EMPLOYMENT TRIBUNALS

Claimant: **Mr B Marriott**

Respondent: **Scarborough Borough Council**

Heard at: **Hull** **On:** **1 to 5 August 2016**

Before: **Employment Judge Forrest**

Members: **Mr I Williamson**

Mrs S Richards

Representation

Claimant: Mr K McNerney, Counsel

Respondent: Mr Alfred Weiss, Counsel

JUDGMENT

1. Mr Marriott was dismissed in circumstances where he resigned because of the way the Council dealt with his whistle blowing complaint; the Council's conduct amounted to a fundamental breach of one of the implied terms of his contract of employment, the implied term of trust and confidence.
2. That dismissal was automatically unfair as the principal reason for his dismissal was that he had made a public interest disclosure.
3. Mr Marriott was subjected to a detriment, when his identity as a whistle blower was disclosed, because he had made a public interest disclosure.
4. That complaint of detriment was submitted in time to the Tribunal.

REASONS

The hearing

1. At the hearing of his claims for detriment on the grounds of making a public interest disclosure; for unfair dismissal, both ordinary and on the grounds of making a public interest disclosure; and for breach of contract in relation to notice pay; Mr Marriott gave evidence to us; and was represented by Mr McNerney, a barrister.

2. The Respondents were represented by Mr Weiss, a barrister. He called as witnesses Ms Elaine Blades, the Respondent's Human Resources Manager; Mrs Gillian Mackenzie, a Human Resources Officer; Mr Martin Pedley, the Head of Asset and Risk Management; Mr Alan Dargue, the Property Asset Manager; Mr Adrian Hill, Asset Management Officer; Mr Andrew Boyes, a joiner; Mr Roy Harewood, a PAT tester and fitter. We were referred to some of the contents of an agreed bundle of documents. In addition, by agreement, the Respondent added a number of pages during the hearing.

Claims and issues

3. Mr Marriott brought claims that he had been subjected to detriments because he had blown the whistle on (made public interest disclosures) the improper use of Council vans; the improper use of Council Contractors; and the improper disposal of Council surplus or scrap property. The detriments he complains of as a result were that he was sent to Coventry by his work mates, challenged over his time sheets, threatened, and had his car damaged on occasion; and that, cumulatively, his health was damaged as a result. These are claims of detriment put under section 43A, 47 and 48 of the Employment Rights Act 1996. He argues that the damage to his health culminated in having to take time off work from December 2014; included heart attacks in February 2015; and continued through to his eventual resignation in February 2016.

4. His resignation is claimed to be a constructive dismissal within section 95(1)(c) ERA; and he argued that the employer's conduct which drove him to resign entitled him to resign in response to a breach of the implied term of trust and confidence: the employer had failed to take his whistle blowing complaint seriously; or to investigate it thoroughly; had failed to acknowledge that his complaints had been justified, and that there had been wrong doing on the part of managers; and failed to provide him with work away from the managers he had accused in his whistle blowing complaint. He claimed that his dismissal was automatically unfair with section 103A ERA as the principal reason was that eh had made a public interest disclosure. In addition, he claimed that his constructive dismissal was in any event unfair as the conduct which drove him to resign was not that of a reasonable employer, within section 98(4).

5. The Respondent accepted that Mr Marriott had made some potentially qualifying and protected disclosures; they denied that they had subjected him to detriments as a result; denied any fundamental breach of contract, arguing that they had handled his whistle blowing complaint seriously and properly; and indeed, had recognised that their procedures needed tightening as a result of the complaint; and had taken reasonable steps to ensure that he could return to work under different managers than the ones he had complained about. They argued that they had acted reasonably and properly throughout. There was no constructive dismissal here; and even if there was, the circumstances were not such as could give rise to any finding of unfair dismissal, automatic or otherwise.

Findings of fact

6. Having heard the witnesses and considered the documentary evidence, we make the followings findings of fact. Further findings, particularly on contested points, are set out as part of our consideration, below.

7. Scarborough Council is a Borough Council covering the three Yorkshire coast towns of Filey, Scarborough and Whitby, and the surrounding villages and countryside. It has about 500 permanent employees; its administrative resources include both a legal and HR department.

8. It has a relatively small property services team, overseen as part of his duties by Martin Pedley, the Asset and Risk Manager. Reporting to him is Mr Dargue, the Property Asset Manager. They are both based in the Town Hall. Mr Dargue manages the 23 employees in Property Services; these include the dozen or so working at operational level in the Council's Dean Road depot. These comprised the Council's direct labour force. They include Mr Marriott, who worked out of the Dean Road depot, which was supervised by Mr Hill., the Asset Manager. Work done from the depot included minor property repairs and maintenance, and electrical testing and testing of portable appliances (PAT).

9. The Council uses a number of approved contractors to do the majority of its maintenance and repair work. In order to get approval, contractors have to apply to be placed on a Framework Agreement. They are vetted for those purposes by the Council's Procurement Team. Once approved, contracts can be awarded to contractors on that approved list by Mr Pedley, Mr Dargue or Mr Hill, depending on the volume and value of the contract.

10. Mr Marriott joined the Council in 2002, initially to work in their cleansing department, principally on the maintenance and repair of the Council's public toilets. He is a qualified electrical and mechanical engineer. His work required him to travel across the Council's area. Initially, to facilitate this, he was allowed to take his Council van home in the evening, and start from home in the morning, either to go to his next job, or to drive in to the depot to pick up work or supplies.

11. In 2008, he moved across from the cleansing department to the Property Services Team. His job remained largely the same, but he was now part of the larger repair and maintenance team, supervised by Mr Hill and managed at first by Mr Bachelor; and from 2011 by Mr Dargue.

12. Employees in the Property Services Team could only take their vans home of a night if they agreed to go on the Call Out rota; that would involve them being on call out one week in five, over the evening and night; and then being on standby for the other four weeks. While on call out, employees had to stay within a few minutes of the phone and van at all times. On standby, employees were not restricted to staying close to the phone, waiting for the call; but, if the Council did manage to reach them by phone, they were obliged to turn out. There was a small payment for being on the rota; and if called out, employees were paid for the hours worked. In practice, those on call out might expect to be called out once or twice a week; those on standby were hardly ever called out: only if a major emergency or crisis occurred.

13. Mr Marriott did not want to accept the restrictions of call out; and so did not join the scheme. It was agreed that he could retain use of his Council van to travel to and from home for a few months; after that he had to use his own car, leaving his Council van in the depot.

14. It was a constant source of irritation to Mr Marriott that most of his colleagues could use their Council vans to travel to and from home, while he could not. He made his views known; views which were not popular with his colleagues, who saw the call out scheme as a valuable fringe benefit. Using their Council

vans to travel from home to work was simpler and cheaper for them; and the Council paid the fuel.

15. In 2011 Mr Marriott took out a formal grievance including his complaint that he was not allowed to use his Council van, unlike his colleagues, to travel to and from home. He took that grievance through three stages: at each stage his views were considered and rejected; the working of the Council Call Out Scheme was explained to him; Mr Marriott agreed that he did not wish to join the Call Out Scheme; he continued to find its operation was unfair, particularly as those on standby effectively had four weeks free travel for a minimal obligation in return. Mr Marriott did not pursue his grievance to the last and final stage. His grievance was therefore dismissed.

16. Mr Marriott had other concerns, apart from his restricted use of the Council van. There was frequent talk in the depot that some of the managers were using Council contractors to have work done on their homes: driveways, extensions, kitchens and so on. The suspicion was that it was either free, or at a reduced price, in exchange for awarding contracts to particular contractors. In addition, Mr Marriott was concerned that there seemed to be no clear system for disposing of scrap or surplus property from the depot; some people seemed able to buy unwanted or damaged goods at way under value. Moreover, some managers seemed to treat the Council facilities as their own, using the Council skips in the depot to dump rubbish for example; or using work vans and their drivers to deliver items for personal use.

17. There is a dispute as to how far Mr Marriott raised these wider concerns of his. Mr Marriott says that he raised them with Mr Kaye, Head of HR in 2012; that Mr Kaye promised action, but did nothing, before taking redundancy and leaving. No records are available of any investigation or outcome from Mr Kaye's involvement.

18. The Council accept that Mr Marriott did raise his concerns with Mr Kaye; they do not know to what effect. They also argue that he raised his concerns in 2013, resulting in an internal audit investigation in 2013. That investigation found nothing untoward. Again, no records are available of that investigation, showing either the extent or outcome.

19. At the beginning of October 2014 Mr Marriott sent his section manager, Mr Pedley, two emails. On 1 October, he complained about being the only one not allowed to take his van home; and also about "office staff having work done by [Council] contractors at home".

20. On 2 October he sent a second email, again protesting his complaint about the use of vans: he complained he was being sent to Coventry by his work mates again, because of this. He also complained about work people were having done at work by Council contractors; he specifically referred to Mr Bachelor, who was having his garage re-wired by Council contractors; he complained of drills being sold as scrap for a tenner; he referred to the Whistle Blowing Policy and asked for an investigation.

21. Mr Pedley contacted Ms Blades, Head of HR. She confirmed that she and Mrs Johnson, the Head of Audit and Internal Fraud, would do a joint investigation under the Whistle Blowing Policy, and that she would meet Mr Marriott to commence the investigation.

22. Mr Marriott was on leave until 20 October; the meeting was set for 24 October, but unfortunately, Mrs Blades had to postpone that meeting (for good reason); and it was re-arranged for 3 November.

23. The Council's Whistle Blowing Policy sets out what should be done when an officer receives a whistle blowing allegation: the officer should immediately report details of the "irregularity" to a member of the Irregularity Response Team (IRT). Mr Pedley, the officer to whom the allegation was reported, did this when he reported Mr Marriott's allegation to Mrs Blades, who as Human Resources Manager, was a member of the IRT.

24. The member of the IRT will then "convene a meeting of the Team as soon as possible". The Team members are: the Chief Executive; the Director, and Section 151 Officer (Nick Edwards); the Director/Monitoring Officer, Liza Dixon (Head of Legal); the Human Resources Manager (Mrs Blades); the Audit and Fraud Manager (Ms Johnson).

25. Mrs Blades did not convene a meeting of the IRT. Instead she decided to conduct a preliminary investigation with Mrs Johnson into Mr Marriott's complaints. They met with Mr Marriott, at the re-arranged meeting, on 3 November 2014.

26. At the meeting, Mr Marriott went through his concerns. He was initially reluctant to share details, but did provide some specific instances which could be investigated further. He confirmed that he was "comfortable" if his name was given to those to be questioned: since it appeared everyone knew anyway, it couldn't make matters worse for him.

27. Subsequently, over November, Mrs Blades and Ms Johnson interviewed 17 employees, including all those suggested by Mr Marriott. They used a standard format for their questions, recording the answers. They then provided a lengthy report, setting out the context of the investigation, Mr Marriott's concerns, the investigation process, the information obtained, and their conclusions. That report went to Mr Edwards, director of business support, in mid December. Their conclusions were:

> 5.24 Overall, the investigation team conclude that:-
>
> - There is no evidence to support the claim made by Ben Marriott that Council vehicles are being misused although it is felt that more comprehensive procedures should be implemented.
> - There is no evidence to support the claim made by Ben Marriott that inappropriate personal use of Council contractors by officers has occurred. However it is clear that such matters should be declared by managers involved in allocating contracts and work.
> - It is acknowledged that policies and procedures need to be tightened up.
> - There is no evidence of Ben Marriott being subject to harassment or bullying. However it is recognised that working relationships are strained at present.
> - There is no evidence of threats being made towards Ben Marriott or deliberate damage being done to his property.
>
> 5.25 The majority of the issues that Ben Marriott has raised have been raised previously by him on a number of occasions in the past few years. The outcome of previous enquiries has reached similar conclusions to those reached by the investigation team in this case. The volume of work arising from this and previous investigations in terms of time and

resources is significant. Although it is acknowledged that staff have the right to bring concerns to the attention of management and for these to be looked at it is a concern that Ben Marriott has raised many of the same issues and examples that had been investigated and that his claims were generally not supported and as a result no formal action was required. The investigation team therefore feel that any further concerns raised by Ben Marriott around these issues should only be investigated again in the event that he were able to find new examples supported by clear evidence.

28. The policies and procedures that needed tightening up were listed in 6.2:

    6.21 The Asset Management Standard Vehicle Policy and Agreement

    6.22 That all staff within the service are made aware that if they are responsible for the procurement and allocation of work involving Council contractors that they make the Service Unit Manager aware of any instance where they consider/use a Council contractor to undertake personal work so that this can be recorded.

    6.26 That a procedure is put in place to document the arrangements in relation to the purchase of property service equipment/items and this is implemented as soon as possible.

29. In mid December, Mr Marriott signed himself off sick from work; on 22 December his GP signed him off with "stress/anxiety state".

30. On 5 January 2015 he enclosed a further sick note, for four weeks from 5 January 2015 for "stress", with a covering letter expressing his concerns, about the effect on his health from "the strain of carrying on work while everyone knows what has happened".

31. The Council, by return referred him to occupational health for report. Mr Marriott rang to protest this treatment on 8 January 2015. On 14 January, Mrs Blades sent him a more personal letter, expressing concern for his health and offering support for his concerns. So far as the investigation was concerned, she told Mr Marriott that she was waiting for Mr Edwards' feedback on the report.

32. Mr Marriott was not placated. His reply, 19 January 2015, sets out his views at the time:

    "I would like to put this enquiry behind me without being persecuted, although I am finding out the hard way, that by whistle blowing I am the bad guy. I am looking at the letters from your department with referral to occupational health as constructive dismissal. I see that no changes have been made to the staffing on my department towards the theft, fraud and corruption that I have whistle blown on, and others have confirmed. This is an indication that nothing has been done or will be done. This will make it impossible for me to return back to work knowing this".

33. Mr Edwards informed Mrs Blades that he agreed with the report on 21 January; and Mrs Blades and Ms Johnson arranged to meet Mr Marriott on 30 January to share its conclusions with him; and to give him a copy of their report. At that meeting, Mr Marriott expressed his dissatisfaction with the report's conclusion about the use of Council contractors by managers:

    "people have committed fraud and I will take it further".

He also described the difficulties he anticipated on returning to work in the same team. Mrs Blades confirmed that the Council would be tightening up a number of policies as a result of his complaint.

34. On 9 February Mr Marriott contacted Mrs Blades to say that he wished to take the matter further. She advised him that this should be done through the grievance procedure, the route for appeal provided in the Whistle Blowing Policy. Mr Marriott contended that the grievance procedure was inappropriate since it expressly stated that it was not to be used for "allegations of serious malpractice within the Council". However, on 10 February he wrote to Mr Dillon, Chief Executive of the Council, lodging his appeal, under the Grievance Procedure.

35. Mr Marriott then suffered three heart attacks between 16 and 18 February 2015. He was admitted to hospital for an operation; and discharged on 25 February to convalesce at home. He remained on sick for several months. Eventually, in the autumn, his Council sick pay ran out.

36. On 8 June 2015 Mr Marriott wrote to Mr Dillon, Chief Executive, saying that he now felt "strong enough to carry on the battle". He protested his treatment; and the dismissal of his complaints in the report. He repeated his original allegations. He added some specific further allegations about Mr Hall, claiming he had used Council contractors to have his drive and garage way repaired. He named the employee of the contractors who had bought rubbish from Mr Hall's driveway and garage to put in the Council skips at the depot; he named the Council yard man who had complained about the extra work which this created for him; he complained that Council steel had been used in Mr Hill's garage. He asked who paid for this use, and who had authorised it, asserting that both contractors and staff had been involved in corruption. No enquiries were made into these allegations.

37. In August, there was a meeting with Mr Marriott to discuss whether he might now be fit enough to attend his appeal meeting with Councillors. Mr Marriott sent a detailed letter of appeal on 9 September. By this stage, the medical reports were indicating that, physically, he was well enough to attend an appeal meeting. The Council then made arrangements to convene a Councillor's Panel at the third, appeal, stage of the grievance procedure.

38. In preparation for that appeal meeting, Mrs Blades and Ms Johnson prepared a lengthy "statement of case" to present the Council's side of the appeal to Councillors. They explained the findings in their earlier report, which was attached; and brought Councillors up to date on subsequent events. They recommended that the appeal be dismissed.

39. The appeal meeting was scheduled for 26 November 2015. However, at that meeting, Mr Marriott protested that he had never had, despite requests, a copy of the Whistle Blowing Policy. The hearing was therefore adjourned to enable him to be given a copy, and to consider it.

40. The appeal resumed on 16 December 2015. Mr Marriott went through his concerns. Councillors asked him if he felt he had won at least a partial victory, as some of the procedures were now to be tightened up as a result of his complaints. Mr Marriott accepted that that was a partial success. However he continued to protest that his actual complaints about his managers' use of Council property had been dismissed, without proper investigation; and he expressed strong concerns about returning to work under the same managers who he had complained about; he feared

retaliation in one form or another; and said he would find returning to work very difficult. The councillor's findings are set out in a minute of 22 December 2015:

> Firstly, the Councillors determined that there had been some positive outcomes as a result of the whistle blowing complaints brought by Mr Marriott. In particular, the members were content that Mr Marriott's concerns had been met by the introduction of the three new policy documents and guidance notes. The Councillors were also content that the investigation had uncovered breaches of policy but not necessarily illegality. In relation to the substance of the investigation, the finding was that there had been some procedural unfairness, in particular the breach of confidentiality ...
>
> The members were concerned about the breach of confidentiality that had occurred as a result of the whistle blowing complaint. The members made a finding of fact that Alan Dargue had been aware of the nature of Mr Marriott's proposed meeting with Elaine Blades in October 2014, although it could not be determined how. Mr Marriott was entitled to protection under the Scarborough Borough Council Whistle Blowing Policy and this had not been afforded to him.

41. On 22 December 2015, HR wrote to Mr Marriott with proposals for a different management structure for his return to work. His job would remain the same, still based at the Dean Road depot, but he would now report to a different manager, Mr Thompson, manager for operations, transport and countryside, who was also based at the depot.

42. Mr Marriott considered that offer over the Christmas period, but on 5 January wrote a letter of resignation, with immediate effect. His letter concludes:

> *"I feel that my position with this company has now become untenable due to whistle blowing. The offer presented to me on 22 December 2015 regarding my future employment does not give rise towards a safe working environment that I deserve; nor does it offer to cover any of the damages or costs incurred to me during this process*
>
> *... my job as a Council employee was to bring forward any wrong doing that I thought were in the public interest, I did that and whether I was right or wrong is not the issue. It is how the Council, associates including yourself have dealt with this issue and that it has been incorrectly managed. I believe that this corruption and has been going on for a long time and getting worse. Once the investigation officers found that private work had been done by contractors and breached Council policy and procedures; they should have brought the police in then, as they had the power to investigate the matter fully. We don't know if corruption has taken place because we have not had the matter investigated thoroughly or professionally. That means we have not protected the public purse and do not know the extent of the corruption.*
>
> *I have suffered bullying, harassment, intimidation for my whistle blowing. This has caused me to have depression and anxiety. This in turn has caused work related stress, causing me to have high blood pressure leading to my heart problems. I have also lost my salary, had to terminate my working life by about three to five years earlier than I would have liked; this is all due to the way the Council has managed the whistle blowing".*

43. His Employment Tribunal application was received on 26 February 2016. He had contacted ACAS for early conciliation on 18 January 2016, and his EC certificate was issued on 27 January 2016.

Consideration

The statutory framework

Part IV A: Employment Rights Act 1996: Protected Disclosures

43A meaning of "protected disclosure"

In this Act 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-43H.

"43B Disclosures qualifying for protection

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

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

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

43C Disclosure to employer or other reasonable person

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

(a) To his employer...

47B Protected disclosures

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

48 Complaints to Employment Tribunals

(1A) An employee may present a complaint to an Employment Tribunal that he has been subjected to a detriment in contravention of 47B.

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

Public Interest: qualifying and protected disclosures

44. Had Mr Marriott made public interest disclosures which qualify for protection under the statute? He relies on 2 emails of 1 and 2 October sent to the manager of his depot Mr Pedley (and therefore qualifying disclosures made to his employer under section 43C Employment Rights Act). In the first of those emails he states:

> *"I am the only one not taking my van home ... no one is here on a night or a morning except the same few. I go home on a motorbike yet there are many of our people home before me how is that? I have noticed and mentioned this several times about office staff having work done by our contractors at home. This is still going on right now".*

In the second email of 2 October he states:

> *"I'm yet again going to raise the question of vans ... the work people have and are having done at home by contractors raises some very serious issues and if you read your own whistle blowing policy it states not to follow up any issues but to report them. I have reported them... I'm yet again sent to Coventry over this van situation which is bullying ... If you are not aware Mr Bachelor [one of his managers] is having his garage at home by one of our contractors wired and a large drill which is so called written off fitted. This drill was bought for scrap for a tenner really? It is not enough to just say we can't prove it, drive, extensions, painting kitchens and bathrooms all leave a paper trail".*

45. We find that included with those allegations there was sufficient information to satisfy the Cavendish Munro v Geduld test. Mr Marriott states for example that his was the only van left in the yard. The clear implication is that all the rest have been taken home by other employees. He states that Mr Bachelor is having his garage wired by Council contractors and the implication of his references to Council staff having work done on their own home is that they were having it done at an under value.

46. Were those disclosures made in the public interest? The first, the complaint that Council vans were being used by employees for travel to and from work was essentially an issue that Mr Marriott had raised formally in 2011 as a grievance: and informally a number of times since. His concerns had been fully investigated in 2011. The use of vans for travel from home to work was found to be appropriate for those staff (the majority) who had opted to be on the rota for call out and stand by. Mr Marriott objected to this policy; he believed it was over generous and he resented the fact that because he did not want to be on call out he could not take his van home. We cannot see how this is said to be in the public interest. The issue had been investigated. The use of vans was in accordance with Council Policy. Mr Marriott did not approve of that Policy but that is simply a private dispute between him and his employer. Arguably we might have found it was in the public interest to raise

it the first time in 2011, since potentially public money was involved, but we cannot see that it was in the public interest, or that Mr Marriott can reasonably have believed it to be in the public interest, once the situation had been properly explained to him, as it was in 2011. This was not therefore a public interest disclosure, qualifying for protection.

47. Nor can we see that the disclosure tended to show any breach of legal obligation. Mr Marriott argued that it was a breach of HMRC rules from the use of employer's vehicles for private use but has produced no evidence of those rules or that there was any breach. The Council's chief payroll officer Mr Gomersall has produced a statement saying that he had checked the on call and stand by policy with the HMRC and it was acceptable to them. We therefore dismiss this part of Mr Marriott's claim. There was no breach of legal regulations, let alone any criminal offence, involved.

48. However the second disclosure does tend to show a breach of legal operation: the contractual obligation owed by Council employees not to use their position for private gain by securing work to be done for them on favourable terms, or securing drills to be sold to them at an under value. The allegation also tends to show that a criminal offence has been committed.

49. Mr Marriott worked in the depot alongside other workers who had regularly talked to him about managers who got work done on favourable terms. He had himself witnessed on occasion such instances. Of course none of the employees knew what the terms were, but it was a climate in which cynicism and suspicion was rife. Indeed that view was shared by the contractor's employees who worked on the manager's homes. They had informed their Council colleagues of what they were doing. Given that the Council seemed to have no clear procedure on the issue of when it was or was not proper for managers involved in awarding contracts to work for the Council to use those same contractors to work on their own homes, we found that Mr Marriott had reasonable grounds for his belief.

50. We found that it was in the public interest to make these disclosures; and indeed the Respondent does not dispute that.

51. We make the same findings about the other disclosure made by Mr Marriott in his formal interview: that managers were misusing Council vans for their own private use.

Detriments

52. The burden of showing the reason for any detriments falls on the employer. The legal threshold for a detriment is low. Essentially it is any matter which could be seen by a reasonable employee as a disadvantage in the circumstances in which he had to work: Shamoon v Chief Constable of Northern Ireland [2003] IRLR 285.

53. The detriments complained of are:-

a. <u>A deliberate breach of confidentiality by disclosing his identify as a whistle blower.</u>

54. Although in his disclosures, Mr Marriott did not specifically ask for confidentiality, the Respondent's whistle blowing policy commits them *"to do its best to protect an employee's identity when a concern is raised"*. An employee may reasonably expect an employer to follow its policy in this regard.

55. However, it appears that Mr Pedley, the overall manager of the section, to whom the whistle blowing complaint was made, had informed Mr Dargue, the line manager of the section, that Mr Marriott had made a complaint about managers using Council contractors to have work done privately on their homes. Mr Pedley therefore suggested to Mr Dargue that he should hold off having his patio done by council contractors, since this was not an appropriate time. Mr Dargue had subsequently revealed to Mr Marriott in a telephone call that he knew Mr Marriott had been asked to attend a whistle blowing interview.

56. We prefer Mr Dargue's account of the first conversation referred to above to Mr Pedley's (who denied the conversation). We heard from both in evidence on this point. Mr Pedley was an unimpressive witness on this and a number of other points; and we did not find his evidence credible. Mr Dargue had no reason to lie about the conversation; indeed, it may have been in his interest to keep quiet about it.

57. We preferred Mr Marriott's account of the second conversation to Mr Dargue's because Mr Marriott was clearly concerned that his manager and others already knew about his whistle blowing complaint when he had his meeting with HR on 3 November. He was shocked by Mr Dargue's phone call: not that his meeting was postponed, but that Mr Dargue knew it was "a whistle blowing meeting". If Mr. Dargue knew, all his colleagues would know. Someone had obviously leaked the information: either Mr Pedley, who he had originally complained to, or someone from HR.

58. Mr Marriott was very concerned that his confidentiality had been breached; he assumed that his colleagues and managers subsequent actions towards him were influenced by knowledge that he was the whistleblower; and so, when asked by the enquiry team at their meeting whether he objected to staff being told the complaint had come from him, he replied that he "was comfortable with them being told as it could not make things any worse for him".

59. We find that the breach of confidentiality did add to the stress that Mr Marriott was under in any event from the situation he was in. He knew his disclosures were likely to cause trouble for his managers and was fearful of retaliation from them; he also knew that they were likely to be unpopular with his work colleagues, particularly in relation to their use of vans.

b. Mr Marriott said he suffered a detriment when he was sent an occupational health referral in early January; and that in particular, the referral was unusual because it was short of the normal four week period before the referral is made.

60. We rejected this complaint. Objectively, no employee could see the involvement of occupational health as a detriment. Mr Marriott was off with stress at the time. Employers are right to seek medical advice on how best to deal with that situation and if they seek that advice early so much the better.

61. We also rejected the other aspect of Mr Marriott's complaint that he was impersonally treated during his lengthy ill health absence. Treatment from a large corporation such as the Council is often impersonal. In the circumstances, where Mr Marriott was making serious allegations against all three of his managers, expressions of sympathy or support from them are likely to have sounded very hollow.

c. Criticism of his timekeeping by his supervisor Mr Hill.

62. Mr Hill had reason to approach Mr Marriott about his timekeeping. Other employees had reported that Mr Marriott had left work early. Mr Hill was duty bound to raise this issue. However, the reports had been lodged some weeks earlier and Mr Hill left it till he was aware that a whistle blowing investigation was likely to take place. Mr Hill is more likely than not to have known that Mr Marriott had instigated that. Whether he was told or not by anyone else, he could have worked it out for himself from Mr Marriott's frequent complaints about vans and other issues. As part of that investigation, van records and timekeeping were likely to be looked at. We find it more likely than not that but for that imminent investigation, Mr Hill might simply have left the issue indefinitely.

63. But that is not the same as finding that timekeeping was raised on the ground of the disclosure. We do not find it was a significant motivating factor on Mr Hill's part, and so dismiss the complaint; but we can understand why the coincidence of timing led Mr Marriott to believe that it was deliberate persecution.

d. Being sent to Coventry by colleagues.

64. We find Mr Marriott was frequently ignored by and isolated from his colleagues. His complaints over the years about their use of vans for the travel to and from work had angered them. Several stood to lose considerable sums if the use of Council vans for this purpose was removed. We find it more likely than not that as the interviews for staff came near, staff would readily identify Mr Marriott as the source of the complaint. He had already, as he had acknowledged, been sent to Coventry in the past over the issue. No doubt the isolation increased at this time.

65. However, since there was no public interest disclosure involved in this complaint about van use, any increase in his isolation did not arise in consequence of a public interest disclosure and Mr Marriott cannot complain of any detriment he suffered as a result of his complaints about vans. As Lord Nicholls observed in Shamoon (paragraph 35): "an unjustified sense of grievance cannot amount to a detriment."

e. Being allocated work for two people but being expected to carry on on his own

66. We dismiss this complaint on the facts. On the evidence Mr Marriott was sometimes allocated work for two people; but he was expected to ask for assistance when required and when he asked it was provided. He therefore suffered no detriment.

f. Damage to personal property

67. We dismissed this complaint on the facts. Any damage that did occur to Mr Marriott's vehicles or boat occurred before the disclosures and therefore cannot have been done because of them.

Time points

68. Claims of suffering a detriment should be submitted within 3 months of the act complained of: section 48(3). The claim was submitted on 26 February 2016; the breach of confidentiality occurred in October 2014, some 18 months earlier. However, the resignation/dismissal occurred in January 2016, following the outcome of his appeal. Section 48(3) goes on to provide: "where the act or failure [complained of] is part of a series of similar acts or failures, [within 3 months] of the last of them". Mr Marriott complained of a number of

acts or failures in between the breach of confidentiality and his resignation, including the outcome of his appeal. Did those form a series of similar acts?

69. The complaint is of a series of alleged detriments, arsing from acts or failures to act of the employer, which Mr Marriott claims all arose from his whistle blowing complaint. The series he complains of culminated in his resignation/dismissal, the final detriment. It is clear for this purpose that dismissal would normally be classed as a detriment. Parliament expressly refers to dismissal as a detriment in section 47B ERA, and then goes on to make an exception for the particular purposes of a dismissal claim by an employee. Section 47B(2) provides: *"This section does not apply where – (a) the worker is an employee, and (b) the detriment in question amounts to a dismissal"*. This means that complaints of dismissal because of public interest disclosures cannot be brought as complaints of detriment by employees. They must be brought as complaints of unfair dismissal instead, under section 103A or section 98 of the Employment Rights Act. However, the section providing for time limits is section 48. The exception set out above in section 47 is not repeated in section 48. Section 48(3) provides that where the act complained of is part of a series of similar acts then time runs from the last of those acts.

70. In this case we are concerned with a series of similar acts – detriments arising from Mr Marriott's disclosure – some of which we have upheld, others not. The series culminated in Mr Marriott's resignation on 5 January 2016 following the rejection of his appeal. The conduct of the employer which drove him to resign was the way in which they handled his whistle blowing complaint, as we set out below. The first such complaint was the breach of confidentiality. Others, dealt with below, contributed to his resignation. In those circumstances we find his complaints of detriment were in time since the last complaint of detriment was his dismissal, and his complaint was presented within 3 months of that.

71. If we are thought wrong in that conclusion we would have found that it was not reasonably practicable for Mr Marriott to present his claim in time and that it was then presented within a further reasonable period, within section 48(3)(b). The Respondent sensibly concedes that it was not reasonably practicable for Mr Marriott to present his complaint while off work with stress from the middle of December, or whilst suffering from his two heart attacks in February 2015; or convalescing. But the medical evidence shows that he was, on a balance of probability, fit enough at least by the autumn of 2015 to have presented the complaint.

72. The reason for his further delay is that he was waiting for the outcome of his appeal. We find that because the outcome of that appeal was itself the last act in a series, where Mr Marriot hoped for eventual vindication, it was not reasonably practicable for him to realise that he should not delay, (despite his employer's delay in arranging the eventual appeal), that he should have sought advice and looked to submit a claim before the appeal was heard, if only as a preventive precautionary measure to stop time running against him.

73. This is one of those rare cases where we find that ignorance of the law was reasonable. Mr Marriott cannot have been expected to know that his remedy of detriment had a different time limit to his remedy for dismissal. The one was inexplicably bound up with the other in Mr Marriott's eyes; as it would have been in the eyes of any reasonable employee. It was practicable for him to present his claim, if not in time then by October when his health had

sufficiently recovered; but the word "reasonably" must be given some weight in this situation. In this case we find it was not reasonably practicable to expect him to submit his complaint until Councillors had heard and disposed of his appeal. The complaint was then submitted within a further reasonable period, on 26 July 2016. The further period was reasonably required to obtain professional legal advice and to obtain his EC certificate.

Causation

74. Was Mr Marriott subsequently subjected to detriments on the ground that he had made a public interest disclosure within section 47B? Where that is the issue, it is up to the employer to show the ground on which the act was done: section 48(2).

75. Mr Pedley breached Mr. Marriott's confidentiality when he tipped off Mr Dargue about the whistle blowing enquiry. That is how Mr Dargue knew about it when he rang Mr Marriott to tell him his "whistle blowing interview" had been postponed. Since Mr. Pedley denied his conversation with Mr Dargue, the respondent is in difficulty in showing why he did it. However, it is a fairly clear inference from Mr. Dargue's account that Mr Pedley's principal motive was to protect himself and his managers from awkward questions being asked by the enquiry about private work done by Council contractors. That is what Mr Dargue told us when asked why he thought Mr. Pedley had tipped him off about the enquiry, and asked him to hold back the work.

76. The case of Fecitt v NHS Manchester [2012] ICR 372 establishes that where there are a number of reasons why a detriment is done, it is enough if the disclosure is a significant or effective cause of the detriment; it does not have to be the main, let alone only, cause.

77. Mr Pedley knew it was Mr. Marriott who had set the enquiry in motion, potentially exposing him and his department to a lot of awkward questions and possibly serious criticism. We find his annoyance at Mr. Marriott was a second, significant and effective reason for the breach of confidentiality: he was telling Mr Dargue who was responsible for stirring up this trouble; who it was making the allegations. We find therefore that Mr Marriott was subjected to that detriment because he had made his disclosures. His complaint of being subjected to detriment on grounds of making a public interest disclosure therefore succeeds.

Unfair dismissal

78. Mr Marriott resigned. He can therefore only succeed in his unfair dismissal claim if as a first step he can bring himself within section 95(1)(c) ERA and show that he resigned in circumstances where he was entitled to, because of the conduct of his employer. "Entitled to" is a strong term. It means in law that he must show he resigned in response to a fundamental breach of contract from his employer.

79. The fundamental breach of contract Mr Marriott relies on is the implied term of mutual trust and confidence: that the employer will not, without proper cause, so conduct itself as to destroy the relationship of mutual trust and confidence that should exist between employer and employee.

80. The opening words are important in this case: did the Respondent have proper cause for its conduct – essentially its handling of Mr Marriott's whistle blowing complaint – that drove Mr Marriott to resign.

81. The Council have a Whistle Blowing Policy: we set out paragraphs 1.1, 1.2, 6.1, 6.2, 6.4, 8.2, 8.3 and 8.14.

Whistle Blowing Policy

1.0 **INTRODUCTION**

1.1 The Council is committed to the highest possible standards of openness, probity and accountability. In line with that commitment, Scarborough Borough Council encourages employees and others with serious concerns about malpractices in the form of irregularity, wrongdoing or a serious failing in standards at work to come forward and voice those concerns. It is recognised that certain cases will have to proceed on a highly confidential basis and the Council wishes to make it clear that staff can do so without fear of reprisal.

1.2 The "Whistleblowing Policy" is intended to provide a framework to encourage and enable staff and other stakeholders to raise serious concerns internally within the Council. The overriding consideration should be that it would be in the public interest for the malpractices to be corrected and for any necessary sanctions to be applied. The Policy has been discussed with the relevant Trade Unions and professional organisations and has their support.

.....

6.0 **HOW TO RAISE A CONCERN**

6.1 As a first step, an employee should normally raise concerns with his/her immediate manager or their superior. This depends, however, on the seriousness and sensitivity of the issues involved, and who is thought to be involved in the malpractice. For example, if it is believed that management is involved, an approach should be made to the Human Resources Manager.

6.2 An employee will be required to record in writing the background and history of his/her concerns, giving names, dates and places, where possible, and to state the reasons why there are particular concerns about the situation. If the employee does not feel able to put his/her concerns in writing, he/she can telephone or meet the appropriate Officer. Such a meeting can take place away from the workplace, if that is what is preferred.

6.4 Although the employee is not expected to prove the truth of the allegation, he/she will need to demonstrate to the person contacted that there are sufficient grounds for his/her concern.

.....

8.2 Where any officer receives such a report, they must not embark on an investigation. The Officer must immediately report details of the irregularity to a member of the Irregularity Response Team who will convene a meeting of the team as soon as possible.

8.3 The Irregularity Response Team members are:-

- The Chief Executive (as Head of The Paid Service).
- The Director (as Section 151 Officer).
- The Director (as Monitoring Officer).

- The Human Resources Manager.
- The Audit and Fraud Manager.

8.14 It is essential that the investigation should be a complete one and the officer to whom it is delegated is entitled to expect the fullest co-operation from all employees.

82. It has not been suggested that that Whistle Blowing Policy is contractually binding, or apt for incorporation, but employees can reasonably expect their employers to follow their own policies. Three aspects of the Whistle Blowing Policy particularly concern us in this case: Firstly, was proper consideration given within 1.2 to whether "*any necessary sanction be applied*", part of the overriding consideration set out by the Council. Secondly, why was the investigation carried out a preliminary investigation rather than a proper investigation under the Whistle Blowing procedure: see section 8. Thirdly, was the investigation that was carried out "*a complete investigation*" as paragraph 8.14 says it should be.

83. Ms Blades accepted that her enquiry was not compliant with section 8 of the Whistle Blowing Policy, since she had never convened an Irregularity Report Team to supervise the enquiry. She described the enquiry she, and Mrs Johnston, had conducted as a preliminary enquiry: if that had revealed something serious, then she would have convened an IRT to report to. She accepted that the enquiry had been conducted outside the Policy. In her view, the Policy (which she had been involved in drafting and reviewing) was remiss: it should have included a preliminary stage.

84. A "*complete investigation*" would normally include putting the specific matters complained of, where details were provided, to the employees implicated. Mr Marriott had alleged on 1 October that Mr Bachelor was having his garage rebuilt and wired by contractors. Mr Bachelor was questioned, but not about his garage. Miss Blades told us that she had missed the point.

85. Several of the employees who were questioned accepted that they had had work done by Council contractors. The allegation was that it had been done as a favour, at a reduced price. None of them were questioned about the price they had paid for the work done; about whether a market price had been paid, for example. None were questioned about how often they had used contractors, or the overall value of work that they had done, or over the time period. Mrs Blades explained that she believed she was not allowed to ask such questions. They concerned private and personal matters. 8.14 of the Policy, however, stipulates that she was "*entitled to expect the fullest co-operation from all employees*". Despite this, neither she nor Mrs Johnson asked any follow up questions.

86. One of the employees questioned stated that one of the managers had had a fuse box fitted for free. The manager was not asked about that.

87. The enquiry team referred to the Council's Code of Conduct in their report. They found that that Code of Conduct obliged employees to report work done privately for them by contractors to managers: there was an obvious conflict of interest involved.

88. None of the managers interviewed (save for Mr Bachelor) were aware of such a requirement. Mr Pedley, the senior manager of the section, responsible for Asset and Risk Management, said when questioned: *"he was not aware of*

any staff within his service who had used Council contractors to do personal work, but suspected that some may well have although he did not know about it if they had". He was asked if he was aware that if staff had had such work done they should disclose this to him if they are allocating Council contracts. He stated that he was not sure of any specific policy but there was an employee Code of Conduct which included a presumption that staff should not put themselves in any potentially difficult positions. Clearly Mr Pedley was aware of the Code of Conduct but not aware of the obligation on staff to disclose conflicts of interest.

89. His statement shows surprising ignorance and lack of curiosity from a senior manager, but evinced no further questioning or expressions of concern from the enquiry team, either at the time in their interview, or in the report itself. Mr Pedley *"suspected there may well have been use of private contractors by his staff, but had never received a report"*. That the manager in charge of the section was ignorant of the basic safeguard that employees should report to him if there was a conflict of interest could reasonably be expected to be of serious concern to the investigators. It lends weight to Mr Marriott's allegation that management turned a blind eye, ignored abuse, that private work was consistently not challenged in any way. However, we recall that it was, on Mr Dargue's account, Mr Pedley who tipped off Mr Dargue about the enquiry and suggested he hold back on this and get the work on his patio completed later.

90. We would have expected an enquiry into corruption and lax governance by managers to react strongly to that information. It appears from Mr Dargue that Mr Pedley was more interested in covering up abuses than in exposing them to enquiry. If so, that is a shocking state of affairs for the Council's Asset and Risk Manager to take; yet the enquiry made no attempt to follow it up. They merely included a bland and non judgmental reference in the report and a recommendation that procedures be tightened. But the Code of Conduct is perfectly clear as the report spelt out; the issue was not that the Code needed tightening up, it was that it needed implementing.

91. A reasonable investigation under whistle blowing might be expected to bear in mind the overriding consideration of whether: *"any necessary sanctions be applied"*. It is not for us to suggest the sanctions if any that should have been applied to Mr Pedley; but it might be expected that some words of guidance on the meaning of the Code, or guidance that his tip off to Mr Dargue was inappropriate, should at least have been considered; if not a referral for formal disciplinary or capability proceedings. An employee making a whistle blowing complaint might reasonably expect some consideration to be given to the Policy's overriding consideration.

92. Similarly with the manager who accepted that he had detached a driver and van from their normal Council work and sent them on a 60 mile round trip at Council expense to pick up a rabbit hutch he had bought on EBay. As Mr Lombard had observed to the enquiry team, if management can do it why can't we? Any employee who did that might expect to be sanctioned. A whistle blower might expect that the enquiry would reasonably have considered that aspect, given the overriding consideration of the public interest set out in Paragraph 1.2 of the whistle blowing policy.

93. Did Mr Marriott get the *"complete enquiry"* that 8.14 commits the Council to conduct? Given that the enquiry was conducted by two officers, one the Audit and Fraud Manager, who believed that they had no power to question managers about private deals they struck with contractors, he did not. Even

the most basic questions: how often, how much, when, what declaration was made under the Code went unasked. Indeed the report was not even conducted under the Whistle Blowing Policy at all. No Irregularity Team Meeting was ever convened. No reports were ever made to the Irregularity Team Members. It is at least possible that some of the senior managers on the team, had they been presented with progress reports as they should have been, might have suggested, as the Whistle Blowing Policy indicates, that some other direction might be followed. For example, that some of the questions left unasked should be put to staff, and answers obtained.

94. On all these grounds Mr Marriott was severely let down. He had raised legitimate concerns of possible corruption in the public interest and the Council, contrary to appearances, had simply not properly, let alone "completely", investigated them. And when they had found breaches of the Code of Conduct or managers incorrect use of private vehicles, they had effectively ignored them.

95. But it goes further. The report was appealed by Mr Marriott to Councillors under the Council's grievance procedure. In the case submitted to the Council Committee by the enquiry team they set their report in context. They referred to the 2011 grievance about taking Council vans home, the 2012 whistle blowing complaint and a 2013 audit investigation saying that the majority of Mr Marriott's concerns had previously been investigated and found groundless.

96. There is no evidential basis for that assertion. The concerns had not been investigated and found groundless. No report or outcome was issued in 2012 when Mr Marriott had taken his concerns to Mr Kaye. The evidence about the audit enquiry in 2013 was even less satisfactory; again no documents were available. The report simply stated, on Mrs Johnson's recollection, that audit had investigated at the time and found work was fairly distributed between subcontractors; but that was never Mr Marriott's complaint. It does not address the issue he raised that managers were using contractors to do work privately at home, at below the real value.

97. We agree with the enquiry team that there is no substance and no public interest in Mr Marriott's first complaint about the use of Council's vans by staff to go home; but that is no reason to make light of his other concerns; to suggest, as the report does, that he brought forward baseless allegations with no evidence. Under the Whistle Blowing Policy Mr Marriott is not required to provide evidence. He is required to: *"demonstrate ... that there are sufficient grounds for concern"*. He did that, providing detailed instances which were simply not investigated. They were never put to the managers involved.

98. The Report is also seriously misleading in the section where it discusses possible breaches of the Council's Code of Conduct: Paragraph 8.54 states: *"The Code of Conduct does not however preclude staff from using Council Contractors to carry out personal work unless they are involved in awarding contracts, which in this case they are not"*. Mr Marriott's three managers, Mr Pedley, Mr Dargue and Mr Hill, about whom he was complaining, were all involved in awarding Council contracts. Ms Blades explained her misleading statement by saying that she had meant to refer to the Framework Agreement, the list of Council Approved Contractors. Councillors were therefore not given the correct picture.

99. A further example of ignoring concerns properly raised by Mr Marriott occurred in the middle of June. He sent a letter (described in paragraph 36, above) to the chief executive Mr Dillon.

100. His letter was simply ignored. It was never investigated; yet in their report to Councillors, Ms Blades dismissed the letter because Mr Marriott *"had provided no evidence in support"*. He had provided no evidence, but he had given chapter and verse: a series of detailed allegations which the Council never investigated, as they were duty bound to under their Whistle Blowing Policy. To dismiss the letter by saying he provided no supporting evidence, when he had provided a wealth of detail that could have been readily checked with Council employees, is, again, misleading.

101. We accept Mr Marriott did not always put his evidence forward when he might have done; but when he did it was ignored. We accept his first complaint was groundless. But the Council "encourages" employees to bring forward their concerns (paragraph 1.1, Whistle Blowing Policy); they must expect to get some groundless complaints. Like many whistle blowers Mr Marriott did resort on occasion to allegations way beyond what his knowledge suggested, but allowance must be made for the difficulty of his position. Like many whistle blowers he was isolated, in conflict with his managers and his colleagues, trying, fruitlessly, to get someone to listen to him; to take him, and their own Whistle Blowing Policy, seriously.

102. It is instructive to reflect on our first impression as a Tribunal on reading the papers, which we did as a reading day on the first day of our hearing. All three of us, independently, reached the conclusion that Mr. Marriott's case was weak; that he faced real difficulties in establishing a dismissal; that the Council had, on balance, behaved well towards him. We considered whether we should give a costs warning on the ground that his case had no reasonable prospect of success; on reflection, we decided that would be going too far, but we did refer to "real difficulties in his case" at the start of the evidence on the second day. It was only when we heard the evidence examined in detail that what had appeared on first reading as minor loose ends, (and no enquiry can be expected to chase down every loose end), turned out to be a wilful blindness to follow up obvious leads; investigators who believed they were constrained not to ask questions, despite that being the whole point of their enterprise. When we went through the transcripts of the enquiry interviews, comparing them to the standards set by the Council in their Code of Practice and Whistle Blowing Policy, the case took on an entirely different aspect.

103. The Council failed Mr Marriott badly. They did not take him seriously or follow their own Policy. We find the report can best be described as a whitewash, a coat of paint applied to cover up what was underneath. We do not say that that cover was applied deliberately, or as part of some wider cover up, but it is indicative of investigators who do not like to enquire too far for fear of disrupting working relationships and teamwork, for fear of upsetting colleagues.

104. It is not part of our remit to find that there was any corruption to be covered up; or that there wasn't. At most there is clear evidence from the manager's admission that one manager abused his position on the use of Council's vehicles. It may be there never was anything more, and that is hardly the most serious case. The difficulty is that because of the failings of

the investigation and report, the Council cannot be sure either way: whether there was more to be discovered, or not.

105. Given those failings we find that the Council did without proper cause so conduct itself as to destroy the relationship of trust and confidence that should exist between employer and employee. Mr Marriott was entitled to expect a thorough enquiry, a "complete" enquiry. He did not get it; instead his concerns were dismissed as groundless, despite the lack of investigation; and while the Council did give him some recognition for the tightening of procedures that followed, he was also disparaged for taking up Council time with repeated, groundless complaints. We find Mr Marriott was entitled to resign and did so in response to that fundamental breach. His trust and confidence in the Council's ability to treat him fairly or properly had been destroyed by the failures in the Whistle Blowing report, and subsequent report to Councillors.

106. That the Council subsequently offered him a job reporting to different managers, though based in the same depot, did nothing to repair that breach. Indeed, it was by that stage irreparable.

107. The principal reason for Mr Marriott's dismissal, as he made clear in his letter of resignation, was that he had made a public interest disclosure which the Council had not properly investigated or considered, leaving him exposed and vulnerable to retaliation from the managers he had complained about. This was an automatically unfair dismissal within section 103A Employment Rights Act.

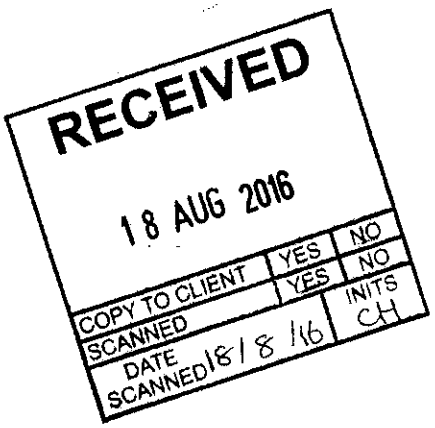
Employment Judge Forrest

Date 17/8/16

JUDGMENT SENT TO THE PARTIES ON

17/8/16

FOR THE TRIBUNAL OFFICE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