craig Rae from the claimant's email address, requesting lights, which was approved. The claimant said he would not necessarily have seen this email but the Tribunal did not find this evidence particularly convincing, given the email was sent from his account. The Tribunal was not persuaded that as alleged by the claimant, workmen were asked to use their i-phones or provide their own headlights.

201. **Telehandler- unqualified driver.** While it was not part of his protected disclosure claim, the claimant stated in his evidence in chief that LTM was using unqualified/untrained forklift truck driver at Aiket Castle and he stated that he was so concerned that this was not safe that he contacted Alba Forklift Training and obtained a quote for instructors to train LTM employees, and then spoke to Steven Laing and informed him that a qualified, certified forklift truck driver was required. The claimant said that he told Mr Laing he could get someone to come on site for £800 to do specialist training, and that Mr Laing replied "*That's fucking dear get something else organised*" and "*to get on with it*". He said that Mr Laing told him because it was a private site he was alright to use an uncertified driver and then he stormed off.

202. The Tribunal found the evidence to be incredible. The emails referred to in the findings in fact between the claimant and Mr Laing (page 57), supported the conclusion that it was Mr Laing who told the claimant that he needed to get a driver trained, rather than the other way around. When it was put to the claimant in cross examination that he did nothing about getting a driver trained, and that he never had a conversation with Mr Laing about using unqualified driver he denied this. He said that he got four

quotes, but every time it was "*kicked into the long grass*". He then went on to say that he got a quote from Alba for £400 a day, and with four days training this was going to cost £1,800.

203. These answers in cross-examination were inconsistent with his evidence in chief, and there was no documentary evidence to support his claim that he obtained four quotes for training forklift truck drivers. The claimant had provided four quotes to Mr Laing in an email of 27 July, for the hire of a telehandler, not the training of a driver.

204. The Tribunal was satisfied that the claimant allowed an unqualified driver to drive a telehandler on site, and when Mr Laing discovered this he arranged for forklift truck driver training to be organised .The claimant in fact accepted that this had occurred in cross-examination.

205. **Stopping Work in August 2015.** The claimant stated in his evidence in chief that on 13 August he noticed that the Head Slater for LTM was perched on the roof/scaffolding without proper safety equipment and that on seeing this he immediately shouted to stop them working and that he then telephoned Mr Laing and told him of what had happened. The claimant said that Mr Laing "*what are you doing stopping men from working*". The claimant's evidence was that he told Mr Laing that the reason for him stopping work was the unsafe manner in which they were working and the potential injury or worse which could occur. The claimant's evidence was that Mr Laing told him he had another job to go to, and to *"'stop fucking around' and that if I would not allow continued working, he would get someone else who would as it was a fixed price* contract".

206. In support of his evidence the claimant referred to page 60 of the bundle which is a copy of a extract from the site diary for Aiket, produced by the claimant for inclusion in the bundle, dated 13/8/15 in which it is noted under the heading Health and Safety "*roofers on roof without harness*", and in diary notes "*slaters were working on the roof unsafe stopped them got phone call from SL and told to let work carry on*."

207. Mr Laing denied that the claimant telephoned him, or that he had told the claimant to stop working. It was Mr Laing's evidence that if the claimant had telephoned him to advise that work was being carried out unsafely then he would have agreed to the work being stopped.

208. Mr Laing explained that he did not look at the site diary, as this was not part of his job. He explained that he visited the site approximately once a fortnight in the period up until Christmas, when he walked round the site with the claimant.

209. The Tribunal was satisfied that Mr Laing's version of events was to be preferred. Firstly, it found credible Mr Laing's evidence that the claimant as Site Manager had authority to stop work if he considered it to be unsafe, and it accepted that if Mr Laing had been told by the claimant that he had stopped work because of unsafe practices, Mr Laing would not have told him to carry on with the work.

210. The Tribunal is fortified in its conclusion by reference to the investment in Health and Safety training for the claimant, and supply of Health and Safety documentation for the site, which is inconsistent with the notion that Mr Laing was unconcerned with, and likely to ignore Health and Safety issues.

211. Secondly, it was unexplained to the Tribunal why, if as it appeared from the claimant's evidence this was a serious health and safety issue, it did not form part of the disclosure which he was relying on as particularised in the additional information he was ordered to supply to the Tribunal specifying the Disclosures made. While Mr Hardman referred to this alleged incident in his submissions, it was not identified as one of the disclosures relied upon. It was also unexplained why the claimant had not reported it to the Health & Safety Executive, if it was as he noted in the diary '*v unsafe'*, and why he had not recorded in the site diary Mr Laing's alleged response.

212. Furthermore there was an inconsistency between the claimant's evidence in chief to the effect that he phoned Mr Laing to inform him of what had happened, and what is recorded in the site diary which is to the effect that got a phone call from Mr Laing. While that inconsistency itself would be insufficient to render the claimant's version of events unbelievable, it was an element, alongside the other factors, which caused the Tribunal to conclude that the claimant's evidence on this incident was not to be accepted.

213. The only positive factual conclusion which the Tribunal was able to reach was that the claimant had completed this dairy entry, which is reflected in the findings in fact.

214. **Hot Tapping an electrical cable** The claimant alleged that in August 2014 Murphy Builders uncovered an electrical cable at the Aiket site which was the main cable which supported the plant room. The claimant said that normal procedure would be to contact the Electricity Board and wait for assistance but when he telephoned Mr Laing, Mr Laing told him that he would contact an electrician himself. The claimant said Mr Laing told him that he would 'hot tap' the cable. The claimant said he was shocked about this but he was bullied/ instructed by Mr Laing to open the site on the Saturday so the hot tap could be performed.

215. This allegation again was not the subject of the claimant's protected disclosure claim, however it went to credibility so the Tribunal dealt with it.

216. The Tribunal was satisfied that it was without substance. It accepted Mr Laing's credible denial that he had acted in this way. The claimant alleged that the electrician told Mr Laing that he knew someone who could do a *hot tap* for £2,000 but he would charge Mr Gordon £5,000, and Mr Laing would pretend to the client that it had been done correctly.

217. The Tribunal had regard to the terms of an email in the bundle at 374, which the claimant was taken to, in which he writes directly to Mr Gordon confirming the costs of the installation of the new cable. Mr Gordon replies

directly sanctioning to the claimant to go ahead with this, (albeit it is copied to Mr Laing). Notwithstanding that the price quoted in this email contained provision for a payment of 10% of the price to the main contractor, the fact that the claimant emailed Mr Gordon in this way, was inconsistent with the claimant's evidence in chief on this matter.

218. **Alleged Disclosure (Concrete Pour) 5/7 September**. The first disclosure which the claimant relies upon is said to have occurred on 5/7 September 2015, when the claimant said he raised what he considered was an unsafe working practice on the part of the subcontractors Murphy Brothers Ltd, in pouring a cement foundation without steel mesh strengthening and, "*chucking in the steel mesh while concrete was being poured*".

219. In his evidence in chief the claimant said that on 5 September Murphy's were pouring concrete and there was no mesh in the foundations. He said that Mr Gordon was on site and noticed this; the claimant was informed about it, and he spoke with Murphy's who said it was normal practice to chuck in the mesh as the concrete was being poured. The claimant said he had never heard of this method, and he contacted Mr Laing and informed him that he was concerned that Murphy's were using unsafe work practices on site. The claimant's evidence was that Mr Laing informed him to "*keep an eye on Murphy's and let him know if he had any other concerns*", and he said that he noted this in the site diary which was produced at page 65.

220. The site diary which was produced by the claimant, notes for 5 September that "*client stopped work on site as Murphy`s were chucking in mesh as concrete was being poured. Spoke with S Laing regarding methods of work*".

221. The claimant went on to state that on 7 September Mr Gordon stopped the pour of concrete at the castle foundation. He was not on site at the time but Mr Gordon contacted him and told him that he had stopped the work because Murphy's were pouring of concrete in the wrong area. The claimant said that when he arrived on site he realised that Mr Gordon was

correct, and he then contacted the Surveyor, who came to the site and confirmed that the foundation was in the wrong place. The claimant said that he contacted Mr Laing and informed him that he was extremely concerned regarding the incompetence of Murphy`s. Mr Laing said to the claimant that he was starting to "*whine like a woman*" and that "*as long as the job was getting done then I was to stop moaning and annoying him*".

222. The claimant said he became extremely concerned about working practices on site, and noted these concerns in the site diary (page 66).

223. The site diary, (again produced by the claimant), in the bundle at page 66 contains a note by the claimant that he was called to the site as Mr Gordon had stopped a pour of concrete as Murphy`s had put the foundation in the wrong area.

224. Mr Laing denied that the claimant had raised any issues about Murphy`s chucking in mesh, or health and safety matters with him. Murphy`s had not poured the concrete in the correct place, that the claimant had never raised any concerns about Murphy`s work. Mr Laing denied telling the claimant to stop whining like a woman or to stop annoying him

225. The relevant point for the Tribunal to determine is what, as a matter of fact, the claimant told Mr Laing on 5 and 7 September 2015.

226. The Tribunal was satisfied that the claimant told Mr Laing about the fact that Mr Gordon stopped the pour of concrete on 7 September, and that at some point he made dairy entries for 5 and 7 September 2015, but it made no positive findings in fact beyond that.

227. In reaching its conclusion the Tribunal takes into account that there is a not insignificant inconsistency between the additional information which the claimant provided, and his evidence in chief.

228. In his additional information the claimant stated that he discovered on 5 September that Murphy`s were pouring cement foundations without steel mesh for strengthening, and *chucking in* the steel mesh while the concrete was being poured, and that he reported this on 7 September to Mr Laing, who told him to stop whining like a woman.

229. The claimant's evidence in chief was to the effect that on 7 September, he contacted Mr Laing because he was concerned about Murphy`s incompetence, in pouring the foundation on the wrong place, and on that occasion, Mr Laing told him to stop whining like a woman.

230. The claimant therefore did not suggest in his evidence that he was told to stop whining like a woman by Mr Laing, when he raised concerns about the health and safety issues around Murphy`s work but rather that when he raised issues about Murphy`s incompetence. This unexplained inconsistency cast considerable doubt on the veracity of the claimant's evidence as to what actually took place.

231. The Tribunal also had regard to the site diary entries which the claimant produced. The entry at page 66 was to the effect (as spoken to by the claimant in his evidence in chief) that it was Mr Gordon who stopped the pour of concrete by Murphy`s on 7 September. The claimant stated in evidence in chief that he was becoming extremely concerned about the working practices on site and that he noted these in the site dray at page 66 of the bundle. There is however no note of concern about work practices in the site dairy at page 66 beyond comment about that it was believed Murphy's were putting the foundation in the wrong area.

232. The site diary at page 65, states that it was Mr Gordon who stopped work on site because of Murphy`s chucking in mesh on 5 September and the claimant spoke to Mr Laing regarding their methods of work.

233. However the site diary at page 65, notes under '*health and safety'* "*no water for site huts*" which does not suggest that the claimant considered, or

raised Murphy`s working practices as a health and safety issue with Mr Laing, but rather suggests it was Mr Gordon, and not the claimant who may have had concerns about Murphy's working practices.

234. Even if that diary entry accurately recorded what occurred on 5 September, it did not support the conclusion that the claimant informed Mr Laing that Murphy`s were using unsafe work practices on site, as he claimed in evidence.

235. Taking into account its general view of the claimant's credibility, and the inconsistencies which were unexplained between the claimant's evidence in chief, and the additional information which was provided to the Tribunal, the Tribunal was not satisfied that the claimant's evidence was to be accepted over Mr Laing's.

236. **Alleged Disclosure (i) of 24/30 September (Scaffolders not wearing Harnesses); (ii) Mr Laing instructed bricklayers to move scaffolding (13 October; (iii) unskilled labourers reported to Mr Laing as not wearing harnesses (14 October).** It was the claimant's evidence in chief that on 24 September some employees from Enviroscaf were on the scaffolding without harnesses. The claimant said he stopped work and telephoned Mr Laing to inform him of this and he asked Mr Laing whether he wanted the scaffolders to leave the site and inform the company by email that any further breaches would result in termination. The claimant said that Mr Laing told him it would be difficult to get another company and not to be too "*heavy handed*" despite the risk. The claimant said the workers from Enviroscaf were then moved the following day to the respondents Slamannan site, leaving Aiket without certified scaffolders.

237. The claimant said he noted his concerns in the site diary. He referred in this connection to the document produced at page 69, which is an extract from the site diary for Aiket, which the claimant produced, and in which he noted there was a health and safety issue "*Enviro staff no harnesses*" and thereafter under notes "*on site 9.33 staff working on castle no harness email SL*".

238. Mr Laing's position was that there was no issue raised by the claimant on 24 September as he alleged, but it would in any event have been appropriate for the claimant to have stopped the scaffolders if they were working unsafely without harnesses. Mr Laing said that was the claimant's job to do this and he did not need to tell Mr Laing before he did it. Enviroscaf were employed by the claimant on a fixed price and if the claimant had stopped work because they needed to get harnesses, then he did not even have to tell Mr Laing he had done it. Mr Laing denied the comments attributed to him.

239. The Tribunal was satisfied that Mr Laing as opposed to the claimant's version of what occurred was to be preferred.

240. The Tribunal was satisfied that the claimant brought to the attention of the Enviroscaf scaffolders the necessity of wearing harnesses; it did not conclude that he raised this as a health and safety issue with Mr Laing on 24 September, or that Mr Laing ignored his concerns.

241. In circumstances where it was recognised to be part of a Site Manager's role to stop work which is considered to be unsafe, it lacked credibility that Mr Laing would have behaved in the way described by the claimant. The inclusion in the progress report (which Mr Laing saw) of the issue with scaffolders not wearing harnesses and being told that they would be removed from site, is inconsistent with the attitude attributed to Mr Laing by the claimant.

242. In reaching its conclusion the Tribunal also takes the following into account. In his ET1 and additional information the claimant said he made a disclosure about scaffolders not wearing harnesses on 24 September, and that he repeated these disclosures on 30 September and 13 and 14 October.

243. In his evidence in chief the claimant made no mention of having repeated a disclosure about the scaffolders working without a harness on 30 September, other than the reference to scaffolders not wearing harnesses in the progress report.

244. Mr Gordon's evidence in chief was that the claimant raised serious health and safety concerns at a meeting on 30 September, and that Mr Laing appeared disinterested when the claimant complained about the fact that he did not have safety harnesses to provide the workers working at height at Aiket. It was Mr Gordon's evidence that Mr Laing did not respond to this and instead attempted to move the meeting forward much to the frustration of the claimant, Mr Gordon and the Architect. He said the claimant having got the "*cold shoulder*" from Mr Laing, then recorded in the minutes ;"*point 6 scaffolders on site not wearing harnesses have been told any further non-compliance will result in loss of contract*" to the visible frustration of Steven Laing.

245. The point 6 which Mr Gordon refers to is part of the progress report dated 30 September 2015. Mr Ross also gave evidence to the effect that the claimant raised serious health and safety issues during a meeting. In Mr Ross's evidence in chief he said the minutes of the meeting could be found at page 70 to 71 (the progress report).

246. The claimant did not say in his evidence in chief that he raised health and safety issues at a meeting with the client and the architect on 30 September or that Mr Laing reacted disdainfully to these issues having been raised at such a meeting.

247. Had the claimant spoken about health and safety issues at the meeting on 30 September in the presence of Mr Gordon, Mr Ross and Mr Laing, and as alleged Mr Laing treated these disdainfully, the Tribunal considered it likely that this would have formed part of his evidence in chief. The fact that it did not do so, cast doubt on the credibility of the witness evidence about what

the claimant was alleged to have said at a meeting on 30 September, and how Mr Laing responded.

248. The Tribunal was satisfied that there was inclusion in the progress report of a reference to the health and safety report from AC Services, and that scaffolders not wearing harnesses on site and would be told that any future non-compliance would result in loss of work.

249.. It did not however conclude these were natters were spoken about by the claimant at a meeting on 30 September as health and safety issues, and that Mr Laing ignored concerns raised by the claimant at that meeting.

250. In the site diary (page 69) for 24 September, the claimant notes that he emailed Mr Laing, however no email was produced in the bundle. It was put to him in cross-examination that there was an inconsistency between his evidence in chief, to the effect that he telephoned Mr Laing, and the entry in the site diary, to the effect that he emailed Mr Laing. The claimant said that he would have phoned and then followed matters up with an email. This was an inconsistency in the claimant's evidence which, albeit not determinative of the issue, taken alongside the inconsistencies in his evidence generally and the overall adverse impression of the claimant's credibility, caused the Tribunal to prefer the more straightforward evidence of Mr Laing, who denied having been advised of an issue on the 24th of September.

251. The Tribunal did not conclude that the claimant advised Mr Laing about the issue of Scaffolders not wearing harnesses on 24 September, and it did not conclude that Mr Laing told the claimant not to be too heavy handed.

252. The Tribunal was satisfied that Mr Laing was content that the claimant had dealt with the matter appropriately and in line with his responsibilities as site manager. It accepted his evidence about the approach he took to the claimant dealing with unsafe working practices.

253. **Allegation that Mr Laing had instructed bricklayers to move scaffolding/ unskilled labourers reported to Mr Laing as not wearing harnesses (13/14 October).** The claimant's evidence was that on 13 October the Architect came to site with Steven Laing and Derek Prain and that the claimant spoke with Mr Laing regarding the lack of scaffolding and scaffolders. The claimant said he explained to Mr Laing that scaffolding was constantly needed, and the job was being delayed as he had to wait for scaffolders to be sent to the site. The claimant said Mr Laing told him that he was "*spending a fortune on scaffolding"* and would not be spending any more and that the claimant should get bricklayers to move the scaffolding.

254. The claimant gave evidence that on 14 October it was scheduled to remove the main castle roof for dormers, but there was no roofing contractor brought to site to carry out this work. He said that he raised this issue with Mr Laing, and Mr Laing arranged for site labourers to carry out the work. He said that unskilled labourers then stripped the roof at Aiket. The claimant said he told Mr Laing that none of these men had harnesses. Mr Gordon was so concerned about the lack of harnesses and he purchased harnesses for the men on site.

255. Mr Laing denied having told the claimant to use bricklayers to move the scaffolding and denied having told the claimant that he did not intend to spend any more money on scaffolding or that the claimant informed him unskilled labourers working in the roof did not have harnesses.

256. On balance the Tribunal did not conclude that Mr Laing had told the claimant to use bricklayers to move the scaffolding or that he did not intend to spend any more money on scaffolding, or the claimant had told him there were unskilled labourers on the roof without harnesses on 14 October.

257. There were a number of elements which cast doubt upon the claimant's version of events in this regard. The Tribunal was taken to an email from a scaffolding company of 12 October (Monday) confirming to the claimant that they would deliver a load of scaffolding on Thursday, with the balance on Friday, of that week, and a reply from the claimant of 14 October,

acknowledging this, and asking that the scaffolding be sent to the site at Aiket (page 409 and 408). The Tribunal was also taken to an email sent by the claimant to another member of staff on site on 16 October asking if scaffolders were on site yet, and the response confirming that they were on site from 9am to 5pm that day. This supports the conclusion that there were scaffolders on site at least on 16 October and is inconsistent with the statement attributed to Mr Laing by the claimant to the effect he would spend no more money on scaffolding and that bricklayers should be used to move the scaffolding.

258. Furthermore the tribunal was taken to an email chain (page 188) from the claimant to Mr Laing; the claimant emailing Mr Laing on 27 November giving him prices to buy scaffolding for Aiket Castle. Mr Laing emailed back on 1 December "*purchase have got quotes from others more expensive".*

259. The claimant said he *disagreed with the validity* of this email, but produced no evidence to substantiate his claim that the email was in some way "*invalid".*

260. Mr Laing's approval of spending on scaffolding in this way was inconsistent with the claimant` statement to the effect that he told that the respondents would not be spending any more money on scaffolding and that he should get brickies to move the scaffolding.

261. In addition the Tribunal found Mr Laing's explanation as to why he would not have instructed brickies to move the scaffolding to be a plausible one. Firstly, he explained they were untrained, and there was a health and safety issue. Secondly, they would likely have taken longer than trained scaffolders to do it, and the cost of bricklayers was no cheaper than the cost of scaffolders, and therefore it made no economic sense to instruct bricklayers to carryout out scaffolding work.

262. Another element which cast doubt on the claimant's position was his acceptance that the respondents had spare harnesses to hand. If that was

the case, then there was no explained reason why unskilled workers could not have been given harnesses, if they required them.

263. These elements all cast doubt on the credibility of the claimants evidence in relation to the events alleged on 13 and 14 October.

264. The Tribunal was not persuaded that much was to be taken from Mr Gordon's evidence that he supplied harnesses, because he said Mr Laing refused to provide safety harnesses necessary to keep workers at Aiket safe. As indicated above the Tribunal formed the view that a good deal of Mr Gordon's evidence was very significantly coloured by his litigious dispute with the respondents, and in any event he did not identify having purchased harnesses because of events on 14 October.

265. Taking these matters into account, and its assessment generally of the credibility of the claimant against Mr Laing, the Tribunal preferred Mr Laing's version of events.

266. The Tribunal did not conclude that the claimant raised issued about scaffolders / unskilled labourers not wearing harnesses with Mr Laing on 14th October or that Mr Laing had instructed him to get bricklayers to move scaffolding on 13 October.

267. **Disclosure on 7, 12 and 18 November -Muddy Conditions at the site –** The next disclosure relied upon was said to have taken place on 7, 12 and 18 November 2015. What is said by the claimant is that he observed the site becoming muddy and slippy and thus dangerous to those working there due to a damaged culvert pipe. He said that he reasonably considered this was an unsafe working practice contrary to health and safety legislation and he brought this concern to the attention of Mr Laing on 7 November, and 18 November, and to Mr Laing through Eric Prain on 12 November 2015. Mr Laing ignored these concerns.

268. What was said by the claimant in his evidence in chief was that on 7 November the culvert pipe was damaged and this resulted in water streaming down the driveway into the site. He said the road was already becoming extremely muddy due to heavy machinery and water was making working conditions even more hazardous. The claimant said that he spoke with Mr Laing on the telephone and informed him of this hazard on 7 November 2015. Mr Laing told him that in his opinion it was Murphy`s fault and that he would get them to pay for it. The claimant said that he asked if he could fix it, and Mr Laing said that he could not do so, until Murphy paid for it. The claimant said that the driveway was left with water streaming down it contributing to the hazardous conditions of the site.

269. The claimant said on 12 November 2015 Mr Prain attended a meeting on the site with Murphy`s Ltd and the surveyor and Mr Ross the architect, and after that meeting the claimant spoke with Mr Prain regarding the site conditions and the fact that water streaming down the road was making conditions hazardous for vehicles and workmen as well as for the client. He said that Mr Prain acknowledged the lack of funding going into the site and informed the claimant that Mr Laing was haemorrhaging money and would not be putting anything into Aiket because it was a fixed price. He said he was told to make do with what he had.

270. The third disclosure was said to have taken place on 18 November 2015 when the claimant attended a meeting at the respondent's office in Stirling with Mr Laing and Mr Prain. He said he was told that the RFIs which he completed were not up to standard, and were to be fixed by Derek Prain. The claimant said there were still outstanding issues concerning scaffolding and health and safety at Aiket and he tried to discuss the hazardous conditions of the Aiket site but was told by Stephen Laing that the meeting was not about that.

271. As with a number of the disclosures the claimant said he had made it was difficult to determine what information he was said to have disclosed.

272. In relation to the 7 November 2015 allegation however, the Tribunal was satisfied that on balance it was likely that the claimant informed Mr Laing about the burst pipe and water streaming from it into the site on or around 7 November, causing the working conditions to become muddy and difficult. Mr Laing accepted that there was a bust pipe, and it was plausible that the claimant contacted Mr Laing to tell him about what had happened, and the difficulties that it caused.

273. There was no dispute between the parties about the fact the site was muddy. The Tribunal was satisfied that this was apparent to all who visited the site, including Mr Laing and Mr Prain.

274. The Tribunal was also satisfied that there were discussions between Mr Laing and the claimant about these conditions with a view to trying to solve the problem. The fact that that was the case is apparent from the terms of the email Mr Laing sent the claimant on 8 December. Although the claimant took issue at the Hearing with the efficacy of the directions contained in Mr Laing's email, there was no dispute that it had been sent to him. The terms of email, which gives directions to the claimant as to how to deal with the muddy conditions at the site, supported the conclusion that there had been a discussion between the claimant and Mr Laing about the muddy conditions of the site and that Mr Laing was concerned about these, and was trying to resolve the issue.

275. Mr Laing's concerns about the conditions at the site are also apparent from the terms of the email he sent to Mr Ross on 30 November, which supports the conclusion that he was trying to do something about it, rather than ignore the issues the claimant raised on 7 November, and which were in any event very apparent to Mr Laing.

276. The Tribunal was satisfied that this was an issue which was apparent to Mr Laing, which he was trying to resolve, rather than the claimant's position that he had brought this to the attention of Mr Laing on 7 12 and 18 November and he ignored the concerns.

277. The claimant said in his evidence that he spoke to Mr Prain regarding the site conditions on **12 November** and the fact that water was streaming down the road making conditions hazardous for vehicles and workman and for Mr Gordon. The claimant said that there was a lack of funding going into the site and that on 12 November Mr Prain said Mr Laing was haemorrhaging "*money*" into Aiket because it was a fixed contract.

278. Mr Prain denied saying this. His evidence was he had no recollection of the claimant raising an issue about a burst pipe. He recalled the meeting on 12 November, and said that the claimant asked if they could carry out work on the access road. His response to the claimant was that he would not do so, as in all likelihood that the respondents would not be paid for doing such work.

279. Mr Prain explained that the original Tender which the respondents presented included the cost of fixing temporary access roads, however Mr Gordon had indicated that he could have this work done himself, and he instructed the work himself and therefore it was not part of what the respondents had contracted to do.

280. Tribunal found Mr Prain to be a straight forward and credible witness who did not seek to exaggerate or embellish his evidence. It was satisfied that he had a discussion about whether the claimant could carry out work to the access road, and Mr Prain responded as outlined above. The tribunal did not conclude that the claimant, as he claimed, said to Mr Prain that water was streaming down the road making conditions hazardous for vehicles, and workman, and for Mr Gordon. The condition of the site was apparent to all who visited it, which rendered it less plausible that such a statement would have been made, and Mr Prain had no recollection of it being made.

281. The claimant in evidence stated that there was a meeting on **18 November** which he attended with Mr Laing and Mr Prain. He said that he was advised the RFI sheets he completed were not up to standard, and required to be fixed. He said that Mr Prain commenced working on the RFIs and Mr Laing

started to work on the pricing mechanisms for stone and that the claimant answered questions when required. He said there were still outstanding issues surrounding scaffolding and the health and safety at Aiket Castle but was told that the meeting was not about that.

282. Mr Laing's evidence was that the concern which brought about the meeting was that Mr Gordon was regularly changing the plans and the respondents were not receiving A.I.'s. He spoke to the fact that the claimant's RFIs were good, and he had colour coded job matters which had been dealt with, and matters which were still outstanding. He said health and safety was not discussed.

283. Mr Prain had a vague recollection of the meeting, and could not recall any health and safety issues being raised at the meeting,

284. The Tribunal was satisfied on the basis of Mr Laing's evidence (to an extent corroborated by Mr Prain) that during the meeting issues around the project was discussed, but it was not a meeting at which the claimant raised various health and safety concerns about the Aiket site and was told that they would not be dealt with. The Tribunal was satisfied that the muddy conditions at the site, and the difficulties they caused, were apparent to Mr Laing, and he was trying to resolve this issue rather than, as the claimants claimed, ignore it.

285. **Meeting 7 December** It was not part of the claimant's case that he made a protected disclosure on 7 December, however he said in his evidence in chief that he attended a meeting on that date with Mr Laing and Mr Norman, whom he categorised as Mr Laing's lawyer. He said that it was apparent that Mr Laing wanted to be released from the contract with Mr Gordon; new RFIs were developed and were presented by LTM which made it look as though the problems were the claimant's fault. The claimant said he was made to look incompetent in front of the Architect and he was being blamed for things which were beyond his control and felt humiliated.

286. The findings in fact which were made in relation to the meeting on 7 December are set out above, and the Tribunal was not persuaded on the basis of the claimant's evidence that he was humiliated or bullied at this meeting, or that, as he averred, the respondents held him responsible for slowing down work at the site and increasing costs by repeatedly raising health and safety issues at the site. It reached this conclusion on the basis that it was not satisfied that the claimant had repeatedly raised health and safety issues at the site, or that these were ignored. It also took into account its generally unfavourable impression of the claimant's credibility.

287. **Disclosure 15 December - Advising Mr Laing that to move heavy stone blocks without appropriate machinery was an unsafe working practice contrary to Health and Safety legislation.** There was a conflict between the evidence of Robert Pearson and Mr Oakes, and the claimant, with that of Mr Laing as to what occurred at a meeting on site at some point in December 2015.

288. The claimant's evidence is that when Robert Pearson started on site on 15 December, he asked the claimant about the availability of machinery to move the stones. The claimant said because Mr Laing was on site he asked him to speak to Robert Pearson about obtaining equipment for safely moving the stones. Mr Laing said '*If you don't fucking like it yours can get your arses up the road'*

289. Mr Oaks and Mr Robert Pearson spoke to a meeting which was alleged to have taken place with Mr Laing, at which they said they complained of an unsafe practice regarding the handling of stones and when asked for a hoist, Mr Laing is alleged to have said "*if you don't fucking like it you can get yourselves up the fucking road*", or words to that effect. Neither of them could pinpoint the date of this.

290. On balance, the Tribunal was not persuaded that this had occurred.

291. On 20 November 2015 Mr Laing authorised the purchase of a Lewis Pin for Aiket Castle to move heavy stone blocks. On 8 December Mr Laing

emailed the claimant on a number of action points, including organising a lifting beams, blocks and slings for installing the dormer stonework, and ensuring all lifting plant was in place for masons to use, and he asked the claimant to organise lifting beams, blocks and slings for installation for the dormer stonework. There was a telehandler on site. In March 2016 Mr Laing approved the hire of a crane when he was asked to by the claimant (pages 113, 115).

292. Such actions on the part of Mr Laing are inconsistent with the notion that he was refusing to provide equipment necessary for the stonemasons to safely do their job.

293. The Tribunal also takes into account that in the risk assessment for Aiket Castle, prepared by the claimant, under the *manual handling section*, noted that the preventative measure "*block and tackle will be implemented for large stones*" (page 51).

294. The claimant accepted that he had hoist on site for lifting 200 kilograms of weight. When it was put to him that his stonemason witnesses spoke about lifting stones which were lighter than 200 kilograms, and therefore could be lifted by the hoist, the claimant had no explanation for this.

295. The claimant's position on this point was further undermined in that Mr Clifford in his evidence , unprompted, sought to suggest that he got the weight of the stones wrong in his evidence in chief witness statement, but provided no plausible explanation as to why that was the case, and his evidence about this lacked any credibility.

296. The Tribunal therefore did not conclude that the claimant informed the respondents of the danger of lifting stones without adequate equipment in December, or in January/February 2016. The Tribunal is fortified in this conclusion in that although the claimant stated in his further particulars of claim, that he raised health and safety issues about moving stone without machinery for building purposes, he made no specific mention of having

done so in his evidence in chief beyond the allegation that it was raised on 15 December.

297. **Allegations in December 2015/January/February 2016.** The claimant made a number of allegations about December 2015/January/February 2106 at the Aiket site.

298. The claimant said that as a direct result of being ignored an injury occurred on site and Mr Clifford was in an accident on 16 December.

299. There was no evidence to support a conclusion to the effect that because the claimant's concerns were ignored Mr Clifford was injured.

300. The claimant claimed that LTM were *on stop* with all building merchants and there were not enough materials on site. The Tribunal was satisfied that it was not correct that the respondents were '*on stop'*. The claimant accepted that was the case in cross examination.

301. The claimant claimed that because of lack of men and scaffolding conversations between him and Mr Laing were becoming even more heated.

302. Mr Laing denied there was a lack of recourses. He accepted that there were challenges on the job; he said that was because of because of the difficulty with the client. He denied however that there were more heated conversations with the claimant. He accepted that by January he had concerns and questioned the claimant's management of the works on some occasions and brought these concerns to the claimant's attention.

303. The fact that the job had become difficult was apparent from the increased frequency of Mr Laing's visits. The Tribunal was satisfied that the issues at the job were likely to have given rise to conversations between the claimant and Mr Laing about the claimant's management of the works. The Tribunal

did not conclude however that Mr Laing bullied the claimant or told him that he was lazy and incompetent, as the claimant claimed, on 4 February.

304. The Tribunal formed the impression that Mr Laing's issues arose from his difficulties with Mr Gordon, and that he had some sympathy for the position the claimant was in, in having to deal with Mr Gordon (indeed he said that was the case). The manner in which Mr Laing responded to the claimant's resignation in March (attempting to have him reconsider his position and suggesting that his letter of resignation was uncharacteristic) also lends support to his conclusion that he was not bullying the claimant, although he may have had concerns about his management of the works at Aiket.

305. The claimant claimed that in February he asked Mr Laing for scaffolders and was told by him that scaffolders were in short supply and that he should use bricklayers to erect the scaffolding. Mr Laing denied this happened.

306. The Tribunal preferred the evidence of Mr Laing in this point. The factors which it takes into account in doing so include the investment in the claimants training, the provision of health and safety materials, and the instruction of independent Safety Consultants on a regular basis, the lack of economic benefit in having bricklayers move the scaffolding, and that it was not the case that Mr Laing was refusing to spend any more money on Scaffolding. There were scaffolders on site in January. The claimant claimed that the invoice of 31January for Bruce Bradford was '*invalid'*, however there was nothing on the face of it to support a conclusion that it was.

307. In reaching its conclusion as to whether, as alleged by the claimant, Mr Laing told him to get bricklayers to move the scaffolding, the Tribunal also take into account the documents produced by the claimant, which are timesheets for a Noel Paton, and a B McCann (pages 98 and 100) which are for the week commencing 15 February 2016. For the Wednesday and Thursday of that week, the time sheets contain entries "*block wash and*

scaffolding; take down scaffolding, and sort scaffolding". These time sheets are signed by the claimant.

308. Firstly these timesheets did not support the conclusion that an instruction had been given by Mr Laing, as alleged by the claimant.

309. Secondly it was the claimant who was in charge of the day to day operation of the site, therefore he would have been in a position to instruct Mr Paton and Mr McCann as to what work to do on the site, and having regard to the claimant's overall lack of credibility, the Tribunal were not persuaded that Mr Laing instructed the bricklayers to erect scaffolding in February or at any other time.

Allegations of Bullying by Mr Laing

310. The claimant's case is that he was upset and demeaned by Mr Laing's response to his raising his concerns about health and safety, which he relies upon as public interest disclosures. He gave evidence about what Mr Laing was alleged to have said over a range of dates in response to his rising concerns which is set out above**.** Mr Laing denied what was alleged against him and denied having bullied or demeaned the claimant.

311. The tribunal, for the reasons given above, was not satisfied that the claimant's version of these events was to be accepted. The Claimant did not impress the Tribunal as a credible witness, and it formed the view that he misrepresented what had occurred with a view to supporting his case. The Tribunal did not conclude that Mr Laing subjected he claimant to bullying or humiliating or demeaning treatment.

Scaffolding

312. There was a good deal of evidence about scaffolding at the Hearing. It appeared to the Tribunal that there were there were a number of relevant points of conflict.

313. The first was whether the claimant required to obtain authorisation from Mr Laing on each occasion when he wanted scaffolders to attend the Aiket site. It was the claimant's position that he needed Mr Laing's approval before scaffolders attending the site, and that Mr Laing did not give this.

314. The Tribunal did not conclude that this was he case. It was satisfied on the basis of the evidence of Mr Laing and Mr Prain that while the claimant required to obtain approval for the purchase of materials/ hire of a subcontractor to perform a piece of work , it was thereafter up to him to arrange for the subcontractor, including the scaffolders, as they were required on site.

315. The Tribunal is supported in this conclusion in that it was not taken to repeated requests by the claimant for the attendance of scaffolders at the site, nor indeed to any requests for the hire of subcontractors or purchase of materials, which had been made by the claimant, and refused by Mr Laing.

316. The second issue was whether there was a refusal by Mr Laing to spend money on scaffolding. This is dealt with above, with reference to the allegations that bricklayers were instructed to move the scaffolding, and for the reasons outlined above the Tribunal did not conclude that there was a refusal by Mr Laing to spend money on Scaffolding

317. The third point was whether it was the claimant's responsibility to put right defects noted in the Scaffolding checklists he completed, and defects or problems noted in the AC Safety's inspection report.

318. The Tribunal was satisfied this was the claimant's responsibility as Site manager. It takes into account the claimant's evidence in chief on this point; he accepted that it was his job, albeit he said the reason he did not do

so, because he was not able to phone scaffolders to fix the defects (in reference to the AC Safety report of 29 February).

319. The next point is whether the reason why the claimant did not put right the defects in the AC safety report of 29 February and Scaffolding Checklists of 22 and 29 February and 3 March was that he could not arrange for the attendance of scaffolders on site, as he did not have Mr Laing's authority to do so.

320. The Tribunal was not satisfied that this was reason the claimant did not remedy the defects.

321. Firstly, the Tribunal was satisfied that after the claimant engaged the subcontractors having obtained the approval of Mr Laing to do so, he could thereafter arrange for attendance of a subcontractor at the site without referring back to Mr Laing.

322. Secondly Mr Laing clearly instructed the claimant to make good the issues raised by the A C Safety report of 29 February. In an email of that date he gave the claimant the instruction to "*make sure all this is made good immediately*".

323. The claimant accepted he had seen this email. In cross-examination he said he had put some elements right, but that some elements needed scaffolders. It was put to him that he did not request scaffolders. The claimant said he did; he said he asked Mr Laing. When it was put to him there was no email to this effect, he said he had spoken to Mr Laing on the telephone.

324. There was however no reference to such a telephone conversation in the claimant's evidence in chief.

325. In reaching it's conclusion as to the credibility of the claimant's position, the Tribunal take into account that the claimant's evidence in chief makes no reference to the email which he received from Mr Laing telling him to put the

issues identified in the AS Safety report right, the fact that he had put some issues right, or that he was prevented in the course of a telephone call with Mr Laing from engaging scaffolders and therefore remedying the defects.

326. The last point in particular was material to the claimant's position, and had this occurred the Tribunal would have expected the claimant to give evidence in chief on it, and the fact that he did not do so impacted on the credibility of the claimant's position.

327. The Tribunal did not conclude that the reason the claimant failed to remedy the defects identified in AC Safety's report, and identified in the Scaffolding Checklists he himself completed on 22 and 29 February and 3 March, was because Mr Laing refused or failed to provide a scaffolders for the Aiket site.

328. The next conflict was whether the Mr Laing was given the Scaffolding checklists completed by the claimant on 22 and 29 February. The Tribunal was satisfied that generally Mr Laing did not see the scaffolding checklists.

329. The claimant said in evidence that he showed Mr Laing his checklist of 29 February and discussed this with him. Mr Laing denied this. The Tribunal preferred Mr Laing's version of evens.

330. Mr Laing accepted that he saw AC Safety's report of that date, and indeed he instructed the claimant to act on it. The fact that he did so, and that it was the claimant's responsibility to put right the defects noted, is inconsistent with the notion that it was the claimant who was bringing these issues to the attention of Mr Laing, by virtue of a checklist he completed on the same day as AC's report. Rather it appeared to be the other way round, with Mr Laing highlighting to the claimant the need to sort out the problems with the scaffolding.

331. The Tribunal did not conclude that Mr Laing saw any of the Scaffolding checklists completed by the claimant, including that dated 29 February.

332. On the scaffolding inspection checklist of 29 February the claimant noted "*need scaff ASAP – SL not helping*". The Tribunal did not attach significant weight to this comment weighted against the other factors which it took into account. There was no dispute that scaffolders were needed at the site. The Tribunal was unable to read into *'SL not helping* that Mr Laing was preventing scaffolders attending the site. Indeed it made no sense for him to take that approach in light of his instruction to the claimant to sort out the defects identified by AC Safety.

333. The claimant said in evidence in chief that Mr Gordon attended a meeting on 29 February and said health and safety had to improve. This evidence was not corroborated by Mr Laing, or by Mr Prain. Mr Prain said Mr Gordon attended the site office that day but only communicating effectively that he was unhappy. The Tribunal preferred this version of events over that of the claimant, and was fortified in this conclusion, in that Mr Gordon, in his evidence in chief did not say that he raised health and safety concerns at the meeting on 29 February.

Claimant's resignation

334. There was a conflict between the claimant's evidence and that of Mr Laing as to what occurred on Friday 4 March 2014, when the claimant emailed Mr Laing saying the client was on site etc (page 119 referred to in the Findings in Fact).

335. It was the claimant's evidence that Mr Gordon noticed the scaffolding was not certified and was unsafe and as he (Mr Gordon) was a consultant in this field, he had asked who had erected the scaffolding and requested an answer. The claimant sent an email on 4th March to Mr Laing, (119) who refused to give the claimant an answer for Mr Gordon. This was the breaking point as far as the claimant was concerned, as he was now being instructed by the Mr Laing to put other's lives at risk, and cover up for him.

336. It was Mr Laing's evidence that he recalled receiving the email from the claimant, and immediately telephoned him, as he wanted to be sure that the claimant was clear about his instructions. He said he told the claimant to let Mr Gordon see the AC Safety report, and it was necessary to rectify the issues before Mr Gordon returned on site. He said he asked the claimant if he had made good the issues in the report; the claimant responded he had no time to contact scaffolders.

337. On balance the Tribunal preferred Mr Laing's version of events.

338. In light of the Tribunal's conclusion that the claimant had not been denied access to a scaffolders by Mr Laing, Mr Laing's version of what occurred was the more plausible one, and the Tribunal was satisfied on the balance of probabilities that he responded immediately to the claimant's email, as he said, by telephoning him and telling him to make the report available to Mr Gordon and asking the claimant if problems had been rectified.

339. Such a response on the part of Mr Laing was also consistent with the terms of his email to the claimant telling him to make good the defects identified in AC Safety's report.

340. In reaching its conclusion the Tribunal also took into account the terms of the claimant's email of 7 March to Mr Gordon (page 122- set out in the findings in fact) .The Tribunal did not attach significant weight to the terms of this email, which were inconsistent with the claimant's evidence in chief.

341. It did not appear to the Tribunal to be credible that the claimant had been told, as he claimed, one thing by Mr Laing in an email, which Mr Laing then contradicted in a telephone conversation, but omitted to say this in his evidence in chief. This omission casts considerable doubt on the statements made in the email to Mr Gordon.

342. The Tribunal was further fortified in this conclusion, in that in evidence in chief, the claimant said that he had emailed Mr Laing on 4th March (page

119) but by the Monday he got nothing back. He thereafter decided to resign.

343. Therefore not only did the claimant omit to mention in evidence in chief that he was being told one thing in an email and then contradicted on the telephone by Mr Laing, but his evidence was in relation to the email of 4th March, that he got nothing back from Mr Laing.

344. The Tribunal was satisfied that albeit the email of 7 March 2016 was a contemporaneous document, it did not represent the facts accurately.

Submissions

345. Both parties produced written submissions which they supplemented with oral submissions.

Claimant's Submissions

346. Mr Hardman took the Tribunal to the claims made, and submitted there were 5 relevant issues on the merits:-

1. Did the claimant make a qualifying disclosure to the respondents, and if so when and how?

2. Whether the claimant suffered any detriment or dismissal by reason of having made such a disclosure?

3. Whether the claimant was constructively dismissed by the respondents and what was the reason for the constructive dismissal, and was that constructive dismissal unfair?

4. Did the respondents fail to pay the clamant agreed overtime or holiday pay?

5. Did the respondents fail to provide the claimant with written terms of employment?

347. In relation to the constructive unfair dismissal claim Mr Hardman submitted that the claimant had the requisite continuity of service. He asked the Tribunal to draw an inference from the fact that Mr Bennie was not called to support the respondent's position. Mr Hardman referred to a number of pieces of evidence in support of his position that the claimant had remained in employment, including the fact that Mr Laing accepted no new contract of employment was issued, and that the respondents had not challenged the claimant's evidence that he did not receive a P45.

348. Mr Hardman referred to Sections 210 to 219 and in particular 210(5) of ERA which sets out there is a presumption of continuity of employment unless the contrary is shown, and submitted that the respondents had failed to overturn the presumption in favour of continuity of the claimant's employment throughout April. On that basis Mr Hardman submitted that the claimant had the requisite service to bring a complaint of constructive unfair dismissal.

350. Mr Hardman then made submissions on the evidence, submitting that the claimant had given evidence in a straightforward, forthright manner. Mr Hardman drew support for the claimant's position from the evidence given by the stonemasons. He submitted the evidence in this case was clearly influenced by the building dispute which was running contemporaneously with these proceedings between Mr Laing and Mr Gordon. The claimant was caught in that dispute, but was not himself a party to it. Mr Hardman submitted that the respondents position to the effect the claimant manufactured this claim was extraordinary and could not be sustained.

351. Mr Hardman referred to the case of ***Chesterton Global Ltd (t/a Chesterton's) –v- Nurmohamed [2015] IRLR 614*** and submitted that the disclosures which the claimant made, following the guidance in that case, constituted disclosures for the purposes of Section 49B of ERA.

352. Mr Hardman referred to the disclosures which the claimant was said to have made, with reference to the bundle and the claimant's witness evidence. He submitted the claimant suffered a detriment and he identified the detriments which was said to been accorded to the claimant on the grounds of having made the disclosures.

353. Mr Hardman then dealt with whether the claimant was constructively dismissed. He submitted that by 4 March 2016 the claimant had serious concerns about a number of health and safety issues on the Aiket Castle site, particularly the health and safety of men working on the scaffolding. He had disclosed these to Mr Laing.

354. The client, Mr Gordon, was pressing the claimant about similar health and safety concerns.

355. By 7 March 2016 the claimant was clearly under considerable strain. He was forming the view that he must resign from his employment. Mr Hardman submitted the reason the claimant formed that view was set out in the claimant's evidence in chief in his witness statement at paragraph 99 which was to the effect that the claimant had reached the conclusion that despite his best efforts "*the respondents were not going to provide the necessary financial and human resources necessary to enable me to manage the Aiket Castle site safely. I was also convinced that if I continued working I may be held responsible (and potentially prosecuted) if there was an accident resulting in someone being hurt or killed*." Mr Hardman submitted the claimant confirmed this in re-examination, when he spoke about an instance when he seen a man badly injured at a badly run a site in Edinburgh. He did not want to be responsible for killing anyone and that was why he resigned.

356. Mr Hardman submitted a resignation for that reason amounted to automatic unfair dismissal in breach of Section **103A** and the principal reason for the claimant's resignation was that he had made the protected disclosures described.

357. Mr Hardman also submitted the resignation amounted to a dismissal under Section **95(1)(c)** of ERA, in that the respondents fundamentally breached the implied term of trust and confidence in the claimant's contract of employment and his dismissal was unfair.

358. In relation to the claim for holiday pay Mr Hardman adopted his submissions in relation to continuity of employment for the purposes of this part of the claim and he submitted unpaid holiday pay or wages amounted to £1,680, this was £2,128 - £448; £2,128 was wrongfully deducted from the correct salary due to the claimant for April 2015 but of £448 was adjusted back in his salary in May.

359. Lastly Mr Hardman dealt with whether the respondents had failed to provide written term of employment. In this regard he referred to the inaccuracies in the documentation before the Tribunal, albeit his primary position was that the claimant did not receive any terms and conditions of employment.

Respondents Submissions

360. Mr Bealey for the respondents submitted that primarily this case turned on the Tribunal's determination of the facts.

361. The Tribunal has to focus on the written pleadings especially the further and better particulars of the claim. It was also necessary to consider some of the other evidence placed before the Tribunal in order to get an overall picture. The respondents take health and safety issues seriously although obviously there is always room for improvement. The Site Manager's most important role is to ensure health and safety compliance and the daily failings at the Aiket Castle site were the responsibility of the claimant.

362. Mr Bealey made submissions on the health and safety at the Aiket Castle site referring to the documentation, the employment of independent consultants, and the site progress reports.

363. In relation to the purchasing of health and safety equipment Mr Bealey submitted there no constraints on the claimant's spending in this regard and he referred to various invoices in the bundle in support of this. He also made submission as to the incredulity of the claimant's position that the respondents had been put "*on stop*" with building merchants which he submitted had been demonstrated as untrue. The claimant had accepted there were a number of instances when he had said he had spent money at the Aiket site.

364. Mr Bealey then dealt with the scaffolding at Aiket, and the checks put in place by the respondents to ensure the scaffolding was safe. Mr Bealey submitted that the Tribunal should note the claimant had been able to produce certain site diary entries and scaffolding inspection reports which, if genuine, may support elements of what he was saying. Clearly the only ones he can find which may indicate he was telling the truth, (and Mr Bealey submitted that was very remote possibility), are the ones which had been lodged.

365. Furthermore, the claimant admitted the site diaries remained at Aiket Castle and he had no idea whether the scaffolding inspection checklists were seen by Mr Laing.

366. The competence of the scaffolders was never questioned. Mr Bealey submitted the issues around the scaffolding seemed to fall into supply of scaffolding and the supply of scaffolders. The documents supported the conclusion the claimant was authorised to purchase scaffolding as he wished, and there was evidence from that scaffolders were on site in January 2016.

367. As to the state of the scaffolding Mr Bealey referred to the first report produced by AC Safety dated 22 September as to the number of defects. The claimant accepted in cross-examination that he had acted on this report and put things right albeit Mr Gordon said he did not. In any event the progress report produced by the claimant on 3 October did not report any

problems with the scaffolding. The next report was on 25 December 2015 and raised only issue with the scaffolding at point 9. Mr Bealey said it was therefore safe to assume the work had been done as required. The next health and safety report was on 10 February 2016, which admittedly the claimant said he did not complete and there was no reference to problems with scaffolding.

369. The next record, is the claimant's own scaffolding inspection check list for 22 February 2016, in which he had identified some problems with scaffolding including housekeeping issues which were clearly his responsibility, and the claimant did not declare the scaffolding to be unsafe at that point.

369. On 29 February 2016 there are two inspections. There is the claimant's own scaffolding inspection check list which again highlights some problems, and which in Mr Bealey`s submission suggested the claimant was not keeping on top of housekeeping. The comments "*Need Staff ASAP*" were in the Mr Bealey`s submission not contentious in that neither side disputes that this was the case. In relation to the comment "*SM not helping*", Mr Bealey submitted it was not clear how Mr Laing was not said to be helping. It did not record the fact that Mr Laing had stopped the claimant getting scaffolders or recording that the scaffolding was unsafe.

370. Mr Bealey submitted the AC Safety report on 29 February identified 9 issues the last 3 of which the claimant could put right immediately and the other 6 he said in cross-examination could be put right within a few days with a team of scaffolders.

371. When the AC Safety report of February 2016 was issued Mr Laing emailed the claimant stating "*make sure all this was made good immediately*". There was no response from the claimant, and it was Mr Laing's evidence he had to chase the claimant up by telephone and the claimant had still not acted on Mr Laing's instructions.

372. On 7 March, the day on which the claimant apparently decided to resign, there was a further scaffolding check list from the claimant from which it was apparent he had again not got on top of housekeeping issues. The problems he identified were unsurprising given he had not arranged for scaffolders to come and put it right. For the first time notes on this report were "*scaffolding not safe*".

373. Mr Bealey pointed to a number of matters which he submitted rendered the claimant's version of events entirely incredible, and supported the respondent's position which was that Mr Gordon wanted to remove LTM from the site and hand work over to Sean Pearson's company, and the claimant was complicit in this. Mr Bealey made a number of submissions in support of this, including the incredulity of the position of Mr Gordon, who said he wanted to calm and sooth the claimant down as he was in a heightened state of distress, and so sent him to one of his own company's which provides services for self employed and CIS workers. That company was not able to assist the claimant but managed by the end of the day to set up a limited company for the claimant, although Mr Gordon was said only to have found out weeks later that that was the claimant's intention. Mr Bealey pointed also to the timing of matters, and the fact that Mr Pearson intimated his intention to resign to Mr Gordon before he intimated it to the respondents, and the fact that Mr Gordon did not contact the respondents when he learned of this.

374. Mr Bealey also made submissions as to the employment of the claimant by Mr Gordon, and again made submissions as the credulity of the position that Mr Gordon was going to call on the clamant from time to time, but issued him with a contract under which he was to be paid £45,000 per annum plus a van. There was no suggestion of a pro rata annual fee, and the claimant was paid £10,000 upfront. In spite the claimant saying the cheque was returned there was no record of that beyond the claimant's and Mr Gordon's evidence.

375. It was accepted claimant did begin to work for Mr Gordon albeit at another site, and subsequently took over the work at the Aiket site.

376. Mr Bealey submitted that Mr Laing gave his evidence in a credible and reliable manner and his evidence should be accepted. The allegations that Mr Laing was a bully and a very aggressive man were not supported either by the terms of his correspondence in the bundle, or his conduct in the course of the Tribunal Hearing, or the manner in which he gave evidence.

377. Mr Bealey then made submissions as to further and better particulars of the claim, and submitted the Tribunal must focus on the claim before it. The claimant was ordered to provide full specification of all protected disclosures and the precise terms of each disclosure giving full specification of all detriments including the precise nature of each detriment. The respondent's position is that no such conversations took place and the claimant was never subjected to a detriment.

378. Further if any such disclosures took place they did not qualify as protected disclosures within the meaning of the ERA in that the claimant did not reasonably believe that what he alleged showed one or more of the list of types of wrongdoing had occurred.

379. The claimant's further particulars used the cut and paste sentence "*the claimant reasonably considered this was an unsafe work practice contrary to health and safety legislation*". There must be the full specification of the protected disclosure and the precise terms of the disclosure, and this does not satisfy any of the requirements. It was unbelievable that the claimant used exactly the same phrase or pretty much the same phrase on each occasion. The further and better particulars say that the claimant *reported his concern*. Although the claimant sought during the Hearing to elaborate on what was said he must be held to the further and better particulars submitted. These did not indicate at all what his concerns were. The reason for this was of course that he did not say anything at all.

380. Mr Bealey then took the Tribunal to each of the disclosure which were said to have been made and made submissions as to why the Tribunal should not conclude that they amounted to disclosures.

381. Mr Bealey submitted the claimant had been issued with a contract of employment, and even if there were inaccuracies in the document it met the requirements of the ERA.

382. Mr Bealey submitted that the evidence supported the conclusion that the claimant had resigned in 2015, and therefore did not have the requisite continuity of employment to bring a constructive unfair dismissal claim under Section 95.

383. The holiday pay claim should not be upheld.

384. Mr Bealey invited the Tribunal to dismiss all the claims against the respondents.

Consideration

385. The claimant brings claims under Section **47B,** Section **103 A,** Section **94,** Section **23** and Section **38** of the ERA.

386. There was also a complaint of breach of contract, which was withdrawn by Mr Hardman on behalf of the claimant at the point of submission, after evidence had been heard.

Section 94 Claim

387. The claimant's complaint of unfair dismissal under Section **95(c)** is contingent upon him having the requisite length of service to present a complaint under Section **94** of ERA.

388. In considering whether the claimant had the requisite length of service, the Tribunal take into account the terms of Section **201(5**) of ERA which provides that a person's employment during any period will, unless the contrary is shown, be presumed to have been continuous.

389. The effect of this is that every week during a period of employment is presumed to be a week that counts unless there is evidence that continuity have been broken. There is a presumption of continuity of employment, and the burden of rebutting it falls on the respondents in this case.

390. The Tribunal was satisfied, for the reasons which are outlined above under *Note on Evidence,* that the claimant had resigned, and that the last day of his employment with the respondents was 2 or 3 April 2015. The Tribunal concluded that the claimant's employment came to an end by virtue of his resignation. It also concluded thereafter he was re-employed by the respondents, that employment commencing on 27 April 2015.

391. The Tribunal was satisfied that the respondents had discharged the burden of proof which they have under section **201(5),** and that the claimant did not have continuity of employment from 2012. The claimant therefore lacked the requisite service to present a complaint under Section **94** of ERA. The effect of this conclusion is that the Tribunal does not have jurisdiction to consider the claimant's complaint of unfair dismissal under Section **94** of ERA.

Section 23 Claim

392. The claimant presented a complaint in relation to unauthorised deductions from his wage/failure to pay holiday pay. Mr Hardman accepted that in the event the claimant was found not to have continuity of employment through

April 2015, then this claim would fall away. The effect of the Tribunal's conclusion on the continuity of employment point is that this claim cannot be sustained, and this claim is dismissed.

Section 47B Claims

393. Section **47B** of ERA provides:-

> *"(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*"

394. Section **43A** of ERA provides that a "*protected disclosure*" means a qualifying disclosure as defined by Section **43B** which is made by a worker in accordance with any of sections **43C to 43H.** Section **43B** provides:-

> "(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."

395. The claimant's disclosures are said to be under paragraph **43B (1)(d).**

396. Consideration of the claimant's Section **47B** claims requires the Tribunal to consider whether he made a protected disclosure in terms of that section, and secondly, whether he was subjected to a detriment on the grounds of having made that disclosure.

397. The claimant alleges he made a number of protected disclosures, and the Tribunal considers these in turn.

Alleged Disclosure 5/7 September

398. The first alleged disclosure is said to have taken place on 5 September 2015, when the claimant discovered that a subcontractor, Murphy's was pouring a cement foundation without steel mesh strengthening and then "*chucking in*" steel mesh while the concrete was being poured. It was said the claimant reasonably considered this as an unsafe work practice contrary to health and safety legislation, and that on 7 September 2015 he advised Mr Laing of his concern.

399. In order to qualify as a disclosure under Section **43B,** there must be a disclosure of information.

400. For the reasons which are set out under "*Notes in Evidence*", the Tribunal was not satisfied that the claimant disclosed any information to Mr Laing beyond that Mr Gordon had stopped the concrete pour.

401. The Tribunal accepted Mr Laing's denial that the claimant had raised any issues about Murphy`s working practices with him and therefore the Tribunal did not conclude that the claimant had made a qualifying disclosure on 7 September 2015.

402. The Tribunal consequently did not conclude that Mr Laing told the claimant to stop whining like a woman on the grounds that he made a protected disclosure.

Alleged disclosure on 24 September/30 September and 13 & 14 October 2015

403. The next alleged protected disclosure is said to be that the claimant observed employees of Enviroscaff Ltd working at height without safety harnesses. He said he reasonably considered this was an unsafe working practice contrary to health and safety legislation and he reported his concerns to Mr Laing by telephone that day (24 September). It is said that the claimant attempted to discuss these concerns with Mr Laing on 30 September and 13 and 14 October 2015.

404. The Tribunal notes the additional information does not actually provide detail of what information is said to have been imparted by the claimant which constituted a disclosure on 30 September and 13 and 14 October.

405. In relation to the 24 September, and the Tribunal was satisfied that on that date the claimant saw employees of the subcontractor Enviroscaff were not wearing harnesses. It did not conclude that he brought this to the attention of Mr Laing at that point, or that Mr Laing told him not to be too heavy handed.

406. The Tribunal was satisfied that the claimant brought the fact that scaffolders had not been wearing harnesses to the attention of Mr Laing by virtue of a progress report which he completed dated 30 September, which states at point 6 the health, safety and welfare issues "*scaffolders on site not wearing*

harnesses they have been told in the future non-compliance will result in loss of contract". Mr Laing accepted that he had seen this progress report.

407. The inclusion of this information in the progress report did, in the Tribunal's view amount to a disclosure of information. It conveyed the fact to Mr Laing that there were scaffolding contractors on site who were not wearing harnesses.

408. The Tribunal then went on to consider whether this was information which in the claimant's reasonable belief was made in the public interest and tended to show that the health and safety any individual had been or was likely to be in endangered.

409. The assessment of whether the claimant had a reasonable belief introduces an objective standard into the test of determining whether there was a disclosure.

410. In this instance, the disclosure was made in the form of a progress report on a building project. Given the significance of health and safety for the respondents, the claimant's training, and his awareness of his responsibilities as Site Manager, the Tribunal was satisfied that he had a reasonable belief that the disclosure of this information (that scaffolders were working without harnesses) was made in the public interest, and that the disclosure tended to show that the health and safety of an individual was likely to be endangered. The Tribunal therefore concluded that at the inclusion of this statement in the progress report amounted to a protected disclosure in terms of Section **47B(1)(d)** of ERA.

411. The Tribunal did not conclude, however, that the claimant was subjected to any sort of detriment on the grounds of having made that disclosure. It was satisfied that Mr Laing considered the response to the scaffolders not wearing harnesses on site was entirely appropriate, and was what he would have expected of the claimant or any site manager.

412. The Tribunal therefore, was satisfied that the claimant had made a protected disclosure on 30 September 2015, but it was not satisfied that he was subjected to any detriment on the grounds of having done so.

413. Despite the fact that the claimant's additional information identified 13 October 2015 as a date upon which he made a protected disclosure about unsafe working practices contrary to the health and safety legislation in connection with scaffolders, he gave no evidence in chief about having made a disclosure of that nature on 13 October 2015. Instead in his evidence in chief he alleged he was told on that date by Mr Laing that he was spending a fortune on scaffolding and would not be spending any more money on it, and that the claimant should get bricklayers to move the scaffolding.

414. For the reasons given in "*Notes of Evidence*" the Tribunal was not satisfied that Mr Laing had told the claimant to get bricklayers to move the scaffolding. The Tribunal did not in any event understand how Mr Laing telling the claimant to get bricklayers to move the scaffolding (if he had done this) could have amounted to a protected disclosure on the part of the claimant.

415. For the reasons given in "*Notes of Evidence*" the Tribunal did not conclude that the claimant told Mr Laing on 14 October 2015 that there were men working on the roof not wearing harnesses.

Alleged Disclosures 7/12/18/November

416. There was no dispute as far as the respondents was concerned that the site was muddy, nor was it an issue that the conditions at the site were discussed between Mr Laing and the claimant on 7 December 2015 and following this, Mr Laing emailed the claimant with a note of actions from that

visit and instructions to the claimant about how he could alleviate the problem.

417. For the reasons given above the Tribunal was satisfied that on balance it was likely that the claimant informed Mr Laing about the burst pipe and water streaming from it into the site on or around 7 November making the site conditions muddy and difficult.

418. The Tribunal therefore concluded that the claimant disclosed information to Mr Laing. That information was that there was a burst pipe and that water was streaming from it into the site making the conditions muddy and difficult to work in.

419. The Tribunal was satisfied that it was in the reasonable belief of the claimant that this was information which showed or tended to show that the health and safety of an individual (the workers on site) was likely to be endangered. In reaching this conclusion the Tribunal takes into account that there was no dispute that the muddy conditions made the site difficult to work in. The Tribunal was also satisfied that it was in the claimant's reasonable belief that the disclosure was made in the public interest in that the information disclosed went to the health and safety issues for workers on the site, and not just his own interests.

420. Albeit the Tribunal was satisfied there was a disclosure in terms of section **47B,** the evidence also supported the conclusion that there was a discussion about the hazardous working conditions, with a view to finding a solution to those difficulties. The Tribunal was fortified in this conclusion, in that although claimant was disclosing information, there was no issue about the information which he was disclosing. The site conditions were apparent to all who visited the site. The Tribunal was satisfied that the respondents were well aware of the difficulties, and were trying to find a solution to them. There was no evidence to support the conclusion that the claimant was subjected to any detriment as a result of having made this disclosure on 7 November.

421. The Tribunal did not conclude that the claimant was subjected to bullying and harassment as a result of attending meetings on 18 November or 7 December , but was satisfied that these were meeting as which the Aiket job, and difficulties arising from that job were discussed.

422. For the reasons given in the Note on Evidence the Tribunal was not satisfied that the claimant disclosed information to Mr Prain on 12 November, or to Mr Prain or to Mr Laing on 18 November, which qualified as a protected disclosure. It therefore did not conclude that the claimant had made protected disclosures on those dates.

Disclosure – 15 December advising Mr Laing to move heavy stones without appropriate equipment was an unsafe working practice contrary to health and safety legislation.

423. The Tribunal's findings in fact in relation to what occurred in December are set out above, and its reasons for those the conclusions are contained in the *Note on Evidence.*

424. For the reasons set out above the Tribunal was not persuaded that an exchange between Mr Pearson and Mr Laing took place where Mr Laing effectively said if you don't like it you can go, but if it had, even on the claimant's own evidence, there was no basis on which to find that the claimant had disclosed information. Putting it as it's highest on his evidence in chief, he asked Mr Laing to speak to Mr Pearson (the claimant's brother) about getting equipment for safely moving stones, and the Tribunal was not satisfied in any event that this had actually taken place. There was no basis upon which to infer, as suggested by Mr Hardman, that there was a conversation in which information was disclosed which constituted a protected disclosure.

425. The claimant makes a general complaint that during the course of January 2016 he repeatedly attempted to disclose concerns concerning these issues

with Mr Laing but Mr Laing ignored his concerns. The claimant alleged that on 4 February Mr Laing told the claimant he considered the claimant's attempts to raise these matters demonstrated the claimant was lazy and incompetent.

426. There was insufficient specification of what the claimant said he had raised for the Tribunal to reach a conclusion as to whether or not he had disclosed information which met the test laid down in Section **47B** of ERA.

427. The Tribunal was satisfied that the job was becoming more difficult and challenging for the respondents, and from Mr Laing's perspective, the reason for this was because of difficulties created by Mr Gordon and the lack of A.I.'s.

428. The Tribunal was also satisfied that by January 2016 Mr Laing was becoming concerned about the claimant's management of the works at the Aiket site, but did not conclude, as alleged by the claimant, that he was bullied by Mr Laing, or that Mr Laing told him he was incompetent and lazy on 4 February. The Tribunal was not satisfied that the claimant had been subjected to any bullying or demeaning treatment by Mr Laing.

429. The Tribunal found that the claimant made two protected disclosures on 30 September and 7 November 2015, as specified above. For the reasons given above it did not find that he had been subjected to a detriment on the grounds of having made those disclosures.

430. The Tribunal did not conclude that the claimant made any of the other disclosures contended for. However even if the Tribunal is wrong in all its conclusions on that point, it was not satisfied that the claimant had been subjected to a detriment, and therefore would have been unable to find the claimant had been subjected to a detriment on the grounds he had made a protected disclosure.

431. For these reasons the claimant's claim of having suffered a detriment under Section **47B** of ERA on the grounds of having made a protected disclosure is dismissed.

Claim under Section 103A of ERA

432. This is a complaint of dismissal under Section **95** of ERA by reason of the claimant having made a protected disclosure.

433. Section **103A** of ERA provides that;-

> "*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*".

434. To establish constructive dismissal the employee must establish firstly that there was an actual or anticipatory fundamental breach of contract on the part of the employer. Secondly, that the employer's breach caused the employee to resign, and thirdly, the employee did not delay too long before resigning, thus affirming the breach of contract, and losing his right to claim constructive dismissal.

435. In considering a claim under Section **103A**, the question for the Tribunal is whether the protected disclosure was the principal reason that the employer committed the fundamental breach of the employee's contract of employment which precipitated his resignation.

436. The Tribunal therefore requires to identify firstly, whether or not the claimant made a protected disclosure, and secondly, whether or not the respondent's response to that disclosure amounted to a material breach of the contract of employment, and if so, whether the claimant resigned in response to that breach.

437. The starting point is whether the claimant made a protected disclosure.

438. The claimant's position is that on 4 February 2016 he reported to Mr Laing that there were no qualified scaffolders on site. He was thus considered that the works had become unsafe. The claimant was instructed by Mr Laing to employ bricklayers on site to move the scaffolding. The claimant did as he was instructed and bricklayers moved the scaffolding. The claimant examined the scaffolding. He reasonably considered this was an unsafe work practice contrary to health and safety regulations, and on 22 and 29 February 2016 he completed scaffolding inspection checklists and brought these to the attention of Mr Laing. These reports confirmed to Mr Laing the claimant's reasonable concern that the scaffolding on site remained unsafe. It is said that Mr Laing both generally, and in particular at a meeting on 29 February at which the issue was expressly raised by the claimant, refused to address the claimant's concerns. It was said that on Friday 4 March the claimant reported his concerns again to Mr Laing and also reported them to Mr Gordon who was expressing concern. The claimant received no acceptable response to that report and he then decided to resign. The claimant said he resigned on 8 March and his immediate reason for doing so was that the respondents gave no indication that they would address his concerns about the safety of the scaffolding on site.

439. Firstly, the Tribunal has already dealt with the claimant's allegations that he was told by Mr Laing to engage bricklayers to move scaffolding on 4 February, and found this allegation to be without substance.

440. The disclosure, on which the claimant then appears to rely, is his completion of scaffolding checklists on 22 and 29 February. The Tribunal was not satisfied, however, these checklists were ever sent to Mr Laing. It was part of the generic health and safety materials which were retained at the Aiket site, and the Tribunal accepted Mr Laing's evidence that he did not inspect the site diary, or the scaffolding checklist sheets which were (or should have been) completed on a weekly basis, on his visits to site.

441. Mr Laing visited the site twice a week by February, and it was plausible that he did not inspect all the health and safety generic documents which were retained at site in the course of his visits. It was in any event it was the claimant's responsibility to put right things which had been picked up by the scaffolding checklist, and he accepted that this was the case.

442. The claimant said in relation to the scaffolding checklist of 29 February (page 104/105) that Mr Laing would have seen this and he discussed it with him.

443. Mr Laing's evidence, which the Tribunal accepted, was that he saw the report prepared by A C Safety on 29 February which was critical of the scaffolding, and that having seen that, the same day, he emailed the claimant instructing him to put right all the defects identified in the report (page 111).

444. The Tribunal did not accept the claimant's evidence that he was prevented from engaging scaffolders by Mr Laing. It did not accept that he required Mr Laing to authorise the scaffolders, or arrange for the scaffolders to attend site in order to put right the defects identified in A C Safety's report. The Tribunal was taken to numerous invoices which demonstrated scaffolders were on site at various times during the project and there was no evidence (beyond the claimant's accretion that it was the case) to support the conclusion that the claimant required to obtain Mr Laing's authorisation for each occasion on which scaffolders attended the site. The Tribunal was therefore satisfied that Mr Laing took action in response to concerns raised in A C Safety report, and therefore attached no weight to the comments which the claimant had appended to his scaffolding checklist sheet of 29 February "*Need Staff ASAP – SL not helping*."

445. The claimant stated that he reported his concerns again to Mr Laing on 4 March, when he reported this to the client Mr Gordon. The Tribunal is unsure if the claimant is suggesting he made a disclosure on 4 March, but if that is his suggestion, there was no evidence on which the Tribunal could

conclude that the claimant disclosed any information to Mr Laing on that date.

446. The general sense of the claimant's position as the Tribunal understood it, is that he brought concerns about the state of the scaffolding to Mr Laing's attention, and Mr Laing refused to act on these, and his refusal to do so, and the manner in which he responded to the claimant's concerns amounted to a fundamental breach of the claimant's contract of employment, in response to which he resigned.

447. The Tribunal was satisfied that Mr Laing was aware of issues with the scaffolding and it was also satisfied that he took steps to deal with them, by instructing the claimant to make good the defects identified in the safety report. The Tribunal was satisfied this was an appropriate response from Mr Laing, in that it was the claimant's job to attend to these matters, and it was not satisfied that the claimant was prevented from doing so, or that he had to obtain authorisation from Mr Laing to engage scaffolders, which Mr Laing did not provide.

448. In reaching its conclusions the Tribunal takes into account the terms of the claimant's email to Mr Laing setting out his reasons for resigning. This is a contemporaneous document; however the Tribunal were not persuaded that it represented the true reasons why the claimant resigned. Firstly, it was not satisfied the claimant regularly raised health and safety issues with Mr Laing, or that Mr Laing had bullied him as a consequence of his doing so.

449. Secondly, the Tribunal did not conclude that Mr Laing had instructed the claimant to use brickies to erect scaffolding.

450. Thirdly, the Tribunal did not conclude that the claimant had made a request for scaffolders to be sent to the site, which was denied by Mr Laing, as he claimed.

451. The Tribunal did not conclude that the claimant made a protected disclosure, or that there had been a material breach of the claimant's contract of employment, or that he had resigned in response to such a material breach in his contract, and therefore his claim under Section **103A** of ERA is dismissed.

452. Having reached those conclusions, it is unnecessary for the Tribunal to determine the reason why the claimant resigned, however had it been required to do so, the Tribunal would have had to consider whether inferences could be drawn from the claimant's meeting with Mr Gordon on 8 March, and the fact that he set up business immediately on his own account, having taken advice from a company recommended to him by Mr Gordon and in which Mr Gordon had an interest, from the fact that the claimants company was thereafter engaged by Mr Gordon to do work at a site at Aiket Mill, and subsequently the claimant's company was engaged to carry out the work at Aiket Castle.

453. Mr Hardman submitted that a moment's consideration would demonstrate that the respondent's allegations that the claimant had manufactured this claim are easily rejected. Would the claimant really manufacture health and safety concerns and record complaints about lack of action on these concerns and persuade 3 workmen to give evidence supporting his manufactured concern? The Tribunal however did not consider that much weight could be attached to these arguments, in light of the other evidence before it.

<u>Claim under Section 38 of Employment Act 2002</u>.

454. The first element of this is to consider whether the claimant received the documents included in the bundle which are headed' *Contract of Employment'.* The claimant denied that he did, but for the reasons set out in Note on Evidence the Tribunal was satisfied the claimant had received

these documents, which comprised letter of appointment, and his contract of employment.

455. There are certain inaccuracies in the document. The covering letter (page 7) which accompanied that document states that the position offered is that of Stonemason; however this was rectified in the contract document which states the claimant will be employed as Site Manager in the Stirling region.

456. The contract of employment (page 8) states that the claimant's remuneration will be £26,880 per annum. It is accepted that the claimant was paid hourly and the section in the document is incorrect.

457. The contract of employment stated that it was for six months with the opportunity to extend. The contract also stated that it was of a years duration. Clearly the contract had been extended.

458. Section **1** of ERA sets out the information to be contained in the statement of initial employment particulars. Section **1(3)** provides the statement shall contain particulars of the name of the employer and employee, the date when the employment began and the date on which the employee's period of continuous employment began: Section **1(4)** provides:-

> "*The statement shall also contain particulars, as at a specified date not more than seven day before the statement (or the instalment containing them) is given, of –*
>
> *(a) the scale or rate of remuneration or the method of calculating remuneration.*
>
> *(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals)…"*

459. Section 2(4) provides:--

"*The particulars required by Section 1(3) and 4(a) to (c), (d)(i), (f) and (h) shall be Included in a single document*"

460. The claimant was provided with particulars of his remuneration, but those details were incorrect, and therefore the Tribunal was satisfied that there was a failure to provide initial employment particulars as required under Section **1** of ERA. The remedy to which the claimant is entitled is determined by Section **38** of the Employment Act 2002.

461. In this case merits and remedy were, however, split, and in the event this matter is not capable of a resolution between the parties, the Tribunal will consider further procedure to determine the remedy.

Employment Judge: Laura Doherty
Date of Judgment: 05 April 2017
Entered in register: 07 April 2017
and copied to parties