



EMPLOYMENT TRIBUNALS

Claimant: Miss D C Fitzalan-Howard

Respondent: Public Health England

Heard at: Nottingham

On: (Reading days) 3 and 4 October
(Hearing days) 5, 6, 11, 12, 13, 14, 17, 18, 19, 20, 24 and 25 October 2016
(Decision days) 26, 27 October

Before: Employment Judge Hutchinson

Members: Mrs J M Bonser
Mr Z Sher

Representatives

Claimant: In Person
Respondent: Mr A Weiss, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:-

1. The claim of unfair dismissal fails and is dismissed.
2. The claims that the Claimant suffered detriments as a result of making protected disclosures fail and are dismissed.

REASONS

Claims, Background and Issues

1. The Claimant presented her first claim to the Tribunal under case number 2600368/2015 on 22 April 2015. At that time the Claimant was still employed by the Respondent and the claim was that she had suffered detriments as a result of making protected disclosures.

2. She said that:

"I was unwillingly "outed" as a whistleblower when I refused to convey NHS personal data to unknown third parties within 3 days of my TUPE'd transfer to the new organisation. Many detriments followed including physical harm, absolute isolation and removal from work and written gagging orders."

3. On 29 July 2015 the Claimant presented her second claim to the Tribunal under case number 2600916/2015. That was the date upon which she says she was unfairly dismissed and that claim was of unfair dismissal only.

4. The Claimant's complaint was of unfair dismissal under Section 103A of the Employment Rights Act 1996 and she also applied for interim relief.

5. The application for interim relief was heard by my colleague Employment Judge Blackwell on 14 August 2015 at which and for reasons set out in his judgment he rejected the application.

6. In their responses to the Tribunal the Respondent's denied that the Claimant had suffered detriments as a result of making protected disclosures and said that the Claimant had been dismissed with notice on 29 July 2015 for "some other substantial reason". It was said by the Respondents:-

- There were irreconcilable differences between the Claimant and her Line Manager which meant she was unable to return to her substantive post in Nottingham;
- The Respondent had a duty of care and would not place the Claimant in a location where she believed she was at risk of harm (albeit the Respondent did not share that belief);
- The Respondent could not sustain the arrangement of the Claimant working from home on restricted activities whilst a fixed term worker was needed to cover her substantive role in the office;
- The Claimant had declined to participate in work place mediation
- The Claimant had failed to engage in the process to seek alternative roles;
- The Claimant had not accepted the training and support offered by the Respondent;
- The Claimant had not identified any alternative solution.

7. Three months' notice of termination of her contract of employment had been given and the last day of employment was 29 October 2015.

8. The two cases were consolidated and I conducted a Preliminary Hearing on 1 September 2015. At that time the Claimant had identified 28 disclosures that she said she had made and 43 detriments that she said that she had suffered. It was agreed that there should be a Preliminary Hearing which would:-

8.1 Identify the protected disclosures relied on by the Claimant;

8.2 Identify the detriments relied on and the link between the detriment and the disclosure;

8.3 Determine whether any of the allegations should be struck out or a deposit order made in respect of those matters;

8.4 Make any further case management orders and list the matter for hearing.

9. My colleague Employment Judge Heap conducted the Preliminary Hearing on 4 and 5 November 2015 and reserved judgment which was then delivered on 12 November 2015.

10. Certain of the allegations made by the Claimant were struck out and this left 21 disclosures and 20 detriments that were then helpfully set out in a schedule by Employment Judge Heap which was incorporated into the bundle and is at pages 266 to 281. The Tribunal has seen the judgment and reasons in respect of that Preliminary Hearing which is at pages 204 to 239.

11. At a further Preliminary Hearing the matter was listed and this Tribunal spent 2 days reading the documents before commencing the hearing.

12. The Tribunal was mindful that the Claimant represented herself and is not a lawyer. I took some time in explaining to her the legal issues in the case and the procedure that the Tribunal would follow.

13. The Claimant believed that Mr Weiss had sought to gain himself an unfair advantage by presenting his skeleton argument prior to the hearing. I explained to Ms Fitzalan-Howard that this was not the case and that it was quite normal and indeed helpful for the Tribunal to have a submission of this nature and that she should take the time to consider it as it set out very well the legal issues in the case.

14. Having discussed the way that the Tribunal would hear evidence, I went on to explain the legal issues in respect of each of her claims.

Unfair dismissal

15. The Claimant's primary case in respect of this is a claim under Section 103A of the Employment Rights Act 1996 ("ERA"). The Claimant says that she was dismissed and that the reason (or if more than one, the principal reason) for the dismissal was that that she had made a protected disclosure.

16. If we were satisfied that the Claimant was so dismissed then her unfair dismissal claim would succeed.

17. It is for the Respondent's to establish the reason for the dismissal and in this case the Respondent's say, as described above, that the reason falls within Section 98(1) of the ERA, namely:

"In determining for the purpose of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show:-

- (a) the reason (or if more than one the principal reason) for the dismissal and;
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

18. Although it is not specifically claimed in the original claim form, if the employer in this case satisfies us that they did dismiss for a potentially fair reason, we must go on to consider Section 98(4) ERA as to whether the dismissal is fair or unfair (having regard to the reason show by the employer).

Detriment on the ground that the worker has made a protected disclosure

19. In respect of this Mr Weiss set out in his skeleton argument the issues relevant to liability in respect of these claims namely:-

- (a) whether there were disclosures of information (all disclosures);
- (b) which in the reasonable belief of the Claimant tended to show a relevant failure – criminal offence or breach of legal obligation (not 12 and 14);
- (c) whether the disclosure(s) was made in good faith (disclosures 1-8);
- (d) whether the Claimant reasonably believed that the making of the disclosure was in the public interest (disclosures 9-28);
- (e) whether the Claimant reasonably believed that the relevant failure fell within any description of matters in respect of which that person is so prescribed, and that the information disclosed and any allegation contained in it are substantially true (disclosure 12 only);
- (f) whether the Claimant reasonably believed that the information disclosed and any allegation contained in it were substantially true (disclosure 14 only);
- (g) whether the Claimant made the disclosure for the purposes of personal gain (disclosure 14 only);
- (h) whether at the time the Claimant made the disclosure the Claimant reasonably believed that she would be subjected to a detriment by her employer if she made a disclosure to her employer or in accordance with Section 43F – to the Information Commissioner (disclosure 14 only);

(i) that the worker had previously made a disclosure of substantially the same information to her employer or in accordance with Section 43F (disclosure 14 only);

(j) whether in all the circumstances of the case it was reasonable for the Claimant to make the disclosures having regard to in particular to the factors in Section 43G(3) (disclosure 14 only);

(k) whether the Claimant had suffered detriments;

(l) whether the Respondent/its employees in subjecting the Claimant to any detriments were materially influenced by the protected disclosure(s) relied on by the Claimant;

...

(p) if any detriment claims are found proven, whether those were presented in time.

Evidence

20. The Tribunal heard from the Claimant first. This was at the Claimant's request. The Tribunal also heard from the Respondent's witnesses who were as follows:-

- Christopher Barzey, Regional Lead for NDTMS quality and the Claimant's Line Manager;
- Jill Smith, Deputy Programme Manager and Mr Barzey's Line Manager;
- Susan Martin, Senior Specialist Occupational Health Nurse;
- Malcolm Roxburgh, Associate Director and Jill Smith's Line Manager;
- Kara Barton Rivadulla-Rey, HR Business Partner;
- Jennifer Coleman, Local Engagement and Deliver Manager and temporary Line Manager of the Claimant;
- Ann Crawford (nee Godwin), Deputy Director Health and Wellbeing and Workforce Development;
- Stephen Raynor, Head of Registration, National Cancer Registration and Analysis Service, Chair of the stage 1 grievance panel;
- Alex Sienkiewicz, Director of Corporate Affairs and Investigation Manager;

- Tony Vickers-Byrne, HR Director, member of grievance appeal hearing panel;
- George Stafford, Head of Public Accountability;
- Andrew Cooper, Deputy Director for Organisational Development and dismissing Officer;
- Camilla Bellamy, Deputy Director of HR, independence source of support in HR for the Claimant;
- Viv Bennett, Chief Nurse.

21. Where there was a conflict of evidence the Tribunal preferred the evidence of the Respondent's witnesses. Their evidence which for most of them covered a period of 2 years was consistent and credible. It was consistent with the documentation that was created at the time and broadly consistent with each other. The witnesses had been subject to very serious allegations made by the Claimant. She alleged being, as she described, "attacked" by Mr Barzey and accused Jennifer Coleman of pushing her down the stairs. She reported Susan Martin to the Nursing and Midwifery Council about her alleged misconduct and also accused witnesses of dishonesty and fraud. We agree with what Mr Weiss says in his introduction, namely that the Claimant:

"Perceives there to be a conspiracy working against her when the reality is that there is none."

22. This Tribunal was impressed by the way that the Respondent's witnesses remained professional despite the Claimant's use of inflammatory language. Her behaviour in cross examination was to treat the witnesses in a most dismissive and patronising fashion. I often had to remind the Claimant that it was not appropriate when she was asking questions to misquote what the witnesses had said and ask misleading questions.

23. When considering the Claimant's evidence we were satisfied that the Claimant had tried to build her case by distorting the evidence that was placed before us. The Claimant was not a reliable witness. The most important example of this was in her description of what happened between herself and Christopher Barzey on 5 April 2013.

24. In her e-mail on 8 April 2013 (page 418) she refers to this as a "lock in". By 9 May 2013 in her notice to proceed to formal grievance (page 540) she referred to Mr Barzey:

"Hemming me to my desk whilst interrogating me."

And that he had caused her "grievous stress".

25. By 17 July 2013 the Claimant was referring to:

"Given his autistic traits to date I was completely unable to read what he would do next and was fearful for my physical safety – terrified in fact

(pages 822-3 of the grievance meeting)."

She went on to say:

"It feels that he could be violent, based on the fact that my own brother has very similar autistic traits to CB and is prone to extreme temper and threatened violence."

26. By 23 December 2013 in the second grievance meeting at page 1122 her accusations had become more extreme describing his behaviour as follows:

"For the avoidance of doubt, CB physically held me against my will for 3 hours in my office (small cubicle like desk arrangement) and subjected me to a form of interrogation. I feared for my physical safety. I perceived CB as being both mentally unhinged and unstable. His demeanour was aberrational and not that becoming of a Line Manager."

27. In her witness statement the Claimant developed this further accusing Mr Barzey at paragraph 29 as having pulled her monitor off its brackets and saying that she had been "trapped behind my desk for the next 3 hours".

28. Her allegations against Mr Barzey in respect of this incident are incredible and we do not believe what the Claimant says. There was a similar situation in respect of her meeting with Jennifer Coleman on 7 January 2014 in Birmingham. In her e-mail at the time (page 1227 to Kara Barton she describes how:

"Yesterday in Birmingham on my journey home I fell at the train station."

As a result she was unfit to work having damaged some ligaments severely.

29. This was also confirmed in her e-mail of 30 January to Camilla Bellamy at page 1352. The note attached also described an allegation that Ms Coleman handed her coat to her and then escorted her off the premises "without customary concern for my mobility issues which would have been evident".

30. In a meeting to carry out an assessment of her wellbeing with a doctor engaged by Health Management Limited, the Claimant then alleged that she had been pushed down the stairs by Ms Coleman (page 3316). This was a matter that was subsequently investigated by the Respondents and found to be an untrue allegation. The Claimant in her witness statement at paragraph 213 renews this allegation saying:

"Jenny Coleman then escorted me out of the building which involved an ID lock system as I recall it. Jenny Coleman pushed me over some steps which, due to knee injury and pulling a wheel mounted case, I had to take time in approaching descent."

31. The Claimant says there is evidence in the transcript of her covert recording but there is nothing in that that suggests in any way that Ms Coleman pushed her down the stairs or indeed pushed her in any way. As a result of this allegation Jenny Coleman was subjected to an entirely unnecessary interview whilst the allegation that the Claimant latterly made in April/May 2015 was investigated.

The allegation is entirely without foundation and added to our concern about the credibility of the Claimant as a witness. In our view the Claimant could not be believed.

Findings of Fact

32. The Claimant commenced her employment as an NDTMS Improvement and Development Manager on 9 January 2012. She was based at Nottingham and worked at the Nottingham City Hospital site. She reported to Duncan Easton who was based in Leeds and was responsible for providing data collated from a number of agencies to the Department of Health. She was in the Yorkshire, Humber and East Midlands region and was part of the National Drugs Treatment Agency.

33. On 1 April 2013 Public Health England was established and NDTMS became part of that organisation. Jill Smith had been a manager in the North East region and Chris Barzey was her Deputy.

34. Prior to 1 April 2013 Mr Barzey had been employed by the University of Durham who hosted an organisation called North East Public Health Observatory (NEPHO). Mr Barzey's job was an NDTMS Systems Integration Manager and he had worked in this role from 29 March 2004 until the transfer took place. The University of Durham dealt with all contractual matters and HR on behalf of NEPHO.

35. As a result of what was described as a "matching process" he was transferred into the role of East Midlands NDTMS Manager based in Nottingham. He was responsible for a small team that comprised him, the Claimant who was his Deputy and Dan Collinson a data analyst based in Leeds.

36. Jill Smith who had been his Manager in the North East as Regional Team Leader became NDTMS Deputy Programme Manager and Mr Barzey reported to her and she reported to Malcolm Roxburgh who had management responsibility for NDTMS.

37. Duncan Easton, under the reorganisation, became Manager of the North and Yorkshire region.

38. Mr Barzey had been matched into the role because he was the only grade 7 employee who was at risk at the time. The Claimant was a grade 6 employee.

39. Jill Smith visited Nottingham prior to the transfer taking place on both 15 and 25 February to introduce herself and Christopher Barzey to the Claimant. We are satisfied that the Claimant was fully aware of the reorganisation and who her lines of management were.

40. The 1st April was a bank holiday and so the 2nd April was the first day when the Claimant was in work in her new role. The Claimant could not access her new e-mail account and over the following 2 days IT and HR tried to resolve these issues. Jill Smith spoke to her personally and described how the Claimant was "extremely distressed and tearful". She said to Ms Smith that she felt that she "in some way had no employment with PHE".

41. Mr Barzey's start time was somewhat later than the Claimant's and when he arrived he found that the Claimant was unable to access a number of the Respondent's IT systems including the unified e-mail server. When he arrived at work he found the Claimant "extremely agitated". Mr Barzey tried to resolve these issues. He had to set aside other matters that he had hoped he would deal with to deal with the Claimant. He described the Claimant's behaviour to us saying that there were "numerous and frequent tantrums". The Claimant indicated that she intended to leave the work place and not to return to work if she did not receive confirmation immediately that she would be paid on pay day, saying "she didn't work for free".

42. Duncan Easton had managed NDTMS for Yorkshire and the East Midlands area before 1 April 2014. Christopher Barzey had made arrangements at a meeting to delay the transfer of some operations between their respective teams. They agreed that it would be most effective if Mr Barzey was to complete a major project on behalf of stakeholders in Northumberland that he already had well underway and was due to be completed in the latter part of April 2013. In return Mr Easton had been able to persuade John Blair to continue serving the East Midlands throughout April 2013 and into May 2013.

43. On 3 April there was an e-mail exchange between Mr Barzey and Tim Packer a web developer for PHE. They had discussed setting up some mailing lists for NDTMS. Mr Packer had said that this was possible and that he needed to set up the list for Mr Barzey. He explained that he could set up the list for Mr Barzey. He could set up the list with "at NEPHO.org.uk addresses or any other domain we directly control" and Mr Barzey had asked about domains that he was able to offer than any PHE (pages 383-4).

44. On 4 April the e-mail exchanges continued (pages 385-7) and it can be seen that they were talking about what they describe as "host lists".

45. Mr Blair who was the Data Manager was also involved in this and it can be seen at page 401 that he makes some suggestions about the mailing list and what would be required by the East Midlands NDTMS team.

46. Also on 5 April in the morning at 9:42 Mr Blair had sent an e-mail to say that he would not continue fulfilling the transitional arrangement that he had previously made with Mr Barzey and Mr Duncan (page 5224).

47. When Mr Barzey arrived at work he was confronted by the Claimant who wanted him to give his immediate attention to what she perceived to be the "urgent and catastrophic implications" arising from this. She went on to express her opinion how "instantaneously perilous" it would be for her continuing ability to do her job. She wanted Mr Barzey to observe various examples on her computer screen.

48. Mr Barzey was concerned about the behaviour of the Claimant and wanted to "remain visibly as far out of the reach of the Claimant as I reasonably could". He responded by demonstrating with his own monitor that they could be repositioned to show what was on the display above and towards the other side of the partition that separated their two desks; they were sat facing each other.

49. The Claimant then attempted to manoeuvre her computer screen so forcefully that the screws clamping the monitor to its stand in 4 places all flew out. She then lost grip of the monitor and it crashed to the desk. This was all witnessed by people in the office. Mr Barzey enquired as to whether it might be possible to fix the monitor back onto the stand but this could not be done at that time and he therefore moved to sit at the Claimant's desk.

50. They then had a lengthy discussion at her computer because the Claimant was not able to complete rudimentary NDTMS operations. During the discussion Mr Barzey had to take possession of her mouse to navigate through the Drug and Monitoring System website that the Claimant was struggling with. We are satisfied that he maintained a distance between himself and the Claimant and that there was no physical contact between them whatsoever.

51. Apart from the issues with the system, the Claimant continued to "harangue" Mr Barzey and complain that there were things not within the scope of her role that she was being asked to do and that she refused to work with data until someone like "John Blair had rendered it into a form that she had to have it in". There was a discussion about what matters were within her job description and the Claimant simply kept repeating "not my job", "not doing it" and "not my problem". We are satisfied that the conversation must have been extremely difficult for Mr Barzey. We are satisfied though that he was merely trying to have a reasonable conversation with the Claimant who was behaving in an extremely unprofessional manner.

52. We are satisfied, contrary to the Claimants assertions, that there was no physical contact between them and she was not "hemmed in" as she describes. Mr Barzey, sensibly tried to keep a distance, so far as he could, between himself and the Claimant. He did not assault her or confine her in any way. Their discussions continued for some time with the Claimant insisting that she was not going to do particular types of work and expressing her dissatisfaction with Mr Barzey's observations. It ended with the Claimant expressing her intention to have lunch, standing up and she then accused Mr Barzey of standing in her way.

53. The Claimant had been copied into the e-mails between Messrs Barzey, Blair and Packer and on 5 April at 13:43 she wrote to Messrs Barzey, Blair, Collinson and Easton (pages 399-400) saying:

"It would be remiss of me in my role if I didn't observe that none of the agencies listed – as far as I can tell – are licensed within a government agency – that is to say that the PHE is part of the Department of Health and hence the .gov.uk world. It would be more encouraging if at least one other agency was a government one."

54. She went on to recommend "respectfully" that further communication was suspended with the provider whilst the views of the Caldicott guardian were sought.

55. Mr Barzey wrote to Jill Smith at 16:34 (page 399) explaining that they were investigating alternative mailing list services to replicate and replace Durham University's Majodomo mailing list facility and copied the e-mails and referred to the Claimant's concerns. He suggested the issue should be placed on the agenda of the next NDTMS Network Managers Meeting or escalated in an

appropriate manner to address those concerns.

56. At 17:52 on the same day (page 411) Mr Barzey sent another e-mail about those concerns and with some further explanation. He referred to a policy which related to whistleblowing. As a result Ms Smith wrote to both the Claimant and Mr Barzey acknowledging the work they were doing about the contact list and noting the Claimant's concerns and saying that she had already shared these with Mr Roxburgh. She instructed that until further guidance had been received they were not to take the project any further. In a reference to Mr Barzey's e-mail she referred to noting his concerns about whistleblowing.

57. Ms Fitzalan-Howard interpreted this innocent exchange as follows:

"Christopher Barzey has initiated a whistleblowing incident against my name. There are serious consequences for all those involved."

This is in an e-mail at 18:50 hours on 8 April (page 410). She goes on to describe that she required a report to confirm that Christopher Barzey has "falsely implicated me in whistleblowing". We are satisfied that this was not true.

58. Just prior to this the Claimant sent an e-mail to Mr Barzey and others at 18:14 (page 415) saying that she would be working from home on 9 April "as I need to resolve HR issues away from the office". It went on to say:

"I will keep you updated as to my whereabouts at all times and will be otherwise concentrating on the DAMS submissions."

59. Mr Barzey had not been made aware of the Claimant's e-mail to Kim Reynolds at 08:29 that morning (page 418). In that e-mail she complained that Mr Barzey had been calling her a "zombie" which was untrue. She also complained that she had been subjected to a "3 hour continuous lock in to my desk" which was also untrue. She went on to say that this had followed an earlier conversation 2 days before:

"When he laughed at me when I suggested very seriously that his idea to remove data from within PHE to a private contracted IT service should – at the very least – be reviewed by others. He is now treating that as a whistleblowing incident!!!"

This was also untrue.

60. She also said in the e-mail that she urgently required her job description and terms and conditions of employment. She finished by saying;

"I am in desperate despair of being locked into a one to one working relationship with this man."

61. The Claimant was then absent from work without permission from her Line Manager and did not attend work until 19 April when she did so for the meeting with Elen Williams and Jill Smith.

62. The e-mail was forwarded to Jill Smith who wrote to Mr Barzey and the Claimant on 10 April at 14:20 (page 422). She made clear her position:-

- (i) There was no information governance issue and;
- (ii) There was no whistleblowing process instigated/required or outstanding concerning any individual in relation to this matter.

She wanted to have a meeting to resolve these issues and discuss future ways of working and ensure there was no repeat of the unnecessary and out of all proportion communications.

63. The Claimant responded the following day 11 April at 08:37 (page 429-30). She alleged:-

- “Being outed as a whistleblower”;
- That Mr Barzey must have a disability and she wished to know what this was;
- The IT system was “flakey”

64 She required a copy of her terms and conditions of her employment. She referred to “the sad case of David Kelley who was outed as a whistleblower and died as a consequence”

She also said that the meeting should not be an attempt at mediation “without addressing her professional issues”. Contrary to what she said in the e-mail her behaviour was unprofessional and clearly designed to make it as difficult as possible for her to continue to work for Mr Barzey and Ms Smith.

65. Ms Smith then responded, dealing fully with her points which are at pages 431-3. She pointed out;

- She already had her terms and conditions. They had not been altered.
- No whistleblowing procedure had been instigated
- Reminded her of the PHE communication ethos
- She had not had permission to work from home and
- She was required to attend the meeting and
- She was required to attend work
- The meeting was not about mediation but about the Claimant doing her job at her place of work
- A job description is “not exclusive” of other tasks that might be required

66. Ms Fitzalan-Howard’s response was to write to Kim Reynolds to say that she wished to initiate a grievance against Ms Smith and Mr Barzey (page 417). It goes on to say;

“I would prefer – for the record – that mediation could be offered between Jill Smith and myself rather than fast tracking to grievance and potential Industrial Tribunal.”

67. On 19 April Jill Smith attended the Nottingham office along with Elen Williams from HR. The intention was to discuss the incident that occurred on Friday 5 April which had been referred to in the e-mail to Kim Reynolds on 8 April. At the meeting the Claimant referred to Mr Barzey "invading her personal space", physically pushing up against her side, preventing her from leaving her desk and that she had been distressed. There was no reference to any "assault" although the allegations were much more serious than those set out in her original email to Kim Reynolds. A discussion took place with Mr Barzey who gave a conflicting account and it was agreed between the 3 of them that Jill Smith would have an "enhanced involvement in their relationship". There would be more frequent visits.

68. It was agreed that the incident in the office had taken place in the open plan area and they were not alone. No one interrupted the meeting or raised any concerns about inappropriate behaviour. There was no suggestion at any stage of a "threat" or as subsequently referred to "an attack". It was agreed that in view of what had happened there would be no future one to one meetings between Mr Barzey and the Claimant in the immediate future.

69. On 22 April the Claimant returned to the office.

70. On 1 May the Claimant submitted an expense report which included a claim for £3.50 for the tram to go into her office on 19 April (page 529-30). As this was her normal place of work the Claimant must have known that she was not entitled to claim this sum.

71. Also on 1 May Mr Barzey filed a positive return, informing management that the Claimant had been absent without leave between 9 and 19 April (page 5232).

72. Mr Barzey wrote to Jill Smith on 2 May about the expense claim form (page 529) and Jill Smith responded the following day to confirm that such a claim was invalid (also page 529). On 8 May the Claimant was told of the action that was required in respect of this at page 536.

73. Jill Smith attended the Nottingham office on 7 May. Jill Smith had a meeting with Mr Barzey. During the meeting Mr Barzey asked for some work to be completed. Jill Smith's view was that the task was reasonable and not limited to skills or role of an analyst. She had a discussion with Mr Barzey first about the strain that had emerged between the Claimant and Mr Barzey and suggested that he should be more talkative. At about 12:05, Jill Smith sent Mr Barzey into the office to invite the Claimant to join them. Despite knowing that they were awaiting to speak to her, the Claimant delayed attending the meeting for about 50 minutes, eventually attending at 12:55 and announcing that she had to leave earlier than usual that day at around 13:00 hours to attend a pre-arranged non work appointment. The Claimant had said nothing about this to Mr Barzey. They tried to commence a discussion with Mr Barzey proffering an apology for not having had as much time to attend to the Claimant as he would have liked to. There was insufficient time to discuss many of the topics on the handwritten list that Mr Barzey had prepared for the meeting.

74. The meeting did not, as the Claimant alleged, make reference to the demotion of her or anyone else. They discussed briefly an offer of training to

support the Claimant but that was all. She would be required to do some data analyst work and we are satisfied that it was not unreasonable for Mr Barzey to expect the Claimant to do this. The matter was discussed in their e-mail exchange the following day on 8 May (page 537). The e-mail refers to her being asked to undertake data analysis work which was she said not part of her job. Jill Smith who had been copied into that e-mail replied saying that it was not data analysis at all and reminded her:

“All members of large and small NDTMS teams are expected to work with data at numerous points in their normal duties. However, if this is a task you are unfamiliar with then I am sure Christopher (or Dan) can talk you through this simple process.”

75. The Claimant's response the following day 9 May at 10:01 was to write to Jill Smith, Christopher Barzey and Kim Reynolds saying that she intended to proceed to a formal grievance against Jill Smith and Christopher Barzey. The grievance is set out at pages 539-41.

76. It refers a number of times to her suffering from “grievous stress”. It ends by saying:

“I cannot be expected to work opposite Christopher Barzey whilst I undertake formal and legal procedures against him and Jill Smith. Please advise what arrangements NDTMS intend to make to accommodate both Christopher and myself as we proceed through grievance. It also follows that I have no intention of meeting Christopher or Jill or both without a third person present.

I am not in the office today (I have prearranged diary events with an agency). I need to know what is expected of me tomorrow as I am stressed beyond belief and my health is being impacted by having to watch my career disappear to accommodate Christopher's skill set.

Can you confirm that HR will provide references for me if required in the absence of a Line Manager? I would let it be known that I would consider any alternative employment available either within NDTMS or PHE or similar and would on consideration of alternative employment offer a review of my grievance as I have no appetite for more conflict.”

77. Elen Williams referred the matter to Helen Richards at Occupational Health at 10:27 (page 562). She was of the opinion that “she perhaps needs to be on sick leave?”

78. The Occupational Health referral was signed by Jill Smith and is at pages 563-6. The reference says:

“I met her on Tuesday 7 and she did not appear or mention that she is stressed, however, there are ongoing matters regarding her line management culminating with her request to lodge a grievance which maybe impacting in the way she describes.

I need to be reassured it is appropriate to ask her to continue to attend her normal work place and undertake her normal duties from the perspective

of her health and our responsibilities as an employer.

Elen Williams has had e-mail correspondence with Trina today and has advised her that we will be making a referral to Occupational Health due to Trina's own statement – her consent has not been sought.”

79. That afternoon Susan Martin, Senior Occupational Health Adviser called the Claimant. She formed the opinion having talked to her that Ms Fitzalan-Howard was not fit to undertake any work activities at present. She was advised to see her General Practitioner and get signed as unfit to work. She arranged for the Claimant to be reviewed by Dr Alan Muir, Consultant Occupational Health Physician on 23 May (page 568).

80. At 13:21 on 10 May (page 572-3) the Claimant wrote to Kim Reynolds and said that on the basis of the Occupational Health Worker's recommendation she would remain absent from work. She said that she had arranged to see her own General Practitioner but made clear:

“I do not consider myself to be sick.”

81. In response Kim Reynolds advised her to complete a self certification form and told her not to check e-mails or undertake any work whilst she was on sick leave.

82. Also on that day the Claimant received notification about her expense claim form. It was necessary for her to amend the form and resubmit it (page 576).

83. On 13 May at 09:35 the Claimant wrote to Kim Reynolds refusing to self certificate (page 578-9). She also raised issues regarding her expenses and the ticket in respect of her attendance at work on 19 April. She also expressed her concerns about payroll, suggesting that what had been said to her amounted to a threat that her pay would be reduced.

84. On 14 May the Claimant submitted her grievance documentation. The grievance record form is at pages 590-8). She said that she was being “constructively dismissed from my contracted role by erosion of my tasks and substantive role being passed to the new NDTMS Manager”. Some of the allegations were outrageous including accusing Jill Smith of nepotism by promoting Christopher Barzey “without competitive interview”. She had no evidence that Mr Barzey was a relative or friend of Ms Smith. He had simply worked for her. She also made unfounded allegations about Mr Barzey's abilities and knowledge. She also indicated that she believed that Mr Barzey had an undisclosed mental issue such as autism. There were no grounds for her to make such allegations against Ms Smith or Mr Barzey.

85. On 20 May Mr Roxburgh acknowledged receipt of the grievance documentation (page 600-1). In his letter he said:

“You are required to comply with the requests made of you within this process and to assist in achieving the timescales given. Please also note that the process must remain confidential at all times. You must not discuss this matter with other employees or external contacts with any

connection to PHE. You must adhere strictly to the principles of confidentiality surrounding this matter. Should it become evident that there is a potential breach of confidentiality by you or anyone related to this grievance, it is likely that the investigation will be stopped and might lead to disciplinary action being taken.”

86. The Claimant referred to this clause repeatedly as a “gagging order”. It is clearly not. It is a sensible instruction by Mr Roxburgh that the “process” must remain confidential at all times. It did not purport to prevent her from raising any other concerns.

87. On 21 May the Claimant wrote to Tim Reynolds, again confirming that she was not sick. She had been to see her General Practitioner and he had confirmed that (page 602).

88. On 23 May the Claimant met with Dr Muir. We have seen Dr Muir’s letter addressed to Jill Smith at page 608-9 which indicates that the Claimant was fit to attend the work place from a medical perspective.

89. The letter was not sent because the Claimant would not give her authority to release the report.

90. On 24 May Ann Goodwin wrote to the Claimant with an invitation to attend a stage 1 grievance hearing (page 614-5). The Claimant responded to this by saying that she was unable to attend and now said that her case had not been handled properly as she had not had an informal meeting with either party and had been moved directly to stage 1 (page 620). She said that despite making it clear in her earlier correspondence/meetings that she was not prepared to meet either of them.

91. On 28 May the Claimant complained that her expenses had not been processed (page 623) and the following day, 29 May, Elen Williams wrote to inform her that Mr Roxburgh would deal with the grievance and that he had requested an investigation to be carried out. This was to be undertaken by Stephen Dingley (page 628).

92. Stephen Dingley wrote to the Claimant on 29 May (page 643) sending her a copy of Mr Roxburgh’s letter of the 20th and his own of the 24th and asking her to confirm that she would attend the meeting on 3 June.

93. The Claimant responded to this with a letter raising a number of issues before the investigation took place (pages 654-5).

94. On 31 May Kim Reynolds wrote to confirm that the Claimant’s expenses had been approved and that she could expect to receive payment shortly (page 656).

95. There was a meeting between the Claimant, Ann Goodwin and Stephen Dingley on 3 June to explore more about the context of the issues before starting the formal process. Again the Claimant said that due process had not been followed and there had been no informal meetings about her grievances. The Claimant was adamant that she would “have her day in Court” if it came to it. Mr Dingley and Ms Crawford encouraged her to go down the

informal route and to discuss the issues to see if any agreement could be reached prior to engaging the formal process.

96. The Claimant had still not by this stage provided authority for the release of the report of Dr Muir. The Claimant's e-mail on 4 June at 10:41 authorised the release of it but only to Christopher Barzey, not to Jill Smith (page 668). She remained off sick even though she knew that she was fit to return to work.

97. At 11:51 on that day the Claimant then wrote to Malcolm Roxburgh complaining that the administration department in Occupational Health had breached confidentiality in respect of her medical reports complaining that they had been shared with Jill Smith (page 676). She also wrote to Helen Madiford the administrator at 12:06 (page 677). She was now alleging:

"I have been duped into complying with a review of my fitness for which I would not have given her consent had I appreciated it was commissioned by Jill Smith for reasons she would be held to account."

98. The e-mail caused distress to the OH Administration Temporary Assistant by the baseless accusations of breaches of confidentiality. At this stage the only report from Occupational Health that had been sent to management was the one sent by Susan Martin which was with her knowledge. The report at that stage had not been sent to any other person. This is confirmed in the e-mail from Elen Williams at page 684 also on 4 June.

99. On 5 June at 07:52 the Claimant wrote to Elen Williams extending her grievance against Jill Smith accusing her of initiating:

"a thorough investigation of my health with the intention to remove me from my work place, thereby enabling and accelerating my constructive dismissal and the acquisition of my task by Christopher Barzey."

100. She also made an accusation without any evidence to support it, that Jill Smith was to have a report from Dr Muir, which was a breach of confidence, when there was no evidence that Jill Smith had done anything of the sort (pages 688-9).

101. Elen Williams acknowledged receipt of the emails at 16:39 and invited the Claimant to attend a meeting with Malcolm Roxburgh on 18 June to discuss the nature of the grievances and the process of dealing with them (page 687).

102. The Claimant responded to this on 6 June at 00:19 (page 686-7) saying that Malcolm Roxburgh was not to chair a stage 1 grievance concerning Jill Smith and requiring to know the precise nature of the meeting on 18 June when Elen Williams had clearly set out it's purpose.

103. On 18 June the meeting took place. In attendance were Malcolm Roxburgh, Elen Williams, Stephen Dingley and the Claimant. The notes are at pages 744-8. At the meeting the Claimant indicated that she wanted to be "lifted and shifted". There was an agreement that the grievances against Jill Smith and Christopher Barzey should be kept separate. It was noted that she had still not authorised the report of Dr Muir to be released and she refused to do so. She pointed out that she was still at home and she was not sick and she was

on full pay, not sick pay.

104. There were 2 separate hearings in respect of the grievance investigation. In attendance at each of them were Ann Goodwin, Stephen Dingley and the Claimant. The meeting in respect of Mr Barzey took place on 17 July and the notes are at pages 813-24 and the meeting on 18 July dealt with the grievance against Jill Smith and the notes are at pages 825-32.

105. Ann Goodwin and Stephen Dingley then met with Jill Smith on 14 August. The notes are at pages 987-97.

106. On 12 September the Claimant wrote to Occupational Health at 16:12 complaining again about the Occupational Health referral on 9 May signed by Jill Smith. She required a copy of the referral (page 902-3).

107. On 18 September the Claimant attempted to lodge a complaint with the Health and Care Professionals Council relating to the behaviour of Susan Martin. She was told that Susan Martin was not registered with that organisation and so she then lodged a complaint with the Nurse and Midwifery Council on 26 September which is at pages 923-32. There are a number of allegations that the Claimant makes against Ms Martin which are summarised at page 928 and included:

“Compliance with fraud against HMRC with others” and
“false record keeping.”

Ms Martin was also accused of “being complicit” with management’s removal of her from the work place. None of the allegations had any basis to them.

108. The Claimant at the time also made a complaint on 28 September to HMRC (pages 934-5) accusing her employers of “submitting false employment records” in respect of her absence from work and on 30 September wrote to the Head of Human Resources (pages 936-7) seeking restitution of unpaid salary whilst she had been off sick and seeking repair of her employment records to reflect “non sickness record”.

109. On 2 October Kara Barton wrote to the Claimant to introduce herself as HR Business Partner with the Chief Knowledge Office Directorate (page 938).

110. On 3 October the Claimant responded to this e-mail (pages 944-5). The letter makes a number of allegations made without foundation namely:-

- Christopher Barzey for fraudulent record keeping;
- Christopher Barzey informing potential employers that she had lied on applications to them;
- Jill Smith had represented herself as her Line Manager to enable her to access medical records;
- Elen Williams and Stephen Dingley had been involved in trying to obtain further medical investigation into her health which amounted

to bullying;

- Jill Smith maliciously created specific medical records to enable her removal;
- Christopher Barzey had "autistic traits" which she wished to have examined and required a report to be sent to her in connection with;
- Susan Martin had been complicit in the removal of her from the work place;
- HMRC had informed her that they would be clawing back SSP "fraudulently paid on her behalf";
- Threatening County Court proceedings in respect of deductions from her wages;
- Elen Williams had said in respect of her meeting with Mr Barzey on 5 April that she should "write off a 3 hour assault by Christopher Barzey as a "one off" and that he had been told "not to do it again".

111. On 4 October Kara Barton responded to the letter acknowledging the further serious allegations that she had made and noting that she wished to return to work. She informed the Claimant that they would like to discuss her return and look at the possibility of finding a temporary redeployment. Jenny Coleman would act as the interim Line Manager for the Claimant (page 949).

112. On 28 October the Claimant met with Elen Williams and Jenny Coleman. The amended minutes of the meeting are at pages 1002-1006. The following summary was agreed (page 1005):-

- (i) the Claimant had requested that her sickness record be set back to the previous level of 6 months ago, i.e. prior to her absence. This was a condition of agreeing the following 3 items;
- (ii) Christopher Barzey and Jenny Coleman were to agree East Midlands project work that the Claimant could deliver;
- (iii) allowing for time to be taken back for travel and reviewing after week 1, the Claimant agreed to spend time in the Birmingham office which would equate to 3 hours per day. This would be used to get her familiar with NDTMS CDSL changes, up to speed with all of the training documentation, mandatory training and possibly an appraisal;
- (iv) working arrangements would be looked at thereafter – a possible location in the Leicester office;
- (v) it was hoped that the other issues would reach closure by the end of the calendar year in order for her to take up full time duties and job description again.

113. The purpose of the meeting was to support the Claimant in her return to

work following a period of absence and the Birmingham office was the nearest office where management support could be offered. It would be for an interim period only. Her substantial base in the East Midlands was not an option due to her ongoing grievance with her Line Manager. It was made clear that it was not a transfer, merely an interim option to support the Claimant on her return to work.

114. The notes of the meeting were sent to the Claimant who returned an amended version on 31 October. The amendments which are underlined were not a true reflection of the discussion during the meeting and provided detail of the Claimant's grievances that Ms Coleman did not need to know as her role was to support the Claimant in returning to work following a break. It was not necessary for her to be involved in the wider issues.

115. Elen Williams wrote to the Claimant on 18 November. The letter acknowledged that the Claimant wished to return to work in her substantive post within the Nottingham office. The letter confirmed that they were happy for her to do so and that they would arrange the logistics for this arrangement to ensure that both the Claimant and Mr Barzey were supported given the ongoing grievances.

116. She was given an alternative that she could be temporarily relocated to Leicester and was asked to respond by 22 November (page 1028-9).

117. The Claimant immediately responded to this not to Elen Williams but to Kara Barton (page 1031-2). She said that she was "disinclined" to accept the option of a return to Nottingham. In her view it was "untenable and unworkable". This was despite the suggestion that she herself had made some 3 days earlier.

118. On 25 November there was a second meeting with Jenny Coleman and Elen Williams. The agenda for the meeting is at page 1041. The notes are at pages 1042-7. The summary at item 11 refers to the fact that there would be an induction set up in Birmingham and an objective setting meeting in Birmingham. Matters had to be referred to senior management to obtain their approval. Elen Williams' note to Malcolm Roxburgh dated 26 November is at page 1048.

119. On 6 December Elen Williams wrote to the Claimant about the working arrangements pending the outcome of the grievances and referred to the meeting on 25 November. She proposed that the Claimant should return to work to her substantive post, managed by Jenny Coleman in Birmingham as an interim measure pending the outcome of the grievance. Although she would be based in Nottingham she would need to attend a short induction at the Birmingham office. The Claimant was asked to reply by 10 December.

120. There was an immediate response from the Claimant (page 1074) saying that she could not reply in the time frame and goes on to say:

"Can you confirm that Christopher Barzey has been removed from the role of East Midlands Team Manager and under what circumstances he and I would be working in the same office? I wish you to take into account the fact that my grievance continues, nor has it been resolved and in case you have not yet been informed I will be extending my grievances against Christopher Barzey to include fraud and whatever issues your current letter raises need addressing."

It says that she would be in touch.

121. On 6 December Viv Bennett wrote to the Nursing and Midwifery Council ("NMC") about the allegations made against Susan Martin (page 1071(c) and (d)). The letter relates to a number of questions raised in a letter from the Nursing and Midwifery Council dated 12 November. In that letter Ms Bennett had been asked for her comments on the allegations and the details of the background to the matter and she attached to the letter a summary of findings at page 1071(e) and an event time line 1071(f-g). The time line had been extracted from the Claimant's HR file. The responses were made in her capacity as Director of Nursing as part of the Respondent's duty to cooperate with the upholding of professional standards and to protect the public. The NMC decided that no further investigation into the matter was necessary as Ms Martin had no case to answer.

122. On 10 December the Claimant wrote to the Chief Constable of Nottinghamshire Police (pages 1079-81). The allegation was that Mr Barzey had uplifted National Drug and Alcohol data sets to an unknown recipient in his former employer, the University of Durham. This came from mainly NHS health records and:

"contains sufficient detail to identify every single substance abuser nationally to their home address. By now it could include data sourced from within HM Prisons across the country... This data has, in my opinion, high value both commercially and criminally."

123. It went on to make a number of what could only be described as further outrageous allegations against Christopher Barzey and Jill Smith and says that Malcolm Roxburgh "is somehow implicated and despite his position as Caldicott guardian has no interest".

124. On 13 December Jenny Coleman wrote to Malcolm Roxburgh expressing her concerns about managing the Claimant (page 1082).

125. Also on 13 December Kara Barton wrote to the Claimant to set out the arrangements for the Claimant's return to work pending the outcome of her grievances (pages 1099-1100). The proposal was for the Claimant to return to work in a substantive post in Nottingham, reporting to Jenny Coleman and that there would be a period of induction and that:

"Full details of your induction and training programme can be discussed upon your return which will commence on Tuesday 7 January 2014 at the Birmingham office with Jenny Coleman and Elen Williams HR Manager in attendance."

126. It goes on to say:

"In the event you do not accept this proposal, Public Health England will have no choice but to consider your absence from work as unauthorised absence effective from 7 January 2014. This action will result in suspension of your pay and requirement for a separate process to be initiated to investigate your unauthorised absence which will be in

accordance with the disciplinary policy and procedure.”

127. The Claimant then sent a further letter to the Chief Constable on 20 December re “her protected disclosures” (page 1106-9). It repeated much of the allegations that she had made in her earlier letter to the Chief Constable.

128. On 19 December the Claimant wrote to Kara Barton saying that she had only just received the letter of 13 December and that she was not able to respond within the time frame. She said that she would respond on 23 December.

129. The Claimant on 23 December wrote to Kara Barton (pages 1120-39), it raises another “formal grievance”. It referred to her whistleblowing and gives much in the way of case law on constructive unfair dismissal. She contended that requiring her to return to work amounted to detrimental treatment and warned that she would be obtaining a restraining order from the Magistrates Court if there were any further acts of harassment, victimisation and/or detrimental treatment. She referred in the letter to concealment of criminality, fraud, malversation and malfeasance and stigmatisation of herself. She wanted a “neutral and independent third party” to undertake a new investigation and hearing into her grievances and disclosures.

130. There then followed an exchange of e-mails with Kara Barton and the Claimant sent a further letter on 3 January (pages 1146-49) in which she threatened to present herself in Nottingham on 7 January. Eventually the Claimant agreed to attend Birmingham on 7 January in telephone conversations with Elen Williams which were covertly recorded by the Claimant at pages 1163-67. Having agreed to attend Birmingham finally the Claimant wrote to Jenny Coleman at 21:25 on 6 January to express her expectations regarding the meeting the following day (pages 1172-3).

131. The Claimant attended the Birmingham office on 7 January and again the Claimant covertly recorded the meeting at pages 1185-1204. The meeting was conducted by Jenny Coleman with Elen Williams. Jeannette Aston attended to record the minutes. The Claimant arrived agitated and aggressive. The Claimant was rude and patronising and Ms Coleman tried on a number of occasions to persuade the Claimant to behave reasonably. An example is at page 1189 when Jenny Coleman said:

“Can I just say I think we need to calm the tone down because you wrote about it in various letters about respect, speaking with dignity, speaking with candour. I am going to be honest; I am actually here to support you in your return to work. I would request that you would treat me in the same way that I am treating you. You are.....you have come into the room. You are appearing to be quite hostile.”

The Claimant's reply was:

“Can I say that the use of the word “hostile” is a hot subjective issue and you may have to explain why I might feel hostile from you telling me that you are organising a work programme round me and my salary is dependent on it. So I am not exactly in a good frame of mind.”

132. At the foot of page 1190 Elen Williams said:

"Can I clarify for the notes that you are refusing a reasonable request to attend the Birmingham office over the next 3 weeks for induction?"

133. Ms Fitzalan-Howard's reply was:

"You can confirm for the minutes – and I will say this very very slowly so you can write it properly."

134. Ms Coleman said "Jeannette is very skilled at minutes".

135. To which the Claimant said "I do not acquiesce – a-c-q-u-i".

136. Not surprisingly in view of the Claimant's behaviour the meeting failed to arrive at a conclusion with the Claimant complaining that the "removal of tools from Nottingham is in breach of the whistleblowing policy where I have protection from victimisation, harassment and recrimination". This was referring to her laptop.

137. At this stage Ms Coleman realised that the meeting was getting nowhere and handed the Claimant her coat and she was escorted to the lift and then through reception.

138. Some 12 months later the Claimant accused Ms Coleman of pushing her down the stairs and she repeated this accusation in her witness statement at paragraph 213. There is no indication from the transcript that at any time was she pushed by Ms Coleman, let alone down the stairs.

139. When she got to reception it can be seen at page 1203 that she engaged with the security staff there saying to them:

"Have you got a way I can contact this desk if I need evidence I was here?"

140. When she was told they could provide a telephone number her response was:

"You wouldn't write it down for me would you?... I'm covering my arse is what I am doing. I'm not meant to do it but I want you to help me if I did..... If I need to contact you through that number you'd just say. Can I sign myself out please?"

141. Ms Coleman contacted Mr Roxburgh immediately after the meeting and an e-mail was sent by Elen Williams to the Claimant at 15:56 on 7 January following those discussions. It expressed that due to her aggressive and uncooperative behaviour demonstrated at the meeting, Mr Roxburgh did not wish her to attend the Nottingham or Birmingham office tomorrow 8 January (page 1225).

142. The Claimant responded to this e-mail on the same day at 18:36 (pages 1231-3). It can be seen that there are a number of allegations that the Claimant made against Elen Williams and Jenny Coleman but no mention of her being pushed down the stairs. Indeed the e-mail goes on to explain at the foot of page 1232:

"I fell badly in Birmingham New Street Station and my knee is in a terrible state. I cannot drive or walk between rooms in my house. Seeking urgent medical diagnosis tomorrow 8 January – would normally call in sick, fill in a self certification etc but my management is screwed so badly I had no idea to whom I advise I actually am not fit to attend work until I resolve my knee."

143. Ms Coleman was so concerned about the behaviour that she took the trouble on 9 January to obtain statements from 3 members of security who were on reception on 7 January (page 1237).

144. She did believe that disciplinary action would be taken against the Claimant as a result of her unacceptable and unprofessional behaviour on that day. Nothing was done.

145. On 17 January Mr Sienkiewicz visited the Claimant at her home address as part of his investigation into the data protection and whistleblowing issues. The attendance note is at pages 1264-90. The Claimant again undertook a covert recording of the meeting which is at pages 1291-1313.

146. Having met several members of staff after this initial meeting he visited the Claimant again on 5 March and his note is at page 1550(a)-(j). Again the Claimant covertly recorded this meeting.

147. Mr Sienkiewicz concluded his report on 24 April 2014 and submitted it and his recommendations to the Chief Executive the same day. He sent a copy of it to the Director of HR, the Chief Knowledge Officer, the Director of Health Protection and Medical Director as PHE's Caldicott Guardian. The report is at pages 1988-2070. He found the Claimant's concerns unsubstantiated and also shared his report with the PHE's internal auditors, the National Audit Office, the Chair of PHE's Audit and Risk Committee, PHE's Chief Executive, the CEO of the PCAW and Christopher Graham the Information Commissioner.

148. He sent a copy of the report to the Claimant who thanked him in her e-mail of 29 April (page 2160). She did not challenge the contents in any way.

149. Separately, on 7 April the Claimant, who by then had returned to work (from home) raised new and separate concerns by e-mail at 10:32 which was acknowledged by Mr Sienkiewicz at 10:49 (page 1692). These new concerns centred on the use of encryption software and Mr Sienkiewicz arranged for these new concerns to be rapidly and thoroughly reviewed by the Respondent's Deputy SIRO. Having conducted the investigation, Mr Sienkiewicz wrote to her at 19:50 on 24 April (page 1979) saying that Axscript had a good track record, appropriate algorithms and wide use. That it was an adequate encryption tool as long as complex random keys were used for the encryption pathways and those keys were kept securely.

150. Her concerns regarding a version that contained "OpenCandy" or other adware as part of the insulation as well as on the potential risk that downloading from an external website could lead to a "man in the middle attack", were also dealt with. It had been agreed that both potential risks could be mitigated rapidly by pulling off a clean version from SorceForge and providing access to this clean copy from PHE's own web servers.

151. After the exchange on 24 April Mr Sienkiewicz heard nothing further from the Claimant.

152. By 11 April Ms Coleman had reluctantly been persuaded to continue with the interim line management of the Claimant and a meeting was held on 9 April with Jenny Coleman and Malcolm Roxburgh. The meeting discussed the issues relating to Axcrypt and OpenCandy. It was covertly recorded by the Claimant at page 1786-806 and the notes from Ms Coleman are at pages 1784-5.

153. At this point the Claimant had commenced working from home, mainly on her Civil Service training, appraisal and an attempt at supporting the NDTMS annual provider audit. The Claimant had health issues that limited what she could do.

154. Also on 11 April an occupational health report was obtained (pages 1841-4). It found that the Claimant was fit to work with temporary adjustments and she was to continue working from home if organisationally possible. The report also stated:

"I am unable to predict when Ms Fitzalan-Howard's condition will resolve. Much will depend upon the treatment plan that is decided by her treating surgeons."

155. In correspondence with Ms Bellamy the Claimant continued to raise issues about the so called "gagging order" and her "removal to the West Midland's Team". Neither of these assertions were true. Ms Bellamy took the trouble to explain what was meant in the letter about confidentiality in an e-mail on 21 April (page 1939).

156. On 16 May the grievance hearing took place. It was conducted by Stephen Raynor and the notes are at pages 2567-74. Having considered all the statements and other documentation presented on the day and the investigation report Mr Raynor found that professional mediation should be considered and that all avenues should be explored that might lead to the Claimant returning to work either within her team or elsewhere in PHE. The outcome letter dated 22 May is at 2587-9. As can be seen the Claimant said in the meeting that the relationship between herself, Mr Barzey and Ms Smith was "irreparably damaged" and the relationship with Mr Roxburgh was also "compromised". The Claimant could not foresee a return to her current department and she would like to be redeployed and move elsewhere in the Civil Service. Only if this was not possible would the Claimant work at distance from Ms Smith and Mr Barzey.

157. As described again in the letter it says:

“You were categorical that you were not prepared to mediate with CB or JS at the hearing and would like a “divorce” from your current post and to be given a new role out with PHE. However, on reflection if all that has since changed, I would like you to reconsider this as it is an option that is still open to you.”

158. Clearly Mr Raynor had given great consideration to the matter and had also considered the grievance investigation report on Jill Smith at pages 2377-2448 and on Mr Barzey at 2282-2376.

159. On 25 May (pages 2631-3) the Claimant responded saying:

“With enormous reservation as to its value I agree to enter into professionally managed mediation with JS and CB – separately – as outlined by ACAS as good practice.”

160. Jenny Coleman had referred the Claimant to occupational health for a report on 22 May (pages 2620-3).

161. On 2 June Camilla Bellamy offered help with the Claimant’s CV and forwarded links about improving her writing skills (page 2655).

162. Kara Barton wrote to the Claimant on 2 June asking for confirmation that she wished to proceed with mediation (page 2657) and the Claimant gave her consent at 15:53 on the same day (page 2656).

163. On 12 September the Claimant underwent heart surgery and was signed off sick until 25 November.

164. Shortly before her return to work it was agreed that Duncan Easton would now be the Claimant’s Line Manager. A further letter was sent on 21 November (page 3117).

165. At 10:45 on 21 November the Claimant e-mailed Ms Bellamy to say that she was withholding her agreement to undertake mediation until a number of issues were resolved (page 3134). She questioned the motives of the Respondent in terms of its mediation offer. It was agreed with Sally Cooper that the Claimant should not return to work until the Occupational Health and Physio Med Assessment had been completed but if the Claimant was keen to return to work then the return to work programme that had been put together would be used.

166. At 13:30 the Claimant delivered her current fitnote (page 3110) confirming that she was fit to work, taking account the advice that there should be a phased return altered hours amended duties and work place adaptations.

167. On 23 November Ms Bellamy wrote again to the Claimant (page 3133). The note contained details of the referral to Occupational Health and it was also confirmed that the Claimant had a right to appeal the grievance outcome if she was not satisfied with it. It was unfortunate that in the outcome letter sent to her on 22 May her right to appeal was not stated in the letter.

168. On 24 November there was a telephone conversation between Camilla Bellamy and the Claimant. Camilla Bellamy's note is at page 3148. The conversation was covertly recorded by the Claimant. They discussed mediation and the Claimant said that she wished to return to her role and for the mediation to be successful. The Claimant said that she would be taking up the option to appeal the outcome of her grievance.

169. Later the Claimant e-mailed Ms Bellamy (page 3159) to confirm that she was content for Ms Bellamy to pass on her contact details to ACAS and participate in mediation.

170. On 25 November the Claimant wrote again to Ms Bellamy complaining about the Occupational Health Department. She said that her personal information had been passed on to Physio Med and that she would be raising a formal complaint that:

"My medical records had been shared without my explicit permission and for purposes which (given you are paying for a telephone assessment or so I have been told) I can only think are hostile to many health issues and grievances."

171. Ms Bellamy spoke to the Claimant later that day and again the telephone call was covertly recorded. The transcript of the recording prepared by the Respondent is at page 3167. The Claimant's separate transcript is at 3172. The position was confirmed in an e-mail from Ms Bellamy at 15:53 (page 3183) confirming that due to the size and complexity of PHE a triage service takes place over the telephone and Physio Med had contacted her as part of the occupational health assessment.

172. Despite this on 25 November at 18:28 the Claimant lodged a formal complaint about Occupational Health to the Information Governance Team (page 3191) at 18:28 on 25 November. Ms Bellamy pointed out to the Claimant in an e-mail on 3 December at 09:14 (page 3262) that the Respondent's had not breached the Data Protection Act. Ms Bellamy confirmed that they had agreed with Occupational Health that all communications with the Claimant would come through her now to prevent any further misunderstandings.

173. On 25 November the Claimant returned to work with Duncan Easton as her interim Line Manager. She was working from home.

174. On 27 November the Claimant submitted her appeal by way of a further grievance. The e-mail is at page 3217 and the grievance document is at pages 3218-28.

175. The appeal hearing was heard by a panel of 3 namely Anne Hopkins, Tony Vickers-Byrne and Brian Ward on 26 January 2015. The Claimant had with her Beverley Garratt a support/friend and the management case was presented by Stephen Raynor. The notes are pages 3747-52. At the start the Claimant stated her 4 desired outcomes which were:-

175.1 A lift and shift option away from PHE/NDTMS but within Nottingham

175.2 Financial compensation.

175.3 Barzey and Smith to be made publically accountable for what they have done.

175.4 The whistleblowing investigations to be handed to an independent accountable body other than PHE/NDTMS.

176. The Claimant repeated her allegations against both Mr Barzey and Ms Smith. They were the same matters that had been considered in the original grievance hearing. During the hearing the Claimant frequently interjected and made accusations of bias against the management team and the panel and Mr Vickers-Byrne had on a number of occasions to intervene to restore order.

177. In the meeting the Claimant made serious accusations about the behaviour of Mr Barzey and as a result the panel decided to commission an investigation led by Stephen Daniel, Deputy Director of HR and involving Jill Smith to establish whether there had been inappropriate incidents concerning Mr Barzey's treatment of other female colleagues in his employment with PHE or his predecessor organisation.

178. That investigation was completed on 9 June when Mr Daniel e-mailed the Claimant confirming that he had contacted Michelle Cook and Gail Haswell, both of whom confirmed to Mr Daniel that they had never had any concerns about the behaviour of Christopher Barzey (page 4334).

179. The agreed outcome of the panel was confirmed to the Claimant in writing on 30 January by Anna Hopkins (page 3683-5). The first two options were not within their "gift or power". Option 3 would be dealt with by an investigation. Option 4 would be dealt with under a separate procedure.

180. The Respondent still tried to proceed with mediation and on 18 February Ms Bellamy e-mailed the Claimant at 18:31 informing her that they had engaged the TCM group (page 3779). The letter provided further information and offered 3 provisional dates for mediation. Ms Fitzalan-Howard responded, raising some queries about the process and on 20 February Ms Bellamy answered these queries (page 3810).

181. At this stage it appeared that the Claimant did wish to undertake the mediation as is evidenced in the e-mail dated 25 February at 09:57 between Kara Barton and Camilla Bellamy (page 3835).

182. On 7 April Ms Fitzalan-Howard wrote to David Lidlle at the TCM group raising concerns about the mediation process and making reference to an active

case being investigated by the "Cyber Crime Unit in Nottinghamshire Constabulary" and under the direction of Kenneth Clark MP (page 3902).
The e-mail says that:

"The Police feel, as does the Parliamentary Ombudsman feel there is a serious crime to investigate and suggested – very strongly – I do not engage in this procedure due to the conflict that may occur in their legal action, and potentially mine in the Employment Tribunal (also filed)."

There is no evidence to support such a contention.

183. On 14 April at 11:07 (page 3924) the Claimant sent an e-mail to David Liddle at the TCM group declining mediation. She said that:

""Concerned professionals" were strongly advising her not to engage in the process because Mr Liddle was "not in a position to give guidance on how mediation and the law works together, other than to confirm the confidentiality clauses effectively evaporates my case in the Employment Tribunal" and "that I will not be attending mediation on the grounds that it compromises my Court case against the two individuals."

She claimed that her "life is at risk in the proximity of Christopher Barzey" and she said she "was pushed down the stairs by another member of staff in Birmingham a year last January".

184. Despite Mr Liddle's efforts to reassure the Claimant that entering into mediation did not jeopardise any future legal processes, the Claimant responded at page 3923 to say that she found little value in the "mediation event". On 16 April David Liddle wrote to Camilla Bellamy to confirm that the Claimant had "confirmed her intention to withdraw" (page 392).

185. On 17 April there was a further referral to Occupational Health (page 3940) and Ms Bellamy wrote to Ms Fitzalan-Howard seeking to arrange a meeting in Nottingham following her withdrawal from mediation to discuss how to proceed (page 3955). The meeting was arranged for 6 May in Nottingham. It was also confirmed that there would be a further reference to occupational health as part of the process.

186. Ms Bellamy met with Ms Fitzalan-Howard on 6 May. Ms Bellamy was accompanied by Duncan Easton as the Claimant's interim Line Manager. Notes were taken of the meeting by Ebony Charles from HR and are at page 4032-46. The meeting was again covertly recorded by the Claimant who subsequently provided copies of the recordings on a DVD and of transcripts she had taken from the recordings. The transcript was not an accurate record of what was said at the meeting and the track changes made by Ms Bellamy to the original transcript notes are at pages 6054-6131.

187. Ms Bellamy described to us, and we accept her evidence, that it was a difficult meeting and on many occasions they had different recollections of events. Ms Bellamy tried to discuss how they should move forward and Ms Fitzalan-Howard became more and more agitated.

188. During the meeting they discussed a number of options. It was agreed that they were not able to pursue any of these. These were;

- A return to the office in Nottingham in the same team as Mr Barzey;
- A return to the office in Nottingham in a different area to that of Mr Barzey and ultimately away from the team;
- Her role to be based in Birmingham, Leeds or Leicester;
- Carrying out her supervisory role of the team based outside of the Nottingham office where the team are based;
- Continuing to work from home. This was not possible due to the fact that the NDTMS system does not have sufficiently mature and robust audit and monitoring (as compared for example with the cancer registry) to permit PID work from uncontrolled environments including home working;
- Relocation to another location away from the Nottingham office – for the same reason above this was not possible;
- Placing Ms Fitzalan-Howard into a different role in PHE without her undertaking an internal competitive interview process ;
- It was not possible to continue to employ a fixed term contract to cover Ms Fitzalan-Howard's duties in the office whilst she continued to work from home;
- It was not possible to find Ms Fitzalan-Howard suitable none PID related work to carry out at home.

189. For these reasons Ms Bellamy explained it was not possible to sustain the current arrangements and that they would work with her to find her a suitable role either in PHE and/or across the wider Civil Service.

190. They then agreed a number of actions which were:-

- Ms Fitzalan-Howard to let Ms Bellamy know in a week if she would take up mediation (they had agreed that she could have a further period of time to consider that option);
- Ms Fitzalan-Howard to be invited to the CV and interview skills training workshop;
- Internal vacancy bulletins to be sent to her;
- The Claimant to review the vacancy bulletins and CS jobs and to actively look for other roles;
- The Claimant to contact Ms Bellamy directly should she have any requirements as part of her alternative job search;

- Occupational Health to write directly to the Claimant's General Practitioner in respect of any further adjustments she may require if an alternative role is identified.

191. Ms Bellamy made it clear that whilst they were keen to find her an alternative role, if this was not possible then it could ultimately lead to the cessation of her employment. At the close of the meeting Ms Bellamy confirmed they would arrange a follow-up meeting to review progress made on the search for alternative roles to take place in approximately 8 weeks.

192. On 13 May the Claimant e-mailed Ms Bellamy to confirm that she:

“declined most strongly to engage in mediation because I do not believe it to be the process it is presented to be” (page 4232).

193. At the meeting the Claimant had told Ms Bellamy that Jenny Coleman had “pushed her down the stairs” at St Phillips Place in Birmingham that had resulted in an injury to her knee, that later resulted in a fall at Birmingham New Street Station. Ms Bellamy asked the Claimant to confirm this complaint in writing. On 18 May the Claimant responded (page 4258) declining to make her allegation formal.

194. On 27 May Ms Bellamy e-mailed the Claimant inviting her to a follow-up meeting on 7 July 2015 (page 4294). The e-mail confirmed that the purpose of the meeting was to discuss and review where she had got up to with her alternative employment search and for her to update Ms Bellamy on the various learning and development opportunities that had been offered to her.

195. Ms Fitzalan-Howard was offered details of 2 career counselling organisations that would be able to assist her and would be able to offer face to face coaching.

196. On 23 June the Claimant was told by Ms Bellamy that she would be contacted regarding the CV and interview skills training (page 4358).

197. On 18 June Ms Bellamy received an update from Sadhbh Nolan, HR Manager with a copy of an e-mail that she had sent updating her with the local vacancies across the Civil Service (page 4356).

198. On 23 June Ebony Charles, HR Coordinator wrote to the Claimant with regards to the career coaching data base available on Civil Service learning and enclosed the links for the Claimant to register.

199. On 7 July Ms Bellamy and Mr Easton met with the Claimant at Nottingham and notes were taken by Emily Taylor from HR (pages 4434-9). The Claimant again covertly recorded the conversation. Ms Bellamy ran through all the actions from the previous meeting on 6 May and provided a full update on the steps taken to try to help the Claimant secure an alternative role. The Claimant confirmed during the meeting that she had been provided with all the necessary links to be able to gain access. However she had not taken the opportunity to contact IT to set up the intranet. The Claimant had not applied for any roles in

HMRC or indeed outside the Civil Service or commenced any search. She said that as she still remained employed by the Civil Service there was not need for her to apply for alternative vacancies.

200. The Claimant said that she had not contacted any of the job coaches and whilst she said that she was booked to meet Prity Parmar on 15 July for an interview and skills training workshop subsequent to the meeting, she said that she was unavailable to attend.

201. Ms Bellamy confirmed the search for an alternative role had not moved forward during the past 8 weeks and that the Claimant did not seem to be actively pursuing any alternative options. Ms Bellamy was not reassured in the meeting that the Claimant had accepted any of the help and support offered to her, nor was there any evidence of her taking any steps to try to identify any alternative role. She confirmed that as a result and as discussed during the meeting on 6 May, she would therefore need to refer the case to another senior manager who was not previously involved to consider her future employment.

202 Andrew Cooper, Deputy Director for Organisational Development had been contacted in May about chairing a possible SOSR dismissal meeting in Nottingham in July. The date for the meeting i.e. 29 July was confirmed to him on 8 July in an e-mail from Camilla Bellamy. He had not had any involvement in any dealings with either the Claimant or her line management prior to the meeting.

203. He wrote to the Claimant on 14 July outlining the reasons for the meeting, inviting her to attend a formal meeting to discuss her future employment with PHE (page 4484). He made it clear that the purpose of the meeting was not for him to reconsider any matters raised under the PHE internal policies. The focus would be to consider her ongoing employment as it had not been possible for her to return to her role in Nottingham working with Christopher Barzey.

204. The letter made clear that whilst all options were being explored and would continue to be explored at the meeting, one outcome from the meeting might be the Claimant's dismissal with notice should there be no other viable options available.

205. Mr Cooper received the management report from Ms Bellamy on 16 July. The report is at pages 6156-6226. In its conclusions at pages 6163-4 it made a number of points, namely:-

- The Claimant was not engaging in the process of the search for alternative employment and had not accepted the training and support offered in seeking such a role;
- PHE could not continue to sustain the arrangements that had been in place since the completion of the grievance;
- The Claimant had refused to mediate and there were irreconcilable differences between herself and Mr Barzey and Ms Smith;
- The Claimant was not actively pursuing other options;

- The Claimant had not provided any alternative solutions.

It ended by saying:-

"In light of all the above, we therefore do not feel that there are any other options available to continue to employ Ms Fitzalan-Howard in a substantive role with PHE. Ms Fitzalan-Howard cannot remain in her current working arrangements, cannot return to work along side Mr Barzey in the Nottingham office and she has failed to engage in a search for an alternative position. Accordingly and with regret we therefore recommend that Ms Fitzalan-Howard's employment contract with PHE is terminated with notice."

206. Mr Cooper forwarded this document to the Claimant who on 17 July sent her response (page 4499). The document headed:

"In response to a non-specific "Formal hearing's" request" is at pages 4501-3.

207. On 23 July Mr Cooper contacted Professor Newton the Director of the Chief Knowledge Officer Directorate seeking his delegated authority to dismiss the Claimant (page 4505). This was because one of the options was dismissal and did not indicate that he had already decided to dismiss the Claimant. Professor Newton's e-mail of 23 July confirmed this authority to Mr Cooper (page 4504).

208. At the meeting on 29 July Mr Cooper was supported by Carol Harris, HR adviser. The management case was presented by Camilla Bellamy and the Claimant attended and was accompanied by her friend Jorj Malinowski. The notes were taken by Emily Taylor HR. Ms Fitzalan-Howard again covertly recorded the meeting. She prepared a transcript which was not reflective of what was said at the meeting and had to be amended by Ms Bellamy to make it accurate after she had listened to the tape. The amended version is at pages 4568-4637.

209. The amended transcript shows the difficulty Mr Cooper encountered in conducting the hearing and as he described in his evidence how Ms Fitzalan-Howard expressed a desire to leave without any process or discussion having taken place. He said she was "egged on" by her colleague Jorj.

210. Ms Bellamy presented the management case and Mr Cooper discussed with the Claimant why she didn't wish to accept mediation. There was also a discussion as to why she could not be deemed "at risk of redundancy" and why adding her to the limited number of ring fenced pools would be unfair to those people and would make their redundancy processes unfair.

211. During the course of the meeting the Claimant had every opportunity to ask questions both of Mr Cooper and Ms Bellamy.

212. During hearing the Claimant accused Ms Bellamy of committing perjury and Mr Cooper asked Ms Fitzalan-Howard to withdraw her serious allegation.

213. At the conclusion of the hearing Mr Cooper adjourned for approximately 30 minutes to consider what he had heard and read and to make a decision. When he returned he read from the document that he had prepared during the adjournment. He said (pages 4564-5):

"I have carefully considered what has been discussed today.

I would like to confirm I will not be considering any matters raised already under PHE internal policies and so this decision is separate from any other processes in train.

I have listened to management's statement of case based on the management report of 16 July and both you and I have had the opportunity to ask questions of that. I have also listened to what you have said alongside your response of 17 July to the management statement of case on both Ms Camilla Bellamy (representing PHE management) and I have had the opportunity to ask questions of that.

In coming to my decision I have taken into account the following:-

- Clearly there are irreconcilable differences in your current employment which means you are unable to return to your role in the Nottingham office;
- You have chosen not to participate in the mediation process despite reassurances that it will not compromise any other processes in train, and you yourself noted at the meeting that it could offer some beneficial impact
- I have neither seen nor heard any evidence that you are engaging in the process to search for alternative employment
- Nor have you accepted the training and support being offered in seeking alternative employment;
- You have not been able to identify further alternative solutions to your current situation;
- I have also considered PHE's duty of care concerning your return to the work place where you feel there is considerable risk;
- And based on these, it is not longer sustainable to continue to employ you in your role working on restricted activities at home, whilst substantive duties continue to be covered on an interim basis by a fixed term contractor.

In light of this, my decision is that your employment with PHE is terminated on grounds of some other substantial reason with 3 months' notice in line with your contractual terms. This decision will be communicated to you in writing.

You have the right of appeal against this outcome. Any appeal must be made in writing to the Director of Human Resources within 3 weeks."

214. Mr Cooper wrote to the Claimant on 31 July to confirm his decision (page 4647-50). In that letter he advised her of her right of appeal to Tony Vickers-Byrne, Director of Human Resources. The letter also confirmed that during her notice period she would have access to all internal PHE vacancies and remain a PHE employee. The last day of her employment would be 29 October 2015.

215. The Claimant submitted an appeal to Mr Vickers-Byrne on 15 August (pages 4712-4).

216. On 8 September 2015 Ms Bellamy wrote to the Claimant about the allegations that she had made against Jenny Coleman that she had been pushed down the stairs at St Phillips Place, Birmingham at their meeting on 7 January 2014. Ms Bellamy sent a copy of the report with her letter (pages 4799-4800). The report is at 4801-37.

217. Ms Bellamy pointed out that under the Respondent's disciplinary policy, offences of dishonesty are offences "so serious that they will normally be regarded as gross misconduct warranting summary dismissal" and that under the code of conduct:

"As PHE staff we will:-

Conduct ourselves openly and transparently, with integrity, impartiality and honesty – we shall never deceive or knowingly mislead the public, our colleagues, the Department of Health, Ministers or Parliament."

218. She pointed out that it would now normally be appropriate for an investigation to be launched under the disciplinary policy and procedure and for the Claimant to be interviewed as part of that process. She pointed out that should the Claimant secure suitable alternative employment with PHE during her notice period a decision would be taken as to whether or not this investigation should be reopened.

219. On 15 September the Claimant presented a complaint/formal grievance to Duncan Selby the Chief Executive of PHE accusing Camilla Bellamy and Dr Kevin Smith, Deputy Director of Healthcare of perjury and informing him that she intended to withdraw from her appeal and lodge a complaint about Camilla Bellamy's letter of 8 September. Her complaint is at pages 4847-55 and her e-mail to Mr Selby which accompanied it, clearly misrepresented what was said by Ms Bellamy in that it says:

"I have also had to withdraw from my appeal against unfair dismissal on the grounds that summary dismissal would be served on me immediately if

I was reinstated according to Camilla Bellamy's letter of 8 September 2015."

220. The Claimant also wrote to Mr Vickers-Byrne attaching a copy of her letter to Mr Selby and saying that she would be referring the perjury matters to the Police and formally withdrawing from the appeal process (page 4864).

The law

Unfair dismissal claim

221. The Claimant's claim is that she was dismissed contrary to Section 103A ERA which provides:

"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.

An employee will only succeed in a claim of unfair dismissal under this section if we are satisfied on the evidence that the "principle" reason is that the employee made a protected disclosure."

222. Mr Weiss referred us to the case of **Kuzel v Roche Products Limited** [2008] IRLR 530. The burden is on the employer to show what the reason for the dismissal was. Where an employee positively asserts that there was a different and inadmissible reason for the dismissal, he must produce some evidence supporting the positive case. That does not mean that he has to discharge the burden of proving that the dismissal was for that different reason. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, it is open to the Tribunal to find that the reason was what the employee asserts it was. It is not correct to say that the Tribunal must find that the reason was not that asserted by the employer, and then it must have been the reason asserted by the employee.

223. When asking what was the reason or principle reason for a dismissal, that is a "reason why" question which must not be confused with the "but for" test. This involves an examination of the employer's mental processes (conscious or subconscious). Mr Weiss referred us to the case of **Arriva London South Limited v Nicolaou** [2012] ICR 510.

224. We are satisfied that even if the Claimant does not succeed with her claim under Section 103A ERA that we should go on to consider the fairness of the dismissal under Section 94 ERA.

225. We referred ourselves to Section 98 of the ERA which provides:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (4) where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):-
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case."

226. In considering Section 98(4) ERA we must focus on the actions of the employer, not the employee. We must not substitute our view for that of the reasonable employer. We must apply the "band of reasonable responses" test that was applied in the **Iceland Frozen Foods Limited v Jones** [1983] ICR 17. The correct approach as outlined by Mr Justice Brown Wilkinson is as follows:

- "(1) The starting point should always be the words of Section 98(4) themselves.
- (2) In applying the Section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the ... Tribunal) consider the dismissal to be fair;
- (3) In judging the reasonableness of the employer's conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
- (4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
- (5) The function of the ... Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair."

Whistleblowing detriments

227. Section 43A ERA provides:

"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 the Sections 43C to 43H."

228. Section 43B provides as follows:

“In this part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, 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 and 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;
- (f) that information tending to show any matter falling within one of the preceding paragraphs has been, or is likely to be deliberately concealed.

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

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

A disclosure of information in respect of which a claim to a legal professional privilege... could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.”

229. A disclosure has to be more than merely a communication, and information is more than simply making an allegation or a statement of position. The worker making the disclosure must actually convey, even if those facts are already known to the recipient as per **Cavendish Monroe Professional Risk Management Limited v Geduld** [2010] IRLR 38 rather than merely an allegation or indeed an expression of her own opinion or state of mind see **Good v Marks and Spencer Plc** UK EAT 0442/09.

230. A disclosure need not be embodied in one communication and it is possible depending on the content and nature of those communications, for more than one communication to cumulatively amount to a qualifying disclosure, even though each individual communication is not such a disclosure of its own, see **Norbrook Laboratories (GB) Limited v Shaw** UK EAT/0150/13.

231. As Mr Weiss pointed out in **Kilraine v London Borough of Wandsworth** [2016] IRLR 422 Mr Justice Langstaff cautioned some care in the application in the above principles. He said:

“The dichotomy between “information” and “allegation” is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one rather than the other, but it is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation that is nothing to the point.”

232. It is not necessary for a Claimant to prove the facts or allegations disclosed are true. Provided that the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is objectively reasonable, it matters not if that belief subsequently turns out to be incorrect, see **Babula v Waltham Forest College** [2007] IRLR 346.

233. Mr Weiss also referred us to the case of **Darnton v University of Surrey** [2003] IRLR 133. “Qualifying disclosures” is defined as meaning any disclosure of information which in the reasonable belief of the worker making the disclosure tends to show a relevant failure. As his Honour Judge Sarota QC said in that case:

“The determination of the factual accuracy of the disclosure by the Tribunal will, in many cases, be an important tool in determining whether the worker held the reasonable belief that the disclosure tended to show a relevant failure. Plus if an Employment Tribunal finds that an employee’s factual allegation of something he claims to have seen himself is false, that would be highly relevant to the question of the worker’s reasonable belief. It is extremely difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knew or believed that the factual basis was false, unless there may somehow have been an honest mistake on his part. The relevance and extent of the Employment Tribunal’s enquiry into the factual accuracy of the disclosure will, therefore, necessarily depend on the circumstances of each case. In many cases it will be an important tool to decide whether the worker held the reasonable belief that is required by Section 43B(1).”

234. It goes on to say:

“The reasonableness of the belief will depend in each case on the volume and quality of information available to the worker at the time the decision disclosed is made. Employment Tribunals will have to guard against the use of hindsight to assess the reasonableness of the belief in this respect in the same way as they are bound in considering liability in unfair dismissal cases, to consider only what was known to the employer at the time of the dismissal or appeal.”

235. Mr Weiss also referred us to the case of **Kraus v Penna Plc** [2004] IRLR 260. "Likely" in Section 43B (1a) to (f) requires more than a possibility of a risk. "Likely" should mean in the reasonable belief of the worker "probably or more probable than not".

236. A disclosure (if made prior to 25 June 2015) will only qualify for protection if it was made in "good faith". Mr Weiss referred us to the case of **Street v Derbyshire Unemployed Workers Centre** [2004] IRLR 687. Good faith means more than a reasonable belief in the truth of the information disclosed. A disclosure will not be made in good faith if an ulterior motive was the dominant or predominant purpose of making it. Where a statement is made without reasonable belief in its truth, that fact will be highly relevant as to whether it was made in good faith. But where a statement is made in that belief, it does not necessarily follow that it is made in good faith.

237. For any disclosure which post dates 25 June 2013 the disclosure relied upon must have been made, in the reasonable belief that the worker or employee making it, in the public interest. As Mr Weiss points out this should not be defined too narrowly. In each case it is a fact sensitive question whether a worker reasonably believes that a disclosure is made in the public interest. He referred us to:-

- **Chesterton Global Limited (trading as Chestertons) v Nurmohammed** [2015] IRLR 614 and;
- **Underwood v Wincanton Plc** UK EAT/0163/15/RN

238. If the Claimant demonstrates that she has made a protected disclosure, then in order to succeed in a complaint under Section 47B ERA she must also demonstrate that she has suffered "detriment". In this regard, Section 47B(1) ERA provides as follows:

"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."

239. As Mr Weiss points out the case of **NHS Manchester v Fecitt and Others** [2012] IRLR 64 found that:-

"The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer."

240. The Claimant must prove that they have made a protected disclosure and they have been subjected to detrimental treatment. If they are able to do so the employer has the burden of proving the reason for the treatment pursuant to the provisions of Section 48(2) ERA. If the employer fails to prove an admissible reason for the treatment the Tribunal must conclude that it is because of the protected disclosure.

241. A Tribunal must be satisfied though that the detriment was “on the ground that the worker has made a protected disclosure” and there must be found to be a causative link between the protected disclosure and the reason for the detriment. The test to be considered is whether the protected disclosure was in no sense whatsoever (in the sense of being more than merely a trivial influence) a factor in the employer’s treatment of the Claimant who made the disclosure.

242. The above case of **Fecitt** also provides guidance relating to the question of vicarious liability for the acts of persons other than the employer who subject a worker to detrimental treatment on the grounds that they made a protected disclosure. The Court of Appeal decision in **Fecitt** provides that given that Section 47B(1) ERA does not provide for personal liability of a worker, there is no legal wrong on which a claim of vicarious liability (to impose that wrong upon the employer) could be based. Thus, acts of the worker against the whistleblower cannot be visited upon by the employer.

243. This position only applies in respect of detriments complained of which predate 25 June 2013. The question of vicarious liability thereafter is addressed by the insertion of Section 47B (1a) to (1e) ERA and the position in **Fecitt** is effectively reversed for any detriment occurring after that point.

Our Conclusions

Whistleblowing detriments

244. We propose dealing with these matters in the order that they are set out at pages 266-281 of the bundle of documents. That comprises a Scott Schedule with schedule C being the disclosure upon which the Claimant was permitted to continue to rely on following the Preliminary Hearing in November 2015 and after the judgment on the consideration and schedule D being the complaints of detriment which the Claimant was permitted to continue to advance, again following the same Preliminary Hearing and Judgment on Reconsideration.

Detriment 1

245. The Claimant alleges that she was asked to transmit sensitive contractual data to unknown recipients and that the words used were:

“We wouldn’t have done that in the NHS, we are in the Civil Service now and perhaps you had better get a senior manager’s agreement to do this.”

We are satisfied that this was not a disclosure of information. It was no more than an observation. It does not fall within the ambit of Sections 43B (1a) or 43B (1b). Indeed at the time the Claimant did not consider herself to be making a protected disclosure. This is evidenced by what she said in her ET1:

“Immediately CB writes to both his direct manager, Jill Smith (JS) and the overall manager of NDTMS Malcolm Roxburgh that I am a whistleblower, which at that point I was not.”

In any event we are satisfied that there was no instruction from Mr Barzey to transfer high value commercial data to unknown recipients.

Disclosure 2

246. The e-mail of 5 April 2013 at 13:43 hours is not a protected disclosure. It does not amount to a disclosure of any information. It is no more than an observation relating to the East Midlands web based mailing list. Furthermore the words used in the e-mail do not fall within Sections 43B(1a) or (b) and the Tribunal is satisfied that the Claimant has failed to identify any criminal offence or legal obligation.

Disclosure 3

247. The e-mail sent on 8 April 2013 at 08:29 hours is not a disclosure of information. There is no information that is protected by Section 43(1a) or (b). In her Scott Schedule the Claimant says that she complained that she had been physically assaulted by Christopher Barzey. That is not what she said at all. The Claimant described the events of Friday 5 April as:

“Christopher chose to subject me to a 3 hour continuous lock-in to my desk, whilst he failed completely to get across to me what he wants or expects.”

That is not an allegation of physical assault. The e-mail does not say that the Claimant had been instructed by Mr Barzey to remove data from the Respondent to a private contractor. It is only later that the Claimant made that allegation. In any event we are satisfied that the Claimant had no reason to believe that the allegation was true. We are satisfied that she knew that the 2 allegations were not true.

Detriment 4

248. This relates to an informal meeting between the Claimant, Jill Smith and Elen Williams on 19 April 2013. It was not as the Claimant describes an informal meeting to discuss her whistleblowing and the attack by Christopher Barzey. The Claimant's complaint at the meeting was that Mr Barzey had hemmed her in and invaded her personal space. She complained that she had been reduced to tears and had been stressed by his behaviour. The Tribunal did not accept the Claimant's account of what had happened and are satisfied that she did not reasonably believe the allegations were true. As described in our fact finding the allegations became more intricate and embroidered along the way when the Claimant wasn't able to get what she wanted, namely either Mr Barzey being removed or her being removed into another job. The same comments apply in respect of her alleging that she had complained at that meeting that she had been instructed by Christopher Barzey to remove data from the Respondent to a private contractor. We are satisfied that she did not say any such thing.

Disclosure 5

249. This relates to her formal grievance against Ms Smith and Mr Barzey made on 14 May 2013.

250. It can be seen from examining the confidential grievance record form which is at pages 591-593 that she made an allegation that Christopher Barzey had attempted to remove sensitive data from within PHE to a private individual (described as a friend) in the University of Durham, referring to Jill Smith as the source of the request. We are satisfied that the Claimant did not believe that the allegations were true and was not acting in good faith at the time.

Detriment 6

251. The Claimant refers to a discussion with Ann Goodwin and Stephen Dingley on 3 June 2013. We are satisfied that there were no protected disclosures made on that date. It was an informal meeting to explore the context of the issues before starting the formal process. At the start of the meeting the Claimant said that she did not think that due process had been followed as she hadn't had any informal meetings about all matters in her grievance. There was no discussion at the meeting of the allegations that are set out in the Scott Schedule. We note that in the Claimant's evidence to the Tribunal (paragraphs 104-106) of her witness statement that the Claimant herself does not refer to making any disclosure at all at that meeting.

Disclosure 7

252. This relates to the written grievance against Christopher Barzey dated 13 June 2013. It simply repeats what is said before and we are satisfied that the Claimant had not been instructed to remove data from the Respondent to a private contractor and therefore could not have had any belief that any criminal act had occurred or there had been a breach of legal obligation.

Disclosure 8

253. We are satisfied that there was no disclosure of information at the meeting with Malcolm Roxburgh on 18 June.

254. The Claimant makes allegations in paragraphs 117-119 of her witness statement that are not what she alleged in her Scott Schedule. We do not believe what the Claimant says in her statement about what was discussed at that meeting. The meeting was to discuss the way forward in respect of her grievance and it was agreed that she would keep the grievances against Jill Smith and Christopher Barzey separate. There was considerable discussion at the meeting about the Claimant's claim that the letter that he had written to her on 20 May was "a gagging order". We have found that the letter did not amount to that at all. The letter did not prevent her contacting or communicating with other PHE staff only that the grievance process was to be confidential and should not be discussed with them.

Disclosure 9

255. The Tribunal has been able to consider the notes of the grievance meeting. At that stage there was no allegation that the Claimant had been physically assaulted by Mr Barzey. The allegation 6(f) was:

"For observed and verbal behaviours outside of acceptable parameters in

an office or public area for which no explanation or apology has been made.”

The allegation was that Mr Barzey had penned her into her desk and the Claimant said that she felt it had effectively been a 3 hour assault. There was no allegation of criminal behaviour by Mr Barzey at all; simply that he had behaved inappropriately. In any event this Tribunal is satisfied that the Claimant knew that the allegation was untrue and that it had been made maliciously for her own ends, ie the removal of Mr Barzey or the removal of herself into another job. It was also not true that Mr Barzey had named the Claimant as a whistleblower or that he had tried to cause irreparable damage to the Claimant’s reputation.

Disclosures 10 and 11

256. These disclosures relate to the allegation that the Respondent was recovering statutory sick pay from HMRC in respect of the Claimant during a period when she was not absent on the grounds of ill health. It was contended by the Claimant this amounted to a fraud on HMRC. Whilst the Claimant made these allegations on 18 July and 25 July 2013 the Tribunal are satisfied that it did not amount to a protected disclosure. The Claimant was signed off sick at the time because she had not consented to the release of the report of Dr Muir the Occupational Health Consultant who considered that she was fit to work. As far as the Respondent’s knew the Claimant was still sick as per the report of Susan Martin. Whilst the Claimant clearly did contend that she was not sick, she had not produced any evidence that she was in fact fit to work and did not try to report to work during this time. In any event this Tribunal is satisfied that the recovery of statutory sick pay from HMRC did not amount to any fraud on HMRC. The Claimant, we are satisfied, could not have believed that the allegation was true. The allegation is incredible and we are satisfied that the Claimant knew it was incredible.

Disclosure 12

257. This relates to the Claimant writing to the Nursing and Midwifery Council about the behaviour of Susan Martin from Occupational Health. The Tribunal is satisfied with the evidence of Susan Martin that she simply was undertaking her professional duties in carrying out the Occupational Health assessment on 9 May. She did not speak to Jill Smith prior to this and the management referral did not instruct her in any way to come to a particular conclusion. She spoke to the Claimant and was genuinely concerned about what she was told and having considered the contents of her letter in which she referred to the stress that she was experiencing she took the view, genuinely and reasonably, that the Claimant should be signed off sick for a period of 2 weeks. The Tribunal did not believe the allegations contained in the Scott Schedule. The Claimant is simply not telling the truth and did not reasonably believe the truth of her allegation made against Ms Martin.

Disclosure 13

258. In respect of this disclosure the same applies to the comments in respect of disclosures 10 and 11. It was simply untrue that PHE had been submitting false employment records to claim statutory sick pay from HMRC and the Claimant knew this.

Disclosure 14

259. The Tribunal's findings in respect of this are the same as before i.e. when the Claimant wrote to the Chief Constable she knew that the allegations that she made in that letter were untrue and in any event the Claimant had taken these complaints externally when she was not entitled to do so because her complaints were being dealt with internally by the Respondent.

Disclosure 16

260. The third and final grievance that the Claimant submitted on 23 December 2013 was not a protected disclosure for the same reasons as above i.e. that the Claimant knew that the allegations that she made in the third and final grievance were untrue.

Disclosure 17

261. This was not a protected disclosure for the same reasons as explained above. She did not believe the allegations were true.

Disclosure 20

262. This was not a meeting to discuss Axcrypt and OpenCandy as the Claimant describes. It was a meeting to discuss the Claimant's work programme and her short term objectives including training, familiarisation etc.

263. During that meeting the Claimant raised various issues about Axscript and OpenCandy and these matters were dealt with by Mr Roxburgh. This Tribunal is satisfied that the Claimant did not believe that the systems that the Claimant is referring to were installed to transfer data outside the Respondent organisation.

Disclosure 21

264. The letter of 14 April 2014 merely sets out what the Claimant had alleged in the meeting referred to above. Mr Sienkiewicz in his report of 24 April found the Claimant's concerns to be unsubstantiated. As stated above we are satisfied that the Claimant did not reasonably believe the truth of the allegations that she was making.

Disclosure 24

265. The same situation pertains to the Claimant's appeal made in writing on 23 December 2014. The Claimant had not been instructed to remove data and that Christopher Barzey had not been setting up systems inside the service to transfer data out of the Respondent organisation to unknown persons. She did not reasonably believe this was true.

Disclosure 26

266. A repeat of her allegation in the appeal meeting with Tony Vickers-Byrne regarding the physical assault and the removal of data were again made in circumstances where she did not reasonably believe it was true. The allegation

that she made that the Respondent had been unaware when Christopher Barzey was recruited that he had a history of attacking females was an outrageous allegation against Mr Barzey made without any basis at all. As was found when her baseless allegations were investigated he did not have "a history of attacking females".

267. The final matter that the Claimant refers to as a disclosure is according to her schedule a matter that is raised in respect of her claim of unfair dismissal only. The assertion made in the formal meeting that led to her dismissal that there had been a breach of the Claimant's employment rights is not a protected disclosure. We are satisfied that the Claimant did not reasonably believe that her employment rights had been breached. They had not.

Detriments

268. Again we will deal with the issue of detriments as per the Scott Schedule using the numbering that's in that document which is at pages 272-281 of the bundle.

Detriment 9

269. It is not true that the Claimant believed at the meeting on 19 April that "mediation would be offered and should have been the first step in bridging a broken working relationship". The Claimant had given specific instructions to Ms Smith prior to that meeting but she would not consider mediation. If there was a broken relationship as the Claimant described she was entirely responsible for it. Mr Barzey was not invited to attend the meeting between the Claimant Jill Smith and Elen Williams initially because they wished to know what the issues were before they discussed them with Mr Barzey. The e-mail of the Claimant of 11 April at 8:37 (page 434) makes clear the issues that the Claimant raised and the fact that she refused any mediation. There was no request by the Claimant that Mr Barzey should be present. It is not true that Christopher Barzey's background and behaviours were discussed "intensively" as the Claimant described and the Tribunal is satisfied that the allegations that the Claimant made about what Jill Smith said in her opinion about the careful handling of Christopher Barzey were untrue. No investigation took place after that meeting because at that stage there was nothing to investigate.

Detriment 11

270. The discussions and e-mails between Jill Smith and the Claimant on 23 April could not in our view be described in any way as a detriment. Jill Smith was attempting to reassure the Claimant at the time and the Tribunal is satisfied that she had not closed routes of resolving matters at all. It was the Claimant who did not wish to resolve matters. At that stage there was nothing to investigate. The assertion made in the Scott Schedule that the Respondent had failed to investigate the Claimant's concerns under their grievance procedure is simply not true. The Claimant had not at that stage instituted any grievance. Jill Smith had not closed down routes to resolve any situation. If the Claimant found herself in a very difficult situation it was entirely of her own making. The Claimant was not denied access to policies and HR support. All the policies are available on the intranet and the Claimant could have asked for HR support at this time if she had wished to have it but she didn't.

Detriment 12

271. It is not appropriate for the Claimant to describe Jill Smith's visit to the office on 7 May as unannounced. After the meeting on 19 April they agreed that that Ms Smith would make regular visits and assist with the Claimant's relationship with Mr Barzey. It was not inappropriate for Ms Smith to have a meeting with Mr Barzey. The Claimant was not demoted at her meeting on 7 May. The Claimant, unreasonably and without justification, alleged that this amounted to a demotion. As Ms Smith described in her e-mail of 8 May at 18:43 (page 537) the Claimant had been asked to undertake a particular piece of work with regards to some information required as a result of a data migration process. It was not data analysis work but rather a small piece of work which can be conducted with simple tools. As she described:

"The data analyst in the teams cannot be solely responsible for all work involving data, and this sort of work would be expected to form part of the data migration process."

The Claimant had not been demoted and she knew it.

Detriment 14

272. Jill Smith did not on 9 May manufacture a situation so as to remove the Claimant from the office. What happened needs to be seen in context. The Claimant had by this time made serious allegations against her Line Manager, absented herself from work without authority from her Line Manager, accused Jill Smith of demoting her and refused to carry out various management instructions and then on 9 May had written to HR to inform them that she wished to proceed with a formal grievance against her Line Manager and his Line Manager. In that letter she made various complaints about breach of her employment rights and said that she had no intention of meeting either Chris Barzey or Jill Smith without a third person being present. She had also again absented herself from the office that day and then said:

"I need to know what is expected of me tomorrow as I am stressed beyond belief and my health is being impacted by having to watch my career disappear to accommodate Christopher's skill set."

274. In this context it would have been remiss of the Respondent not to seek a report urgently from Occupational Health. Although Jill Smith signed the management referral form as her Line Manager, it was Elen Williams who decided that the matter should be referred to Occupational Health, not Jill Smith. It was Elen Williams who said (page 562) "I am of the opinion that she perhaps needs to be on sick leave". It was necessary for the urgent referral and the Claimant was not, as she described, removed from the work place. On 9 May she had absented herself and said that she would not be meeting Christopher Barzey or Jill Smith without a third person being present. It was the Claimant's desire to be removed from the office. Again as is evidenced in her e-mail of 9 May at 10:01 regarding the notice to proceed to formal grievance when she said:

"Can you confirm that HR will provide references for me if required in the

absence of a Line Manager? I would let it be known that I would consider any alternative employment available either within NDTMS or PHE or similar, and on consideration of an alternative employment offer review my grievance as I have no appetite for more conflict."

275. Susan Martin, it was alleged by the Claimant, was part of some conspiracy to have her removed. Again, another baseless allegation made against a professional who was simply doing her job and made an assessment both on what she saw in the referral and what she heard in the telephone discussion with the Claimant. The report of Susan Martin to her professional body for alleged misconduct with baseless allegations was in our view malicious.

Detriment 15

276. Malcolm Roxburgh had to become involved in the process because he was the next Line Manager above Jill Smith. It is not true that he named himself as the person who would be "Chair" of a stage 1 grievance. The letter is not a gagging order as persistently described by the Claimant. It merely says:

"Please also note that the process must remain confidential at all times."

It is about the process, not about preventing the Claimant from speaking to anyone else at all. It makes no reference to the Claimant not discussing any of her previous disclosures or risks a disciplinary hearing. Mr Roxburgh was not acting outside of the policies of the Respondent. It was a perfectly sensible instruction to the Claimant who took it upon herself to interpret it despite several assurances otherwise that it was a gagging order.

277. It is also not fair for the Claimant to allege that Mr Roxburgh "ensured routes to resolutions were through him". He was simply managing the process and appointed an investigation manager to conduct an investigation into the allegations that she made.

Detriment 17

278. This relates to a claim for expenses that the Claimant made for attending her normal place of work on 19 April 2013. The Claimant put in a claim for £3.50 tram fare to attend work after she had been absent without leave for 2 weeks. It was not a detriment for Mr Barzey to disallow the claim. He disallowed the claim because the Claimant was not entitled to payment of it and she knew that she was not entitled to payment of it. Ultimately the expenses were paid even though the Claimant was not entitled to it.

Detriment 18

279. It was not true that Mr Roxburgh ignored a recommendation by the grievance investigators for consideration of the complaints made by the Claimant at the informal stage of the grievance procedure. Mr Roxburgh was not at the meeting on 3 June. The meeting on 3 June was with Anne Goodwin and Stephen Dingley and until that meeting the Claimant had spurned any effort made by Jill Smith to resolve matters informally and it was the Claimant who had made the grievance "formal". The allegations made in the grievance documentation against Jill Smith and Christopher Barzey were extremely serious

and required investigation. It is to be noted that when the Claimant was later offered mediation she repeatedly refused to participate in it. The Claimant did not suffer any detriment on 3 June.

Detriment 19

280. It is not fair to describe that on 6 June that the Claimant received direction from Malcolm Roxburgh to represent her grievance in 2 parts for his tacit approval. It had been agreed by the Claimant in discussion with Anne Goodwin and Stephen Dingley that she would deal with her complaint against each of Jill Smith and Christopher Barzey as separate grievances. The Claimant was not instructed to "cease immediately contacting anyone else as per the gagging order". It is not fair for the Claimant to allege that Mr Roxburgh directed that the Claimant remove from her grievance reference the fact that she had suffered a physical attack from Christopher Barzey. In her grievance she had not described any physical attack by Mr Barzey. Indeed her description in the grievance refers to "interrogation at my desk for 3 hours".

Detriment 20

281. The meeting on 18 June was not held as a "none specific meeting". The Claimant was aware via an e-mail from Elen Williams of 5 June (page 687) of the nature of that meeting. The meeting as an informal meeting and did not require the Claimant to be accompanied. It is not true for the Claimant to allege:

"The Claimant had complied as a condition of this meeting of resubmitting her grievances for approval by Malcolm Roxburgh in exchange for the grievance process to go ahead."

There is no evidence to support any such allegation at all. The meeting on 18 June was conducted professionally and the notes of the meeting are an accurate reflection of what was said. The notes of the meeting were sent to the Claimant after the meeting. None of the issues were swept aside and it was the Claimant who said at the commencement of the meeting that she wanted to be "lifted" and moved to another job.

Detriment 22

282. The Claimant's pay consisted of her receiving full pay. The Claimant was off sick because she had been signed off sick by Susan Martin and then the Claimant refused to give authority for the Consultant Occupational Health Officer Dr Muir, to give his report to the Respondent's which indicated that she was fit to work. If the Claimant had given authority for Dr Muir's report to have been released she could have been back at work, except of course she was refusing to work with either Jill Smith or Christopher Barzey and so an alternative place for her to work would have had to be found. The Claimant was not incorrectly labelled as being off sick, nor was there any fabrication of her sickness record.

Detriment 26

283. The Claimant agreed to attend a series of meetings to discuss her working in Birmingham on an interim basis when it had been established that the Claimant was fit to return to work. It is clear from our findings of fact that there

was never any intention that the Claimant should be transferred to another post against her will. Any move to the Birmingham office was on an interim basis only and no action was taken against the Claimant despite her clear refusal to follow reasonable management instructions. In the end the Claimant only attended the Birmingham office on 3 occasions on 28 October, 25 November and 7 January. These were only for meetings which were designed to discuss her return to work ultimately in Nottingham. It was made very clear to her that there was no suggestion that there would be a permanent move to Birmingham. It was agreed in the meetings that she would only be expected to spend 3 hours per day at Birmingham and her travel would be during her working hours. The Claimant was to be reimbursed any travel expenses. There was no intention to force the Claimant into resigning from her employment by offering her untenable positions and there was never any discussion that she would undertake a "diminished role of data analyst on a reduced grade".

Detriment 28

284. The letter of 6 December 2013 simply confirms what was discussed at the meeting on 25 November with Jenny Coleman (page 1072-3). Apart from confirming that the Claimant would attend a short induction at the Birmingham office it refers to her return to the Nottingham office. The Claimant had in the meeting made it clear that she did not wish to be in close proximity to Christopher Barzey and that it would not be appropriate for her to be located on adjacent desks. It referred to security problems with regard to her desk location and went on to say "it would therefore be reasonable to locate you elsewhere in the office at a distance from Christopher as an interim measure pending the outcome of the grievance process". The letter does not in any way suggest that the Claimant should be isolated as she alleged. Nor does it amount to a punishment as the Claimant describes for whistleblowing. The options considered were entirely reasonable in the circumstances and it can be seen that the letter is described as a proposal in respect of the working arrangements pending the outcome of her grievances. That is all that it was.

Detriment 29

285. Whilst the Claimant did receive a copy of the whistleblowing policy on 19 December 2013 there was no delay or late receipt of the Respondent's whistleblowing policy. The Claimant had not made any request for a copy of the whistleblowing policy on or around 19 April 2013. There were no "numerous requests" for it.

Detriment 30

286. The Tribunal is satisfied that the Claimant is referring to the letter that Kara Barton sent to the Claimant on 13 December that the Claimant received on 19 December. The letter is at 1099-1100. Again the letter has to be seen in context. A proposal had been made by Elen Williams on 6 December that the Claimant should return to work in her substantive post in Nottingham, reporting to Jenny Coleman and she was required to attend a meeting in the Birmingham office on 7 January to discuss her induction and training programme. This was an entirely reasonable management instruction that the Claimant was not prepared apparently to comply with in her various e-mails sent between 6 and 13 December.

287. It was therefore perfectly reasonable to require the Claimant to return to work and comply with the management instruction and that if she did not comply she would be treated as being absent without authority and suspended. This would be investigated as unauthorised absence in accordance with the disciplinary policy and procedure. There is no reference in the letter to the Claimant facing dismissal. It was not "a confusing and unnecessarily blunt instrument". It is also not true for the Claimant to say that "she was willing to return to her desk as she had done so before April/May 2013". There is no evidence to support the contention that PHE never intended the Claimant to return to her desk in Nottingham or that they had "moved her place of employment to Birmingham without her knowledge".

Detriment 34

288. The Claimant was not subjected to any detriment at the meeting on 7 January. The Claimant had to be required to attend the meeting because of her reluctance to do so. It was a reasonable management instruction. As stated above she was not told that she would face "potentially dismissal". It was not a hostile HR meeting although the Tribunal is satisfied that the Claimant herself behaved in a hostile and unreasonable way at the meeting. There was no requirement for the Claimant to "attend Birmingham on a non specific permanent basis". It is clear that any move to Birmingham was very much on an interim basis with the intention of returning her to Nottingham as soon as possible.

289. The Claimant then went on in her schedule to persist with her outrageous allegation that Jenny Coleman "pushed the Claimant causing her to fall on steps and twisting awkwardly her injured knee". It is not true that the Claimant tried to report the fall to the security personnel on her exit. The injury to her knee was apparently caused at Birmingham train station as per her e-mail the following day which does not refer to any allegation that Jenny Coleman pushed her down the stairs. The Claimant did not report the matter as an "accident at work". The quotation made in the Scott Schedule by Ms Bellamy which starts "you can't prove it..." is taken entirely out of context. The allegation made against Jenny Coleman was unfounded as found in the investigation the Respondent's latterly undertook.

Detriment 35

290. There was a delay in dealing with the Claimant's freedom of information request but this did not amount to any detriment the Claimant suffered. It certainly had nothing to do with her alleged whistleblowing. There was no unlawful provision of a report and/or personal data of the Claimant with the NMC when Viv Bennett wrote to the NMC on 6 December 2013 as a result of the entirely unfounded allegations made by the Claimant against Susan Martin. She was simply providing information legitimately to the NMC about the background and the circumstances which had led to the complaint being made by the Claimant.

Detriment 37

291. On 6 October 2014 the Claimant wrote to Martin Catteral at the Parliamentary and Health Service Ombudsman. It is not true that the Claimant

was directed by George Stafford, Viv Bennett and Camilla Bellamy to make her disclosure to the Ombudsman. The Claimant had been written to by Camilla Bellamy on 5 August 2014 to advise her of the relevant channels for escalating her remaining concern which included provision of the contact details of the Parliamentary Health Services Ombudsman (page 2902). This does not amount to a direction as the Claimant says. There was no failure to deal with her concerns and grievances so that it was necessary for her to make her complaint to the Ombudsman.

Detriment 39

292. We are satisfied in respect of this matter that there is no evidence to support the Claimant's contentions. No consent was required to obtain an occupational health report. In any event the Claimant knew that the referral was being made and she was sent a copy of the referral. It is not true that from November 2014 all complaints would be handled by Camilla Bellamy "who effectively quashed them without resolve".

293. The allegation that Camilla Bellamy had warned that she would change documents is again an accusation that is made without foundation. Ms Bellamy gave truthful evidence to this Tribunal we are satisfied and the allegation that she was "preparing to commit perjury in the forthcoming case against the Claimant" is scandalous and there is no evidence to support such a contention at all.

Detriment 40

294. The Tribunal is satisfied that there was no reluctance by Camilla Bellamy to allow the Claimant's appeal to go ahead. The Claimant was out of time to make any appeal against the grievance but because she had been absent Camilla Bellamy agreed that the appeal would be dealt with by way of a further grievance. Despite the fact that it was in effect an appeal out of time, it was allowed to go forward. There was no condition that the Claimant be required to attend the Occupational Health assessment. The Occupational Health assessment was undertaken to establish the fitness of the Claimant and that is all.

295. The Tribunal has examined all the references of occupational health and are satisfied that those references do not amount to any detriment suffered by the Claimant.

Detriment 41

296. Camilla Bellamy did not withhold the Claimant access to an appeal. In a helpful way she suggested that the Claimant might forward the appeal document to her before she submitted it. The appeal was conducted perfectly properly on 26 January 2015 and the Tribunal is satisfied that all matters that were subject to the appeal were considered. It is not true as the Claimant alleges that:

"The outcome (as with the grievance) was to urge the Claimant to "go get another job and leave"."

297. To summarise the position, this Tribunal is satisfied that the Claimant has not made any protected disclosure of information. She did not have a reasonable

belief that they tended to show a relevant failure, either a criminal offence or a breach of legal obligation.

298. The disclosures 1-8 were not made in good faith and the disclosures numbered 9-28, the Claimant did not reasonably believe that the making of the disclosures was in the public interest.

299. In respect of disclosure 12 the Claimant did not reasonably believe that the relevant failure fell within a description of matters in respect of which that person was so prescribed or that the information disclosed and any allegation contained in it were substantially true.

300. In respect of disclosure 14 the Claimant did not reasonably believe that the information disclosed and the allegation contained in it were substantially true.

301. In respect of disclosure 14 the Claimant made the disclosure for the purpose of personal gain and the Claimant did not reasonably believe that she would be subjected to any detriment by her employer if she made the disclosure to her employer or to the Information Commissioner. In all the circumstances it was not reasonable for the Claimant to make the disclosure having regard to the facts in Section 43G (3).

302. The Claimant has also not suffered any detriments and if contrary to our findings that any of the matters she complained of did amount to detriments they were not in any way, let alone materially, influenced by the alleged protected disclosures.

Unfair dismissal

303. We find that the reason for the dismissal of the Claimant was a combination of the following factors:-

- The irreconcilable differences in Ms Fitzalan-Howard's relationship with her Line Manager. Despite trying to resolve this the Respondent's found that the relationship had broken down to such an extent that the Claimant was unable to return to her role in the Nottingham Office;
- The Claimant had chosen not to participate in work place mediation despite a number of efforts by the Respondents to bring this about;
- It was not sustainable to continue to employ the Claimant in her role working on restricted activities at home. This was only a temporary measure. The PHE had to fund the cover of the Claimant's substantive duties in the office on an interim basis by a fixed term contractor, which arrangement could not be sustained in the long term;
- The Claimant was not engaging in the process to search for alternative employment;

- The Claimant declined to accept training and support offered by the Respondent in seeking alternative roles;
- There were no other mitigating circumstances that the Claimant could identify;
- The Claimant maintained throughout the process that she felt that she was at considerable risk. The Respondent's also had to consider their duty of care to her line managers who had been subject to grievances raised by the Claimant against them, which were found to be unfounded.

304. We are satisfied that at the time that Mr Cooper made his decision he was satisfied that the relationship of trust and confidence between the employer and the employee had completely broken down. We are satisfied that it was the Claimant who was entirely responsible for this breakdown in the relationship.

305. We are satisfied that it was the Claimant's belief that she should have been appointed to the role of manager in the East Midlands rather than Mr Barzey. This is evidenced as early as her original grievance signed by her on 14 May when she accused Ms Smith of nepotism for promoting Mr Barzey and her criticism of Mr Barzey "not having the skill set required to work as NDTMS Manager". We are satisfied that the allegations made against Mr Barzey and Ms Smith were designed to either have him removed as her manager or if that was not possible for her to be "lifted and shifted" into a new role. In the course of the next 2 years the Claimant had:-

- Made unfounded allegations against Mr Barzey and Ms Smith;
- Absented herself without leave;
- Failed to cooperate with occupational health;
- Accused an occupational health nurse of professional misconduct without any justification;
- Accused managers and payroll of fraud;
- Accused Jenny Coleman of assault, namely pushing her down the stairs without foundation;
- Refused to carry out reasonable management instructions;
- Behaved in a most unprofessional manner in meetings by covertly recording them and then deliberately mistranscribing them;
- Acting in meetings in an unprofessional manner, being abusive, patronising and aggressive to all those who tried to deal with her.

306. We agree with Mr Weiss when he says that this is a sad case. It is a sad case for all those who have had to deal with the Claimant for over 2 years during her employment and then for over a further year in these Employment Tribunal

proceedings during which they have been subjected to the most outrageous accusations.

307. The Tribunal is satisfied that the Respondent's have established that they dismissed her for some other substantial reason of a kind such as to justify the dismissal of this employee holding the position which she held.

308. We are satisfied that the reason or principle reason for the dismissal was not because the Claimant made a protected disclosure.

309. We are also satisfied for the reasons outlined above that the Respondent's acted fairly within the provisions of Section 98(4) Employment Rights Act. When it was clear that the relationship had broken down irretrievably, the Claimant was invited to attend a meeting with Mr Cooper. She knew that one of the outcomes of the meeting could be her dismissal. The Claimant had received the management report from Camilla Bellamy prior to the hearing which recommended her dismissal and she had responded to it, which was considered by Mr Cooper. Mr Cooper then conducted a fair meeting with the Claimant where all the issues were discussed and he came to a fair decision. He had not prejudged matters as alleged by the Claimant, nor did he dismiss her for misconduct, again as alleged by the Claimant.

310. We are satisfied that dismissal was within the band of reasonable responses and the dismissal was fair and all the claims fail and are dismissed.

Employment Judge Hutchinson

Date 21 December 2016

JUDGMENT SENT TO THE PARTIES ON

21/12/16

FOR THE TRIBUNAL OFFICE



