EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Miss Mowe Saha	**v**	**Capita PLC**

Heard at: London Central

On: 20 –24 February 2017
In chambers: 27 - 28 February 2017

Before: Employment Judge Lewis
Ms L Chung
Mr I McLaughlin

Representation

For the Claimant: In person

For the Respondents: Mr D Maxwell, Counsel

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.

2. 80% is deducted from the claimant's basic award for conduct prior to dismissal and 80% from her compensatory award for contributory fault. No additional deduction is made by reason of Polkey.

3. The claimant's compensatory award is increased by 25% for the employer's failure to follow relevant parts of the ACAS Code on Disciplinary and Grievance Procedures.

4. The claims for detriment and automatic unfair dismissal for whistleblowing are not upheld.

5. The claims for detriment and automatic unfair dismissal in relation to health and safety are not upheld.

6. The claim that the claimant was subjected to a detriment under s45A(1)(a), (b) or (f) of the Employment Rights Act 1996 is not upheld.

7. The claim for automatic unfair dismissal for asserting a statutory right is not upheld.

Remedy

8. A remedy hearing in relation to the finding of unfair dismissal will be held at 10 am on **20 April 2017**. The parties are invited to agree compensation in advance and if they are able to do so, to notify the tribunal as soon as possible if the hearing is unnecessary.

9. If agreement is not possible, the claimant should provide the respondents by **4 April 2017** with (i) a figure for her net weekly pay at the time of her dismissal; (ii) a figure for her gross weekly pay at the time of her dismissal (iii) a calculation for pension loss (iv) her gross and net weekly pay for any period of earnings since dismissal together with evidence such as payslips and any contract of employment.

10. The respondents should notify the claimant by **14 April 2017** whether they agree the gross and net figures and if not, the reason for the difference.

REASONS

Claims and issues

1. The claimant brings claims for ordinary unfair dismissal under s98(4) of the Employment Rights Act 1996, automatic unfair dismissal and detriment for making protected disclosures, automatic unfair dismissal and detriment for raising health and safety matters, automatic unfair dismissal for asserting a statutory right in relation to the Working Time Regulations 1998 and detriment for asserting rights under the WTR 1998. The issues were agreed as follows:

2. <u>Unfair dismissal</u>

2.1 Have the respondents shown the reason for dismissal?

2.2 Was the reason a substantial reason of a kind which can justify dismissal?

2.3 Did the respondents genuinely believe there was a breakdown in the working relationship / misconduct (as the case may be)?

2.4 If so, did they have reasonable grounds for that belief?

2.5 Did they carry out a proper and adequate investigation?

2.6 In general, were fair procedures followed?

2.7 Was it fair to dismiss the claimant for that reason, applying the band of reasonable responses?

3. Whistleblowing

The claimant states that she was dismissed and subjected to a detriment because she made the following protected disclosures:

(a) Her email dated 1 December 2015 alleging that working excessive hours at year end was detrimental to her health.

(b) In her email dated 7 December 2015 to Mr Greatorex, alleging she was being offered money to leave after complaining of excessive hours, which was bribery or blackmail.

(c) In her email of 7 December 2015 to Mr Greatorex, stating under sub-heading B that accounting procedures were being used which wrongly inflated the respondents' profit.

The alleged detriment is the offer to the claimant of terms for a proposed termination of her employment on 4 December 2015. The issues therefore are

3.1 Did the claimant make qualifying disclosures as defined by Employment Rights Act 1996, s43A? In respect of each such disclosure:

3.1.1 Was it a disclosure of information?

3.1.2 Did the claimant reasonably believe it was made in the public interest?

3.1.3 Did the claimant reasonably believe it tended to show under s43B -

(a) in respect of the 1 December 2015 email, that the health or safety of any individual has been, is being or is likely to be endangered,
(b) in respect of the 7 December 2015 email, that a criminal offence has been committed, is being committed or is likely to be committed,
(c) in respect of the 7 December 2015 email, that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

3.2 Was the disclosure made in good faith? (This will be relevant only to compensation.)

3.3 Was the claimant was subjected to the detriment on 4 December 2015 on the ground that she made a protected disclosure on 1 December 2015?

3.4 Was the reason or principal reason for the claimant's dismissal that she made a protected disclosure?

4. Working time detriment

4.1 Whether by her email dated 1 December 2015, the claimant –

4.1.1 (under s45A(1)(a)) refused to comply with a requirement which the employer imposed or proposed to impose in contravention of the WTR 1998. The alleged requirement is to work without a weekly 24 hour rest break.

4.1.2 (under s45A(1)(b)) refused to forgo a right conferred on her by the WTR 1998. The alleged right being to have a weekly rest break of 24 hours.

4.1.3 (under s45A(1)(f)) alleged that the employer had infringed such a right.

4.2 In relation to 3.1.3, whether the claim to the right and the claim that it had been infringed were made in good faith.

4.3 Whether the claimant was subjected to a detriment on the ground that she had done any of those things. The detriment is that described in relation to the whistleblowing claim.

5. Automatic unfair dismissal – asserting a statutory right s104

5.1 Whether the reason or principal reason for dismissal was that the claimant alleged the respondents had infringed her statutory rights under the Working Time Regulations 1998, ie that she was entitled to a 24 hour break in a 7 day period.

5.2 Whether such allegation was made in good faith as required by ERA 1996 s104(2).

6. Health and safety detriment and automatic unfair dismissal – s44 and s100

Under s44(1)(c) and s100(1)(c)

6.1 Whether there was a health and safety representative or committee

6.2 whether there were circumstances connected with the claimant's work which she reasonably believed were harmful or potentially harmful to health or safety.

6.3 whether the claimant brought these to her employer's attention by reasonable means

Under s44(1)(d) and s100(1)(d)

6.4 Whether there were circumstances of danger which the claimant reasonably believed were serious and imminent and which she could not reasonably have been expected to avert

6.5 Whether in such circumstances she proposed to leave her workplace

Under s44(1)(e) and s100(1)(e)

6.6 Whether there were circumstances of danger which the claimant reasonably believed were serious and imminent and which she could not reasonably have been expected to avert

6.7 Whether in such circumstances she took appropriate measures to protect herself by giving notice in her email of 1 December 2015 that she would not be working such hours.

6.8 Whether the claimant was subjected to a detriment on the ground that she did any of the above

6.9 Whether the reason or principal reason for dismissal was that the claimant had done any of the above.

Matters relevant to remedy to be determined at this stage

6.10 If the dismissal was unfair on procedural grounds, what is the chance that the respondents would have dismissed the claimant even if they had followed fair procedures and on what date would the dismissal have taken place?

6.11 Would the claimant have been fairly dismissed in any event in the near future because of the breakdown of working relationship

6.12 Should there be any deduction from the basic award for conduct prior to dismissal? Regarding the compensatory award, did the claimant cause or contribute to her dismissal and if so, to what extent?

6.13 Was there a breach of the ACAS Code on Disciplinary and Grievance procedures and if so, should there be any adjustment of the compensatory award should the claimant succeed ad to what extent?

Procedure

11. The tribunal heard evidence from the claimant, and on her behalf, from Elizabeth O'Brien. From the respondents, the tribunal heard evidence from Janine Dreyer, Martin McLoskey, Simon Mayall and Chris Terry.

12. The parties each produced written opening and closing skeleton arguments. There was an agreed trial bundle of 873 pages.

13. At the start of her own evidence on day 3, the claimant said she would have liked to see an email chain between Mark Black and herself in about November 2015 regarding MSDL licenses. She said this would show Capita Registrars were resistant to providing information when requested. The tribunal was concerned at the lateness of the request given that the respondents' witnesses had already been cross-examined and the matter had previously been aired at the preliminary hearing before EJ Grewal. The respondents stated the documents were irrelevant anyway since their complaint was not that the claimant had chased Capita Registrars for information, but the way she had done so. Nevertheless, the tribunal suggested that if it was not too onerous for the respondents to do a search overnight, they did so. The claimant was happy with that approach. The next day the respondents produced what they thought were the correct documents. The claimant said these were not in fact correct because they related to MSDN which was not the same as MSDL. The respondents stated that they had done a search in response to her original request prior to the EJ Grewal preliminary hearing and this is all that had been turned up. In the circumstances, the tribunal told the claimant that this could be taken no further. The claimant accepted the position.

Fact findings

14. The respondents are a well-known international outsourcing company with approximately 82,000 employees worldwide. They have 12 divisions and 250 subsidiary trading businesses, each of which are separate legal entities.

15. The claimant worked in the Group Management Accounts team as an Assistant Management Accountant from February 2014. She had transferred from a lower level accounts role with one of the subsidiary companies during a redundancy situation. Janine Dreyer, the Head of Group Manager Reporting, decided to offer her the post despite her relative lack of experience and that she was not yet studying for her accountancy qualifications, which is usually required for the role. The annual salary was £27,000. The claimant did start studying some time after her appointment.

16. The claimant's contract says that her normal working hours are 9 am – 5.30 pm Monday – Friday with an hour for lunch but that in order to be flexible, she may be required to work additional hours from time to time, for which payment is discretionary. In her offer email dated 31 January 2014, Ms Dreyer said:

> 'There are a few points … that you should consider before accepting the position:
> - There are times in the month when the team is expected to work longer hours than the standard 9 am – 5.30 pm core hours.
> - Financial year-end processing and reporting periods, working hours are extended to very late in the evening and weekends.
> - We work to strict deadlines that have to be met …
>
> If you wish to talk to me about any of the above points, please let me know and I will give you a call to discuss.'

The claimant responded that she would be delighted to accept the offer and 'I completely understand the need for longer hours and the strict deadlines, and I am perfectly happy with that.'

17. The claimant worked in a team of 18. At the time she joined, her supervisors were Kasia Madej and Anthony Li Ting Chung. Ms Dreyer, who was a qualified accountant, was her line manager. Ms Dreyer reported to Simon Mayall, who was the Deputy Group Financial Controller at that time. He was also a qualified accountant. The Group Financial Controller was Clare Waters, who in turn reported to Nick Greatorex, the Group Finance Director. Mr Greatorex was a member of the main Group Board and he reported to the Chief Executive. Ms Dreyer was responsible for the day-to-day running of the Management Accounts Team.

18. Group Management Accounts carried out work for the various group businesses and provided a check on their accounts. The amount of work for each business varied. Employees in the team were allocated various businesses. The claimant was allocated fixed assets work plus the PRISM project for Capita Registrars Ltd within the Asset Services division, and twelve companies outside the division. Charles Cryer was Divisional Financial Director of Capita Assets Services. John Brimble was its Divisional Financial Controller.

19. The claimant's work comprised monthly reconciliation of balance sheet accounts and monthly reporting work. PRISM was the largest of the asset purchase reviews. It involved the construction of an IT system for share plans and dealings which was provided by Capita Shareholder Solutions (a business within the Asset Services division) to corporates. Nigel Fish was the Finance Director for Capita Shareholder Solutions. A significant part of the claimant's role was to collect and verify support costs related to this build. She would spend approximately 50% of her time reviewing each item on the balance sheet which related to PRISM. This entailed checking whether there was evidence to support each item of expenditure as a cost against the project. Some evidence would be contained in existing records, but the claimant would often need to contact individuals within the business to ask for supporting evidence. Over time, the claimant managed to get support and

evidence for about £50 million, almost the entire value of outstanding items on the balance sheet. Ms Dreyer thought the claimant was a good fit for the PRISM work because it was owned by the Shareholder Services business within Asset Services, where the claimant had previously worked.

20. Some bad habits had formed within Asset Services and a lot of time was needed to resolve them. The claimant did the work she was asked to do and did well in cleaning up the balance sheets. However, difficulties began to arise from as early as April 2014 regarding the way she went about her tasks. The problem was both the tone of her emails and that she could be pedantic about the detail and form of supporting information which she wanted. The claimant was raising large numbers of queries and too many people in the businesses were becoming involved in sorting out relatively low level queries. Ms Dreyer would talk informally to the claimant about the tone of her emails. She would say things like, 'Try to keep your emails short and professional', and 'If something has upset you, sit on your hands'.

21. The department operated a level of 'materiality', ie they would tend not to press for supporting evidence for lower value items. There was no fixed sum or percentage below which items should not be questioned. It was a matter of judgment and proportionality. However the claimant was insisting on back up for every single item, even when told it was not necessary or proportionate.

22. The following is an example of the claimant's communication style and of her tendency to escalate. After difficulty resolving an issue with Mr Fish, the claimant emailed both Mr Fish and Mr Cryer with the heading 'Breaches of Group Policy':

> 'Nigel (Charles – below)
>
> Not sure why you feel able to, quite easily, breach Group Policy?
>
> Project Lincoln
> You were aware that you did not have the authority to approve the capital spend …..'

Towards the end of the email, the claimant added:

> 'Charles – as I have not had a response from Nigel and it appears Nigel is a rebel FD, please could you ensure that these issues are resolved and, going forward, Group Policy is followed?'

23. Mr Cryer discussed the email with Mr Brimble and Mr Fish, and Mr Fish then forwarded it to Ms Dreyer with a request to meet. Ms Dreyer responded: 'Oh my! That was 'brave' of Mowe'. She went on, 'Though the communication issue needs to be addressed, there are issues we are trying to work through with the Beckenham team …. Me and my team leads have been guiding Mowe but at all times the message is to communicate and resolve queries professionally and to work with the business'. Mr Brimble replied, 'Think we'll be on the same page here. I will be the first to admit that there are things we need to improve on at this end …. The communication however was not very

helpful and copying Charles definitely didn't have the effect she may have hoped for! For the record I believe that we as a division have a good working relationship with you and your team – Anthony, Tim, Kasia and Marie in particular and have never had anything like the issues we have had in this last month.'

24. The claimant was shown these emails in the tribunal. She did not accept Mr Brimble and Ms Dreyer were making any criticism of the tone of her email.

25. When he spoke to Ms Dreyer about this matter, Mr Brimble asked to have a different team member deal with their Group Management Accounts Reporting. He said his team were providing everything the claimant wanted, but he would like her to be less confrontational. Ms Dreyer decided not to move the claimant, who had been allocated the task and was delivering results. As we have said, Ms Dreyer's approach was to guide the claimant as to approach, showing her how she worded her emails abruptly and suggesting a less pedantic and pushy style. As a result of the conversation with Mr Brimble, Mr Mayall and Ms Dreyer decided to hold a meeting to improve the working relationship. The meeting was attended by Ms Dreyer, Ms Li Ting Chung, Mr Fish, Ms Lane and the claimant on 14 May 2014. The meeting went well but afterwards, the working relationship continued to deteriorate.

26. In May 2014, after two emails from the claimant with enquiries on Project Ruby (a refurbishment in Beckenham), Mr Fish emailed her saying, 'Please route these routine enquiries through Hazel please', Hazel Lane being a member of his finance team. The claimant responded that routine enquiries would of course be routed via Ms Lane, but as the matter was initially directed towards him by Ms Dreyer, it should remain with him until resolution. Mr Fish responded with one line, 'Please route ALL queries through Hazel'.

27. In June 2014, there was a lengthy email exchange between the claimant and Mr Fish and his team regarding whether there was sufficient evidential support on a particular item. Eventually Mr Fish spoke to Ms Dreyer. In her follow-up email, Ms Dreyer started by saying, 'Some points to clarify and I hope, calm the situation.'

28. In June/July 2014, there was an exchange of emails between the claimant and Mr Brimble regarding an authorisation on Project Proteus. Mr Brimble said he would discuss the matter with Mr Cryer when the latter returned to the office. The claimant insisted the approval needed Mr Cryer's attention because of the amount involved and then started to copy Mr Cryer in. On 11 July 2014, Mr Brimble emailed Ms Dreyer to say, 'Charles has asked me to again remind you that if you or your team believe you are not getting appropriate or satisfactory responses from me or others in Asset Services and feel the need to escalate to him, then this escalation should come from you only'.

29. In September 2014, a further meeting was held between the teams to help resolve outstanding issues and improve the work relationship. Mr Fish left the meeting positively: 'All, many thanks for your time today. I think we had a

productive meeting and it feels like we now have a definite path to getting everything regularised in short order'. The claimant followed up with some queries. Mr Fish replied that the non co-terminous point had been agreed at the meeting and should not now be reopened. Mr Mayall confirmed this was the case.

Year end 2014/5.

30. As Ms Dreyer signalled to the claimant when offering her the job, longer hours and weekend working were expected at year-end. Thursday 1 January 2015 was taken as a day off being the New Year Bank Holiday. The team then worked Friday 2 January 2015, and from Monday 5 January 2015 through to Friday 16 January 2015. A couple of people came in over the first week-end, but not the full team. The claimant came in on the Saturday (3 January 2015) but not the Sunday. Although the claimant told us she worked the whole week-end, Ms Dreyer disputes this, and the claimant's email of 8 January 2015 only refers to working the Saturday.

31. The claimant says the core hours of the team over this period were 9 am – 9 pm Monday – Friday (5 pm on the final Friday) and 10 am – 6.30 pm Saturday – Sunday with half an hour for lunch and 45 minutes for dinner which was brought in. We find this is broadly correct, but there were days when the claimant and her colleagues were allowed to leave earlier, as indicated for example by the email dated 8 January 2015, referred to below. Employees were allowed to leave their desks to make tea and coffee or go for a cigarette.

32. Ms Dreyer said that everyone was given two days off in lieu. She said that two days in lieu of the interim worked weekend were always offered apart from one year when the team opted for a cash payment instead, but that was not 2015. The claimant denied this. On balance we find the two days in lieu were offered. Mr Mayall gave very specific evidence that the entitlement was introduced by Ms Waters three to four years previously.

33. On Wednesday 7 January 2015, the claimant texted Ms Madej to say she would not arrive until 10.10 am but that all the journals had been parked the previous evening and there was no need for anyone to cover her. The claimant told the tribunal this was because she had worked to 10 pm the previous evening and she felt sick. The claimant received an 'unkind' text back from Ms Madej, which said that was unacceptable and that she needed to be in the office like the rest of the team. On arriving at work, the claimant went to discuss this text with Ms Waters. Ms Waters said the year-end process had always been carried out this way. The claimant said deadlines should be changed or more staff recruited from adjacent teams. She said she was so tired that she had almost been knocked over by a taxi outside the building. The claimant was stressed and crying. Ms Waters told her to calm herself and quietly go home. The claimant returned to work on Thursday 8 January 2015 and worked the remainder of the period to 16 January 2015.

34. On 8 January 2015, Ms Dreyer sent the team an email stating the tasks for the day and their aim to leave at 5.30 pm that day. The claimant was sent a

separate email stating that as she had arrived 30 minutes late that morning, she should work till 6 pm. The claimant responded that she was late because a bus had broken down. She said she had worked till 10 pm on Tuesday, 1 hour after most of her colleagues had left; till 9 pm on Friday and Monday, and that she was in on Saturday. She added, 'If you insist on contractual hours then I will be leaving at 5.30 pm every evening from now on'. From this email, we conclude that the claimant had worked Saturday 3 January but not Sunday 4 January 2015. There is no mention of tiredness or health issues in this email.

35. The claimant told the tribunal that she had worked long hours in other jobs, but the monotonous nature of this work in front of a computer screen caused her 'exhaustion'.

Lead up to grievance

36. On 12 February 2015, Ms Madej told Ms Dreyer that everyone had completed their reviewing packs except the claimant and someone called Jite. Ms Dreyer sent a general email saying the pack deadline was today and 'it is, to be blunt, poor work ethic not to communicate or provide a status update'. The claimant responded to Hema Ley, Group HR, copied to Mr Mayall, 'Please can you advise why I am being accused of poor work ethic? Is it to push me out of my job??'

37. On 18 February 2015, having heard that the claimant wanted to speak to HR, Ms Madej emailed Ms Dreyer:

> 'Do you know what kind of support can I get from HR in this situation? Or does it work one way only? … Her behaviour is having bad impact on the morale of the team since everyone is commenting of what is happening with Mowe and others are supposed to pick up her work if she does fail to turn up …… People are starting to wonder how long she can get away with such a behaviour. Things are getting worst and worst since our year end. We don't get time to record of what she doesn't do or what she does during her time at work and to complain to HR since we want to concentrate on our work.'

38. Ms Dreyer forwarded this to Mr Mayall who told her the claimant had been talking to him about having an informal meeting with Ms Dreyer and himself before deciding whether she wanted to take a formal grievance. He said he was concerned that this had now become more widespread within the team. In the event, the claimant did not take out a formal grievance at that time.

39. On 20 February 2015, the claimant emailed Mr Mayall complaining that her bonus was only £3,038 (12.5%) despite her business contributions and she complained that a colleague was being paid more than her. She said:

> 'Once the remuneration for working 12/13 hours days during the week (0.5 hr for lunch) and 8 hours over Saturday and Sunday during year-end is taken off, that leaves little which reflects my contribution to the Group result..'

40. On 26 February 2015, the claimant sent Ms Dreyer an email complaining about some extra work allocation without prior discussion. Ms Dreyer responded that she reviews work allocation across the team at all points in the year. The claimant replied, copying in Mr Mayall and Ms Waters. She accused Ms Dreyer of bias in her allocation of duties among team members. She wrote, 'Given the achievements I have made, I expect more from you rather than be accused in writing of having 'poor work ethic' …. You can continue in this way, but then how do you expect to retain a skilled workforce?'

41. On 3 March 2015, Ms Dreyer emailed Ms Ley. She understood that the claimant had issued a grievance, one of the issues being work allocation. She asked for guidance on communicating with the claimant 'as there is always a backlash. I am impeded and I have to consider the impact to the rest of the team.' Ms Ley responded that she should continue to manage the claimant as she would any member of her team, applying a fair and consistent approach. By 11 March 2015, the formal grievance still had not been lodged. Ms Dreyer told Ms Ley that Ms Madej had said she could not continue to work in this 'hostile/toxic environment' and was looking for another job. Ms Dreyer had therefore moved the claimant to Mr Li Ting Chung's team.

42. When this was put to her in the tribunal, the claimant would not accept that Ms Dreyer was genuinely fearful of communication with her. She said she thought Ms Dreyer found her easy to deal with and enjoyed dealing with her. She said Ms Dreyer was in this email trying to defend herself in front of HR by formulating these false scenarios.

43. On 18 March 2015, the claimant sent an email to Mr Mayall, which she copied to Ms Waters and Ms Ley. Her email stated:

> 'We discussed in August that I was not achieving the result I wanted with Co 0005 because Nigel Fish, John Brimble and Hazel Lane would bypass me, and then Janine would override the position I had taken …..
> Once again, Janine has disregarded my position in order to indulge (pander) to the business….. I have told Janine that we shouldn't jump every time Nigel Fish asks us to…'

Mr Mayall responded, 'These long emails aren't helping anyone …. It's generally better to talk these things through and going through the grievance procedure below will hopefully be a watershed.'

44. The claimant's appraisal dated 5 May 2015 was carried out by Ms Madej and Mr Li Ting Chung. The claimant was rated 3 on every item ('progressed') as opposed to 1 (exceeded), 2 (achieved) and 4 (not achieved). Ms Madej stated that the claimant worked well on individual tasks, but did not contribute to the team. She noted that the claimant 'has developed a working relationship with the various contacts she has but risks damaging some Group Finance/Business relationships with her inflexible approach to issue resolution'.

45. The claimant did not receive a written copy of her appraisal till July 2015, as it required Ms Dreyer's input. However, during her appraisal meeting with the

claimant on 5 May 2015, Ms Madej and Mr Li Ting Chung reiterated these comments. They pointed out there was no team cooperation at the year-end and on the monthly basis. They drew the claimant's attention to her communication style, particularly in emails, and asked her to copy in her line manager when escalating problems.

46. There was a discussion about the extended year-end hours during the appraisal meeting. The claimant made various suggestions about how the work could be organised differently to avoid such hours.

47. The level of authorisation for expenditure within the respondents depended on the size of the overall spend. Only the largest scale projects would require authorisation by Mr Greatorex. If a low value new item arose, it could be authorised at a lower level if it was an independent item, but if it was part of a large project, it would need authorisation by the person who originally authorised the whole project. On occasions, the claimant disputed a business's categorisation of an item as independent of a larger project.

48. In June 2015, the claimant entered an exchange of emails with Mr Fish regarding whether £15,000 for a new compactor needed to be added to the Project Ruby Capex, which would require Mr Greatorex's approval as it would be an extra cost. Mr Fish said the item was not part of Project Ruby. The claimant would not accept this, and on 11 June 2015 she forwarded it to Mr Greatorex asking him to approve an extension to the Project Ruby Capex. Mr Fish spoke to Ms Dreyer and then emailed Mr Greatorex asking him to ignore the claimant's email as he was not asking for an extension of the Project Ruby Capex.

49. In June 2015, there was an email exchange over the 'Share Dealing Bubble'. On 18 June 2015, the claimant was sent a Capex request for works to extend an office for the Share Dealing team within Capita Registrars. The request was signed off by Mr Brimble with the agreement of Mr Fish and Justin Cooper. The claimant responded that this expenditure should be assigned to the refurbishment Capex for Project Duke and any further costs would therefore need to be approved by Mr Greatorex. Mr Brimble replied that the new spend had nothing to do with the original refurbishment and had been signed off by the business Managing Director and Finance Director. Nevertheless, the claimant responded that she would have to refer the matter to Mr Greatorex as to whether the costs should be covered by a separate Capex. She wrote, 'How do we know that the Group FD had chosen not to approve the extra spend and this is now being flown under the radar on a smaller Capex?' Jackie Millan, the Divisional Finance Director, then emailed the claimant to confirm the request was unrelated to the original refurbishment and they would never intend to fly items below the radar. However, if the claimant felt she needed to escalate, it should go to Nick Bedford instead of Mr Greatorex. (Mr Bedford was a senior Finance Director at a level between Ms Millan and Mr Greatorex.) Mr Brimble then discussed the matter with Ms Dreyer and wrote an email (copied to the claimant) saying there was nothing spare on the original Capex and the Share Dealing Bubble was a completely separate project. Despite these emails, the claimant forwarded the email to Mr

Greatorex setting out her reasoning. She started 'FYI – It seems that if Asset Services shout loud enough, they can get their own way. Therefore 2 Capexes now for Dukes Place'. Mr Greatorex forwarded her email to Ms Waters and Mr Bedford simply with a '?'. Ms Millan, on discovering what had happened, emailed Mr Mayall:

> 'As you can imagine, I am beside myself. Could I respectfully request that Mowe is removed from anything to do with Asset Services. I am definitely willing to accept areas for improvement and will continue to work to improve but the point regarding escalation seems to be wilfully disregarded'.

50. In May/June 2015, the claimant entered an exchange of emails with Mark Black and Mr Fish. On 2 June 2015, in a jointly addressed email, she finished a query to Mr Fish with, 'Does that mean the Capexes are overstated so they can take these spurious charges?' Then after several further exchanges, she started copying in Ms Dreyer and Mr Mayall. On 18 June 2015, Danny Cartland wrote to Ms Dreyer and Mr Fish saying he had seen the emails and 'I sense more than a level of frustration, cross-purpose discussion and lack of understanding'. He suggested a meeting to clear up queries.

51. In late June 2015, Ms Dreyer received a copy of the claimant's appraisal from the supervisors. It had been delayed due to intervening holidays and heavy work demand resulting from staff study leave. On 23 June 2015, she added her own comments. She said the claimant was thorough and detailed orientated and that she should continue to work on developing both team and business contact relationships; understanding the necessity of following the correct group escalation protocol, and improving her timekeeping/punctuality.

Grievance

52. On 19 June 2015, the claimant sent an email to Ms Waters, copied to Mr Greatorex and Hema Ley of Group HR seeking a salary rise from £27,000 to £37,000, itemising her achievements and complaining about a colleague being given more opportunities.

53. On 29 June 2015, the claimant lodged a further grievance regarding the 'way in which I believe Janine is treating me despite all my efforts'. Her email was copied to Ms Waters, Mr Greatorex and Ms Ley. The claimant listed eight matters which she sought to address and noted, 'At every stage, Janine will seek to undermine me and support the business. This is demoralising, causes anxiety, and is importantly, wrong business practice.'

54. The claimant's grievance was initially addressed at stage 2 because it concerned her line manager. To avoid any potential conflict, Mr Mayall asked an independent director, Nick Latner, to deal with the grievance.

55. Ms Dreyer sent Mr Latner written comments. She said, 'I have been questioned and undermined at every opportunity by Mowe, when I manage her as part of my team……The team in the Asset Services division find it very hard to work with Mowe, the relationship is unhealthy but I asked them to

persevere so Mowe could achieve a result ..I have had to manage the relationship since June 2014 … to keep the Group Finance relationship intact…I have never made Mowe aware of the fact that the business refused to work with her. I have supported her all the time.

56. Mr Latner rejected the claimant's grievance by letter dated 19 September 2015. He said that Ms Dreyer acknowledged she could sometimes communicate better and write emails which appeared less blunt. However, he had the impression that the claimant felt her role was to police the business and that she felt they were out to cheat the process, whereas her role should be to work collaboratively and partner and support the business, providing the right level of rigour and challenge while working collaboratively. He said that the claimant regularly escalated issues which made it difficult for Ms Dreyer to manage her.

57. The claimant appealed. She said, 'Since filing my grievance, Janine has continued with her overbearing attitude. Janine has decided to turn her attention to the issue of punctuality which I have discussed with her many times before and had thought that the matter was resolved.'

58. The stage 3 grievance hearing took place on 12 September 2015. Notes were taken by Robert Summers from HR. Martin McCloskey, Group Commercial Director, was the hearing manager. The claimant told him that she still had a degree of trust in the company and she thought she had acted professionally while the grievance was ongoing, but that Ms Dreyer had not acted the same. The notes record her saying, 'Thinks being picked on more as a result of having raised grievance and the relationship is broken with Janine'. The claimant denied in the tribunal that she had said the relationship was broken. We find she did say this. It is noted by an independent HR manager. It is consistent with other remarks made by the claimant about Ms Dreyer, referring to her 'overbearing attitude' and picking on her. It follows on from the claimant's statement that she has been picked on more as a result of having raised the grievance. In addition in the outcome letter, Mr McCloskey refers to the claimant having said the relationship with her line manager was broken. The claimant did not write back to correct him, as one might expect with such a serious statement if it was wrong.

59. Mr McCloskey rejected the claimant's grievance by letter dated 2 October 2015. He said he had investigated her comment that she believed the relationship with her line manager was broken. He said that, having reviewed the correspondence between her and Ms Dreyer, he had some concerns. He said that over a prolonged period, her communication style with her manager was not what he would deem in line with Capita values, eg on more than one occasion, she had questioned and undermined her manager's decision in front of other team members. He said this also extended to complaints from the business, in particular questioning decisions of senior management and outlining points as 'unacceptable' which was not the remit of her role.

60. Mr McCloskey said he could not see any evidence of harassment of the claimant. He said he was concerned about the employment relationship and

felt various remedial action might be implemented. He therefore recommended a third-party hosted mediation session between the claimant and Ms Dreyer attended by Group HR to agree (1) how communication between the claimant and Ms Dreyer could be improved; (2) when it was appropriate to challenge/escalate and how that escalation should be undertaken; (3) a review of the allocation of company accounts across the team; (4) study arrangements for the remainder of the calendar year. The latter two issues had also been the subject of complaints by the claimant.

61. Mr McCloskey noted that for mediation to be successful, both parties must consent to engaging in the process and to work towards improving the employment relationship. He asked the claimant to confirm her acceptance to engage in the proposed mediation by 12 October 2015. Should either party not wish to engage in the process or if the working relationship was not improved, the company would have to decide on the next steps.

62. Ms Dreyer indicated her willingness to engage in mediation. The claimant did not get back to Mr McCloskey. When cross-examined, the claimant did not give a clear explanation why not. She said she did not think Mr McCloskey was genuinely concerned about her communication style because she thought he was setting up false allegations as a result of her grievance. The claimant also sought to say that so much time had passed since originally presenting her grievance, things had moved on, her workload had resolved and she was quite happy in her job. We do not accept this was the claimant's state of mind. It is not consistent with what she said at the grievance appeal only a few weeks previously.

63. In June 2015, David O'Daly had been engaged as Ms Dreyer's deputy. Ms Dreyer allocated to him the task of managing the claimant's timekeeping as she was often late and responded badly when tackled. He was also asked to manage the issue of self-certification. The claimant often failed to provide self-certification forms and Ms Dreyer had given up asking her as, again, she responded badly.

64. The claimant told the tribunal Ms Dreyer had raised timekeeping and they had agreed flexi working. Ms Dreyer denies there was any such agreement. The documents support Ms Dreyer's account. On 11 August 2015, Ms Dreyer emailed the claimant to say, 'Please ensure you are at your desk and working by 9 am. We have spoken about punctuality and I have noticed you arrive after 9 am most days. If travel is causing a problem, please start your day a little earlier to ensure you are on time.' The claimant replied, 'I don't find the below acceptable. We have discussed this at length and I have told you my travel arrangements in the morning which is to catch an overground train'. The claimant said she had tried to catch an earlier train but it was difficult to board at her station and she had sent pictures to confirm this. She said she should not have to send pictures to verify herself 'and evidently, there is a lack of trust despite the fact that I meet all deadlines and deliverables and there is no impact on the team'. The claimant went on to say that 'Capita has a flexible working policy as set out by law, but I don't think it should be necessary to make a formal application to cover the times that I don't come in at 9 am (and

we are only talking no more than 10 minutes)'. The claimant went on, 'As I have stated before, if you wish to stick to the 9 am start and remain unflexible [sic], then I have the option to opt out of working late when it comes to month-end and year-end'. The claimant copied and pasted an extract from Capita's flexible working policy.

65. On 21 August, Ms Dreyer replied that she had spoken to Ms Waters and Ms Ley, and it was important for all individuals to arrive on time. This was particularly important in a large team with many junior less experienced members just starting out on their careers. Therefore the claimant was required to arrive on time at 9 am.

66. The claimant then stated she would like to make a formal application for flexible working 'in line with the company policy and as laid out by law' for flexible working hours. Ms Dreyer sent the claimant two links for making an application, but the claimant never did so.

67. Mr O'Daly did not have much success either at dealing with the claimant's timekeeping and self-certification issues. He monitored the claimant's start times from August onwards. By November 2015, other staff were getting annoyed at her constant lateness. When shown in cross-examination an email dated 17 November 2015 recording seven dates when she arrived late between 2 and 17 November 2015, the claimant said Mr O'Daly had fabricated the information because she would not take on a greater workload. We did not find this suggestion credible.

68. By September 2015, Ms Dreyer felt like she was treading on eggshells with the claimant. She felt every email she sent the claimant was either challenged or escalated to Mr Mayall. She did not feel the work situation improved in any way after the grievance outcome. Ms Dreyer became so stressed that she went to see her GP who discovered she had abnormally high blood pressure (205/124) and sent her directly to hospital. Ms Dreyer believed her high blood pressure was caused by the pressures of managing the claimant. The tribunal is not in a position to say whether or not that is medically the case, but we accept it was Ms Dreyer's perception. She told Mr Mayall about the issue at the time. Mr Mayall did not do anything. He said she could take time off if she needed it. Ms Dreyer did not seek any management intervention from him. She said she was able to carry on.

69. In October/November 2015, there was an exchange of emails between the claimant and various managers at Capita Asset Services regarding housekeeping and PC/laptop orders. This is an example of the claimant seeking to bypass Ms Dreyer. At one stage in the chain, the claimant suddenly copied in both Ms Dreyer and Mr Mayall. On 24 November 2015, she emailed Mr Mayall, with only a copy to Ms Dreyer, asking him to confirm the approach to be taken on the issue. Ms Dreyer replied, copying in Mr Mayall, 'Please direct these queries to me in the first instance'. She went on to give her view on the matter. The claimant replied, similarly copying in Mr Mayall, 'This has been discussed many times and requires a decision from

Simon ….'. Mr Mayall then replied, 'I'll leave this with Janine and yourself to agree the way forward'.

70. On 19 November 2015 there was a team meeting to discuss arrangements for the year-end accounting process. Ms Dreyer produced a time-table and there was a discussion about where the evening meals would be ordered from. Ms Dreyer says the proposal was 12 days, ie two weeks with the intervening week-end. The claimant says the hours were to be 'the same as' the previous year. We do not know what that means. We know that in 2015, a few people had come in on an ad hoc basis the previous week-end, including the claimant on the Saturday. But the block period for the whole team in 2015 had been Monday 5 January – Friday 16 January. As Friday 2 January 2015 was worked, some ad hoc arrangements on the immediately following week-end might logically have been made. In 2016, 1 January fell on a Friday and no one would be working. There was no evidence put to us that the team were expected to come in on Saturday 2 and Sunday 3 January 2016. When the claimant shortly after the team meeting wrote her 1 December 2015 email, she did not quote any hours. She simply referred back to what had happened the previous year as being excessive. Further, her reference back was not accurate in that it included 1 January and Sunday 4 January. It is therefore not reliable in trying to infer what was now proposed. On balance, to the extent there was any precision in the discussion, we find that the proposal was to work from Monday 4 January to Friday 15 January 2016, ie 12 days as Ms Dreyer states.

71. On 1 December 2015, the claimant emailed Mr Mayall with a copy to Ms Dreyer, Ms Waters and Mr Greatorex. The email, which is the first alleged protected disclosure, reads as follows:

> 'Please be advised that I will not be working the extended hours at year-end this year.
>
> The reasons behind my decision are that:-
>
> 1. This is detrimental to my health given the fact that we worked approximately 76 hour weeks last year without a day's break (9am – 9pm weekdays, 10 am – 6pm weekends from 1 Jan to 15 Jan, 9am – 5.30 pm on 16 Jan 2014)
>
> 2. This is against the working time regulations which means the right to one day off a week.
>
> It is not unreasonable to expect that we should have been compensated for these excessive working hours – a slice of cake and the chance to go home at 5pm instead of 5.30 pm on one particular Friday afternoon is, in no way, compensation for the effort put in by our team.
>
> I'm sure you are very disappointed with this but I have considered my position on this matter very carefully, and I do not expect to suffer any detriment as a result of my decision.
>
> Four weeks notice should provide ample time for you to address any impact on the year-end process.'

72. The claimant had read the WTR 1998 before she wrote this email.

73. Mr Mayall replied on 3 December 2015 to say 'this is something we need to discuss, I'll arrange a meeting for 4.30 this afternoon. I'll bring along someone from HR…' He subsequently confirmed it would be an informal meeting. The claimant said she would bring a support with her, and it was agreed the meeting would be deferred to the next morning.

74. Mr Mayall found the tone of the email curt and abrupt. After thinking about matters, he decided to offer the claimant £10,000 to leave. He felt the email was yet another example of the claimant's challenging nature and the difficulty in the working relationship. He felt it was the straw that broke the camel's back. He felt they could work around the two weeks, but the problem was the general relationship.

75. The meeting on Friday 4 December 2015 was attended by Mr Mayall, Ana Maru from HR and the claimant brought a work colleague from a different department, Lizzie O'Brien. No one took notes as Mr Mayall said no notes should be taken. However, Ms Maru jotted down her recollection of the meeting later that day and emailed it to Mr Mayall. Initially there was a discussion about the refusal to work year-end hours. This was not a discussion regarding whether the claimant would work any extended hours at all. It was simply the claimant stating that she would not do so and that she had copied in Mr Greatorex as no one would listen to her and she would not speak to Ms Dreyer because she did not have a great working relationship with Ms Dreyer. She also did not feel comfortable discussing the matter with Mr Mayall or Mr Waters as she felt nothing would change regarding the year-end arrangements.

76. Mr Mayall then said he would like to make the claimant a 'without prejudice' offer to terminate her employment in return for £10,000. He said he would give her a day to think about it. When her witness protested at the short amount of time, he extended this to Monday. He said that after close of play on Monday, the offer would be withdrawn and it would then be necessary to look at the working relationships as the claimant had said she did not feel comfortable talking to managers. He also said they would have to manage her absence. Mr Mayall said they accepted the claimant opting out of the additional hours and they would find a way to manage this, though it would impact on her bonus as it was one of her objectives. Ms Maru's notes record that Ms O'Brien sought – and received - confirmation at the end of the meeting that if the claimant did not accept the offer, the only impact would be on her bonus and the need to improve the work relationship.

77. Mr Mayall emailed the claimant at 12.53 on Monday 7 December 2015 to confirm the offer was open until close of business. At 14.55 the claimant emailed Mr Greatorex. The email was headed 'whistleblowing and blackmail'. This is her second alleged protected disclosure. The claimant copied this email 20 minutes later to Andy Parker (the Group Chief Executive) and to Dawn Marriot-Sims and Vic Gysin (joint Chief Operating Officers). She told the tribunal that this was in case Mr Greatorex was 'in on it' ie the 'blackmail'.

Her email to them asked them to hold off on acting until she had a response from him. She said 'In particular, I would like to know whether or not Nick is aware of this pay-off which undoubtedly brings the company into disrepute'.

78. The claimant's email started by informing Mr Greatorex that on 4 December 2015, she had been offered £10k to leave Capita with only a few hours notice. Her deadline had been extended till 7 December 2015 after her witness's intervention. She wanted to know whether Mr Greatorex was aware of the 'without prejudice' offer and whether he was aware that 'without prejudice' 'does not stand in cases such as bribery, blackmail or whistleblowing'. She asked whether the offer was made because she had escalated her right not to work 76 hour weeks without a break as that would be detrimental to her health and safety or because she had escalated two issues to Mr Greatorex. She said she was told that if she did not accept the offer, she would be managed out, presumably via her sickness records.

79. The claimant said she was not aware her work was in question in any way and she had proven exceptional relationships with all her business contacts over the past two years. If anything, she had gone above and beyond to benefit the company. The claimant cited seven matters (A-G) in support of this. Items C, D and E had been raised previously as part of the claimant's grievance and dealt with. Item B is the third alleged protected disclosure. It stated, 'I am told that there are £30m unsupported prepayments in the balance sheet, with £15m being related to the Asset Services division'. It is not clear exactly what the claimant was saying about this. Her primary point appeared to be to the effect that she had given advice, which was followed, but she had received no acknowledgement. During the tribunal hearing, it emerged that the claimant had become aware of these figures only when mentioned by Colin Edwards and Mr O'Daly the previous week.

80. The claimant is certainly saying now, as part of her case, that item B raised matters of false accounting. Her evidence as to whether that was a reason for disclosing the matter at the time is unclear. She accepted her primary purpose was to state all the useful things she had done for the company. But she added, 'In doing so, I was disclosing things that were not quite right with the company, but we were working towards resolving them.'

81. At 5.13 am on 8 December 2015, the claimant emailed Mr Greatorex again asking him simply to state whether he knew about the '£10k pay off'.

82. Mr Mayall emailed the claimant on 8 December 2015 at 14.12:

> 'As has already been made clear on a number of occasions the extra hours are needed in order to complete the heavy workload that presents itself at this time of year. The period this normally extends to is two weeks and includes one weekend. Your decision whilst disappointing is noted and accepted……..Please ensure that all matters like this are raised with me or your manager Janine first. If our response is not satisfactory, then you are requested to raise this with Clare Waters before escalating this to the Group Finance Director, Nick Greatorex.'

He went on to say that under the Working Time Regulations 1998, hours are averaged over a 17 week period.

83. On 9 December 2015 at 18.25 the claimant replied to Mr Mayall that workers are entitled to a 24 hour rest period in each seven day working period. She said only two items had been escalated to Mr Greatorex and asked why that should be a problem. She then forwarded her email to Mr Greatorex with a copy to Mr Parker, Ms Marriot-Sims and Mr Gysin, asking them to resolve the matter with Ms Waters and Mr Mayall 'as I can't handle this any further and I would like to be left alone to do my job'.

84. On 11 December 2015, Mr Mayall emailed the claimant stating that her conduct sending emails to Mr Parker, Ms Marriot-Sims, Mr Gysin and Mr Greatorex was disruptive to the entire Group at a particularly busy period. He therefore required her not to send any further emails to any member of the Group Board regarding her concerns about her working hours and year-end arrangements. She should raise all matters first with her line manager and if she felt her needs were not being met, escalate to him.

85. Mr Mayall noted that the claimant had not accepted the invitation to participate in mediation. He would therefore ask Ms Dreyer to seek advice from HR as to how to manage a working relationship or decide on any appropriate action.

86. The claimant responded at 5.06 pm to Mr Mayall with a copy to Mr Greatorex, Ms Marriott-Sims, Mr Gysin and Mr Parker. The letter went over various issues and included these comments:

> 'I have the right to approach the Board without being berated by you …. I'm sorry that this is embarrassing for you (and possibly Nick Greatorex) but this is due to your behaviour….If matters are being escalated above you, then you ought to ask yourself why. I am clearly not happy by your or Clare Water's management which is why this has been raised at a higher level….. The fact that I have not taken part in mediation has no bearing on this current issue. The previous grievance was closed off and related only to Janine's behaviour towards me…. Finally, I do not believe that the working relationship between you and I has broken down and needs to be managed'.

87. Mr Mayall considered the matter over the weekend. He discussed it at length with senior HR personnel on Monday. He decided that the claimant could not continue in the respondents' employment. Although the claimant's approach to work tasks was generally well-executed, the businesses had raised concerns about the claimant's approach and Ms Dreyer had had to manage the relationship for some time. The claimant did not work as part of the team and effectively refused to be managed at all. She continued to escalate, even after being asked to deal with matters through the chain of line management, and she continued to raise the same issues. She had continued to send her emails to members of the Board, even after he had instructed her to deal first with Ms Dreyer and then himself. He felt any disciplinary action would be pointless because the claimant was unable to see any issue with her own

behaviour. She had rejected the suggestion of mediation, so it was also pointless to pursue that option.

88. On 15 December 2015, Mr Mayall went to the claimant's desk and asked her to accompany him to his office. He did not say why and did not suggest she bring someone with her. Hazel Cloke from HR was present. Mr Mayall told the claimant that she was dismissed because the relationship between her and Capita had broken down and could not be repaired. He did not discuss the matter any further. He said she was to leave with immediate effect and would be paid in lieu of notice. He escorted her to her desk to collect her things and then out of the building. The claimant found this humiliating. By letter dated 18 December 2015, Mr Mayall confirmed the dismissal was due to 'the irretrievable breakdown in our working relationship'.

89. The claimant appealed. Chris Terry, Group Risk and Compliance, heard the appeal. He had not been involved previously. The only information he had was the correspondence from 1 December 2016 until termination and what the claimant told him at the appeal hearing. He did not speak to any other witnesses. He therefore did not know on what basis Mr Mayall considered there was an irretrievable breakdown of the working relationship and he was unaware that Mr Mayall had taken into account events prior to 1 December 2016. The claimant had also not been given examples by Mr Mayall and was thus unable to address specific examples. Mr Terry rejected the appeal. He reached the view from looking at the correspondence that there had indeed been a breakdown.

Law

Whistleblowing

90. Under Employment Rights Act 1996, s103A, it is automatic unfair dismissal if the reason or principal reason for dismissal is that the employee made a protected disclosure. Under s47B a worker has a right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done on the ground that the worker has made a protected disclosure. Under s43B(1), a 'qualifying disclosure' means any disclosure of information which, in the claimant's reasonable belief was in the public interest and tended to show, inter alia, that

    (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,

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

91. Once it is established that the claimant made a protected disclosure and that she was subjected to a detriment. it is for the employer to show the ground on which any act or deliberate failure to act was done. (ERA 1996 s48(2) .) With regard to the causal link between making a protected disclosure and suffering

detriment, s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. (Fecitt v NHS Manchester [2012] IRLR 64, CA)

92. In Kuzel v Roche Products Ltd [2008] IRLR 530, the CA said this regarding the burden of proof on claims for automatic unfair dismissal for making a protected disclosure. Where an employee positively asserts there was a different and inadmissible reason for her dismissal, eg making protected disclosures, she must produce some evidence supporting the positive case. However, she does not have to discharge the burden of proving dismissal was for that reason. It is enough to challenge the employer's reason and provide some evidence for doing so. Then having heard the evidence for both sides, the tribunal should make findings of fact based on direct evidence or reasonable inferences from primary facts. The tribunal must then decide what the reason or principal reason for dismissal was. If the employer does not show to the tribunal's satisfaction that the reason was what it asserts, it is open to the tribunal to find it is what the employee asserted. The tribunal is not obliged to so find, although that may often be the case.

93. The EAT in Cavendish Munro Professional Risks Management Ltd v Geduld (UKEAT/0195/09) stated that the legislation recognises a distinction between an allegation and information. The ordinary meaning of giving 'information' is conveying facts. It is to be distinguished from an allegation in a letter from a claimant or a claimant's solicitor which states, for example, that the employer is in breach of contract and that if the situation does not improve, the claimant will resign and claim constructive dismissal.

> '..the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information.

94. The question for consideration under s.43B(1) of the 1996 Act is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest.

95. The words 'in the public interest' were introduced to do no more than prevent a worker from relying upon a breach of her own contract of employment where the breach is of a personal nature and there are no wider public interest implications. A relatively small group may be sufficient to satisfy the public interest test and this can solely comprise fellow employees. It does not prevent the disclosure satisfying the public interest test that the claimant is also making the disclosure in her own interests. (Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2015] IRLR 614, EAT.)

96. Whether or not the disclosure was made in good faith is relevant to compensation should the claim succeed. 'In 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 would 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. (Street v Derbyshire Unemployed Workers' Centre [2004] IRLR 687, CA.)

Working Time

97. Under reg 11 of the Working Time Regulations 1998, a worker is entitled to an uninterrupted rest period of not less than 24 hours in each seven-day period during which she works for her employer. The employer can decide whether to give two 24 our rest periods in each 14-day period or one uninterrupted rest period of mot less than 48 hours in each such 14-day period. Under reg 4, unless a worker opts out, a worker's working time in any reference period must not exceed an average of 48 hours for each 7 days. Subject to any agreement otherwise, the reference period is 17 weeks.

98. Under s45A(1) of the Employment Rights Act 1996, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done on the ground that the worker
(a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,
(b) refused (or proposed to refuse) to forgo a right conferred on her by those Regulations,
(f) alleged that the employer had infringed such a right.

99. Under s45A(2) It is immaterial for the purposes of subsection (1)(e) or (f) whether or not the worker has the right, or whether or not the right has been infringed, as long as the claim to the right and that it has been infringed has been made in good faith. Under s45A(3), it is sufficient for subsection (1)(f) to apply that the worker, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

Dismissal for asserting a statutory right

100. Under s104 of the Employment Rights Act 1996, it is automatic unfair dismissal to dismiss an employee if the reason (or, if more than one, the principal reason) for the dismissal is that the employee (a) brought proceedings against the employer to enforce a right conferred by the Working Time Regulations 1998 or (b) alleged that the employer had infringed a right conferred by the Working Time Regulations 1998. It is immaterial whether or not the employee has the right, or whether or not the right has been infringed as long as the claim to the right and that it has been infringed has been made in good faith.

Health and safety

101. Under s100(1) of the Employment Rights Act 1996, it is automatic unfair dismissal to dismiss an employee if the reason (or, if more than one, the principal reason) for the dismissal is that
(c) being an employee at a place where there was no health and safety representative or committee, she brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety,
(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, she left (or proposed to leave) or (while the danger persisted) refused to return to her place of work or any dangerous part of her place of work, or
(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, she took (or proposed to take) appropriate steps to protect herself or other persons from the danger. Under s100(2), whether such steps were appropriate is to be judged by reference to all the circumstances including, in particular, the employee's knowledge and the facilities and advice available to her at the time.

102. Under s44 of the Employment Rights Act 1996, an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done on any of the above grounds.

Detriment

103. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, the House of Lords said this:

> In order for a disadvantage to qualify as a "detriment", it must arise in the employment field in that the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment"…. It is not necessary to demonstrate some physical or economic consequence.
>
> The test that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought to suffice. While an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute "detriment", a justified and reasonable sense of grievance about the decision may well do so.

Ordinary unfair dismissal

104. Under s98(4) of the Employment Rights Act 1996, '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

105. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own decision.

106. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

107. The Code is also relevant to compensation. Under section 207A, if the claim concerns a matter to which the Code applies and there is unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.

108. Under s122(2) of the Employment Rights Act 1996, the tribunal shall reduce the basic award where it considers that any conduct of the claimant before dismissal was such that it would be just and equitable to do so. Under s123(6), where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

109. An award of compensation to a successful complainant can only be reduced for contributory fault if the claimant's conduct was culpable or blameworthy. The Court of Appeal in Nelson v British Broadcasting Corpn (No 2) [1979] IRLR 346*,* CA quotes a passage explaining this as follows: 'This includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or if I may use the colloquialism 'bloody-minded'. It may also include action which, though not meriting any of those more pejorative epithets is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy, it must depend on the degree of unreasonableness involved.'

110. Where the dismissal is unfair on procedural grounds, the tribunal must also consider whether, by virtue of Polkey v AE Dayton Services [1987] IRLR 503, HL, there should be any reduction in compensation to reflect the chance that the claimant would still have been dismissed had fair procedures been followed.

Conclusions

111. We now apply the law to the facts to determine the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length. We begin with the allegations of automatic unfair dismissal and detriment. For conciseness, we have used abbreviated sub-headings, but we have of course made our decision by reference to the full wording in the issues.

Whistleblowing

(a) The email dated 1 December 2015

112. Issue 3.1.1: The information which the claimant disclosed was the hours and days she had worked from 1 – 16 January 2015. She erroneously noted 2014, but we accept this was a typographical error and the reader would have understood she meant 2015. She accompanied this information with a statement that she would not be working the extended hours at the forthcoming year end and that it would be contrary to the Working Time Regulations.

113. Issue 3.1.3: We do not find that the claimant reasonably believed the information tended to show that the health and safety of any individual had been or was likely to be endangered. Damage to health suggests something more than being tired. 'Endangered' is a strong word. The claimant produced no medical evidence. She simply told us she was 'exhausted', that she had felt sick when she woke up on Wednesday 7 January 2015 and that she had nearly stepped in front of a taxi the previous evening. We do not know why the claimant felt sick when she woke up on 7 January. There could be a variety of causes. Maybe it was something she had eaten the previous day. We do not know how sick she felt. We do not know why she crossed the road carelessly the previous evening. Maybe she was in a hurry. That is all we have regarding the impact on the claimant's health. The fact that the claimant became stressed and tearful the next day might equally be explicable by her objecting to what she perceived as an 'unkind' email from her supervisor. This incident occurred at the start of the stint – the claimant had so far only worked extended hours on the Friday, having had Thursday off as New Year's Day, come in on Saturday, and worked extended hours on Monday and Tuesday. It is difficult to envisage why her health should already have shown signs of being damaged. The claimant gave no evidence of any health damage after that Wednesday, notwithstanding that she worked the extended hours and weekends from Thursday 8 – Friday 16 January 2015. On 8 September 2015, the claimant was late again, but not for any health reason. When she complained about being asked to stay until 6 pm, she made no mention of health issues or even tiredness. The claimant frequently arrived late during her employment for reasons which were nothing to do with her health, so the fact that she was late on 7 January does not in itself tell us she must have been feeling ill. The claimant did not like working the extended hours. She found it monotonous and tiring. She thought it could be avoided if the

respondents made alternative arrangements. She thought there should be more pay in recognition. We do not think she reasonably believed her health had been or was likely to be endangered. For this reason, there was no protected disclosure by the email of 1 December 2015.

114. Issue 3.1.2: the 1 December 2015 email did not contain a protected disclosure in addition because the claimant did not reasonably believe the disclosure was made in the public interest. We accept it does not matter if a worker makes a disclosure in her own interests as well as those of others, nor that the 'public' constitutes colleagues at work. However, we find that the claimant made the disclosure purely in her own interests. Her email refers to a detriment to 'my' health. Her general discussion of the matters also reinforces our view that she was thinking only of her own desire not to work the year-end hours. To the extent that she occasionally mentioned her colleagues also being exhausted, exploited and unpaid, it is clear from the context that she said this merely in passing to bolster her own interests.

115. Further, it would not be reasonable for the claimant to believe that her disclosure was in the interests of her colleagues. Working these hours was not inherently likely to damage health. None of the claimant's colleagues had complained in the staff meeting of 19 November 2015 and the claimant had no evidence that there was an adverse effect on the health of any of them.

116. As this was not a protected disclosure, it is not necessary for us to make findings on issues 3.2 – 3.4 in respect of alleged disclosure (a).

(b) 7 December 2015 email to Mr Greatorex alleging bribery or blackmail

117. Issue 3.1.1: we find there was a disclosure of information by the claimant to Mr Greatorex in her email of 7 December 2015, ie that Mr Mayall had offered the claimant £10,000 to leave the company following her statement that she did not wish to work a 76 hour week without a break.

118. Issue 2.1.3: the claimant contends this information in her reasonable belief tended to show a criminal offence had been committed. The criminal offence was identified as blackmail and/or bribery. We reject this contention. Mr Mayall offered the claimant £10,000 – broadly amounting to six months' net pay – in return for her leaving as a result of the breakdown in relationships. He said that she was free to accept the sum or not, but if she did not, working relationships and attendance issues would need to be addressed. Proposing this solution cannot reasonably be characterised as the criminal offence of blackmail or bribery. If an employee appears unhappy at work and relationships have broken down, a reasonable sum to leave can be a good solution for both parties. If an employee does not want to go down that road, obviously the work difficulties need to be dealt with. Mr Mayall should have offered the claimant more time to think about the matter and suggested she take advice. But his failure to adopt this good practice does not make his offer a criminal offence. Nor does it become a criminal offence because the latest matter of dispute was the hours which the claimant would agree to work at

year-end, even if such hours were in breach of the Working Time Regulations, which they were not (see post). In any event, Mr Mayall said that the respondents accepted the claimant opting out of the year-end hours and would work around it. Finally we mention that HR were present throughout this meeting and the claimant was permitted a witness, which is an unlikely arrangement of Mr Mayall were considering committing a criminal offence.

119. Nor do we find, if this is alleged, that the disclosure in the claimant's reasonable belief tended to show Mr Mayall had failed or was likely to fail to comply with any legal obligation. It was not made clear to us what the legal obligation was in this instance. If it refers back to compliance with the WTR 1998, it was not reasonable for the claimant to believe the respondents were likely to fail (or had failed) to comply. The claimant had read the WTR 1998 before she wrote her 1 December email and knew that the requirement was for either one day off in 7 days or 48 hours off in a fortnight.

120. Issue 3.1.2: In any event, we do not find that this disclosure was in the claimant's reasonable belief made in the public interest. We find that the claimant was thinking only of her own position when making this disclosure, ie that she personally did not want to work 12 days without a break and she personally had been offered money to leave when she complained about it. For this reason also, this was not a protected disclosure.

121. As this was not a protected disclosure, it is not necessary for us to make findings on issues 3.2 – 3.4 in respect of alleged disclosure (b).

(c) 7 December 2015 email to Mr Greatorex sub-heading B

122. Issue 3.1.1: we find there was a disclosure of information by the claimant to Mr Greatorex in her email of 7 December 2015, ie item B and the statement which she specifically relies on that 'I am told that there are £30m unsupported prepayments in the balance sheet, with £15m being related to the Asset Services division'.

123. Issue 3.1.3: the claimant in her witness statement for the tribunal describes this as a reference to 'false accounting'. However, that is not what she says in the email. In the email, item B is mentioned as an accomplishment which should have been acknowledged. She does not say that she or indeed Mr Edwards 'uncovered false accounting'. The way in which she refers to the matter suggests to us that she did not perceive it as tending to show false accounting or any impropriety at the time.

124. Moreover, the claimant cannot have reached much of a view since her disclosure was based on information given to her by Mr Edwards and Mr O'Daly the previous week, when she was helping Mr Edwards with some work. There is no indication she carried out any further investigation on that matter. We therefore cannot see any basis on which she can have reached a reasonable belief that a criminal offence or breach of legal obligation was taking place.

125. All sorts of decisions were made within the team on different accounting factors as to where expenditure should be allocated. Such matters are not always clear-cut. In every organisation there are discussions between accountants and managers regarding where different items of expenditure should be allocated. Throughout her employment, the claimant engaged in arguments with more senior managers in her team and in the businesses she had been allocated. There is nothing on this occasion which demonstrates to us that in the claimant's reasonable belief a criminal offence or breach of legal obligation had been committed.

126. Issue 3.1.2: we do not find that this disclosure was in the claimant's reasonable belief made in the public interest. The matter was referred to in the claimant's email purely by way of demonstrating the work she had carried out for the respondents, which she felt was unacknowledged.

127. As this was not a protected disclosure, it is not necessary for us to make findings on issues 3.2 – 3.4 in respect of alleged disclosure (c).

128. As the claimant made no protected disclosures, her whistleblowing claims under issue 3 for detriment and automatic unfair dismissal fail.

Working time detriment: issue 4

129. The claim that the claimant was subjected to a detriment under s45A(1)(a), (b) or (f) of the Employment Rights Act 1996 is founded upon her email dated 1 December 2015, where she stated that she would not be working the extended hours at the forthcoming year-end.

130. Under s45A(1)(a), the employer did not impose or propose to impose a requirement in contravention of the Working Time Regulations 1998. The proposal to work without a weekly 24 hour rest break was not in contravention of the WTR 1998 because the employer elected to give employees a rest period of not less than 48 hours in the 14-day period. The proposal was to work 12 days from Monday 4 January 2016 – Friday 15 January 2016, with free week-ends at either end.

131. Under s45A(1)(b), the claimant did not refuse to forgo a right conferred on her by the Working Time Regulations 1998 because she did not have a right to a weekly rest break of 24 hours if the employer instead provided, as was proposed, a 48 hour rest period in the 14-day period.

132. ERA 1996 s45A(1)(f) allows for a situation where a worker does not have the right or when her right has not been infringed, provided the claim to the right and that it has been infringed is made in good faith. Subject to our view that the sub-section does not refer to an allegation regarding future infringement, we find that the claimant's allegation was in good faith. We accept the respondents' submission that the definition of 'good faith' is likely to be the same as in Street v Derbyshire given that s45A(1)(f) also falls under the ERA

1996. The claimant's motive in raising the WTR 1998 was that she did not want to work the additional hours.

133. However, the claimant did not allege that the employer 'had infringed' such a right. This connotes an allegation of an infringement which has happened in the past. The claimant was not alleging a past infringement. She was stating that she would not in the future be working extended year-end hours and asserting that to do so would breach her rights under the WTR 1998. Her reference to the previous year was simply contextual. The claim for detriment under s45A(1)(f) therefore fails.

134. Even if the claimant had been alleging that what took place in January 2015 was an infringement of her WTR 1998 rights, this was not a material factor in Mr Mayall's decision to make a 'without prejudice' offer on 4 December 2015. Mr Mayall was not concerned with what had happened a year earlier. The claimant had made her views known about that in January 2015 and again in her appraisal meeting in May 2015. That had not prompted any action by Mr Mayall. What upset him about the 1 December 2015 email was that it was, going forward, yet another example of the claimant's confrontational tone.

135. Further, we do not find that making the claimant a 'without prejudice' offer to terminate her employment was a detriment. An unjustified sense of grievance is not a detriment. A reasonable worker looking at matters from the point of view of the claimant could not take the view that this offer was a detriment.It is a recognised tool of industrial relations that an employer may make an employee an offer to leave the employment if there are difficulties in the working relationship or with an employee's conduct or performance. It can be a solution which is satisfactory to both parties. It can benefit an employee in that she is spared performance management or disciplinary action which might otherwise take place. It may make it easier to obtain new employment than an acrimonious departure. An employee need not accept. In this case, the claimant had the option whether or not to accept. She was not told she would otherwise be dismissed. She was told that the difficulties in the employment relationship which she had herself alluded to, and her attendance, would need to be sorted out if she remained in the employment. That is perfectly reasonable. The claimant had herself numerous times indicated she was unhappy with Ms Dreyer's line management. The claimant complains she was not forewarned of the offer, but such an offer always needs to be broached for the first time at some point. She was allowed to bring a colleague with her. The claimant complains she was not presented with proposed written terms, but it is perfectly reasonable to have a verbal discussion to see whether there is any interest before putting matters into a formal document. If anything, presenting the claimant with a formal written compromise agreement would have placed pressure on her and looked like a fait accompli. She should have been given longer to think about the matter, but Mr Mayall did agree to give her until the end of Monday.

<u>Automatic unfair dismissal: asserting a statutory right: issue 5</u>

136. The claimant contends that she was dismissed because she had asserted a statutory right, ie a right under the WTR 1998. She relies on her 1 December 2015 email stating that she did not intend to work extended hours on the forthcoming year-end.

137. The claimant was wrong that a right had been infringed, but – as with WTR 1998 detriment – we accept she raised the WTR 1998 issue in good faith.

138. ERA 1996 s104(1) says the dismissal or principal reason for dismissal must be that the claimant alleged the employer 'had infringed' the relevant right. Our conclusion is the same as in relation to detriment under the WTR 1998 (above). The claimant was not alleging an infringement in the past. The claim for automatic unfair dismissal for asserting a statutory right therefore fails.

139. In any event, we do not find that the reason or principal reason or dismissal was that the claimant had asserted this statutory right. We do not believe the reference to working excessive hours the previous year was a factor at all. In so far as the refusal to work excess hours at the forthcoming year-end was a factor, it was minor. It was not the reason or principal reason for dismissal. Mr Mayall did not respond to the claimant's 1 December 2015 email by seeking to dismiss her. He made her a 'without prejudice' offer to leave because of the breakdown in the working relationship. He had not in any event at this stage decided to dismiss the claimant. He assured her in front of two witnesses that if she did not accept the offer, the only consequence would be what followed naturally in relation to her bonus, and workplace relations would have to be addressed. The reason for dismissal was the claimant's subsequent conduct which illustrated an ongoing intractable attitude and further examples of escalation.

Health and safety: issue 6

140. In relation to the claims under s44(1)(c) and s100(1)(c), the respondents accept there was no health and safety representative or committee. The claimant relies on her email dated 1 December 2015. She contends that the proposed hours for year-end 2015 constituted circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety.

141. We do not consider it reasonable for the claimant to believe that the intended hours were harmful or potentially harmful to health or safety. Although 'harmful' under this sub- section suggests a lower threshold than the wording in the following sub-sections, which refer to danger, or in the whistleblowing section, which refers to health being 'endangered', in all cases the words 'health' and 'safety' are used. We are not satisfied by the evidence that it was reasonable for the claimant to believe the hours might be harmful to health as opposed simply to being tiring or monotonous. Whilst we fully accept that excessive hours over a prolonged period can be detrimental to health, we would not say that is inherently likely for a period of only 12 days on the proposed hours. After all, the proposed hours did not contravene the Working

Time Regulations, which are themselves pitched at a level which is designed to protect health and safety. Moreover, in this case the claimant and others were to be given two meal breaks and were allowed to make themselves tea and coffee, these breaks exceeding the minimum required by the WTR.

142. The hours were therefore not self-evidently potentially harmful and we do not think it reasonable to believe that they were. It is therefore a question of what other evidence the claimant relied on to support a reasonable belief of potential harm. Regarding her own position, there was no medical evidence that her previous experience of working similar hours had been harmful to her health. It had been very tiring, intense and monotonous, which is not the same thing. There was also no evidence at all of any harm or potential harm to the claimant's colleagues. We refer to our discussion of the lack of convincing evidence on this in relation to the whistleblowing claim.

143. For these reasons, we find the claims under s44(1)(c) and s100(1)(c) fail and it is not necessary for us to address issues 6.3, 6.8 or 6.9.

144. In relation to the claims under s44(1)(d) and (e) and s100(1)(d) and (e), the respondents, we do not accept that the proposed hours amounted to 'circumstances of danger' to health or safety for reasons we have already given. Further, such circumstances were not 'imminent' as the proposed hours were to take place in four weeks' time. The claims under these sub-sections fail and it is not necessary for us to consider the balance of issue 6 in relation to them.

Unfair dismissal: s98 Employment Rights Act 1996: issue 2

145. The reason for dismissal was 'some other substantial reason', ie a breakdown of the working relationship. Mr Mayall gave that reason to the claimant verbally and in writing, and we find it was the genuine reason.

146. Communication between the claimant and her managers had patently broken down and it showed no signs of improving. She had a tense relationship with her superviser, Ms Madej. She told Mr McCloskey at the stage 3 grievance hearing in September 2015 that the relationship with her line manager, Ms Dreyer, was 'broken'. She increasingly by-passed Ms Dreyer. She questioned every instruction and frequently escalated to higher levels. She would not respond to management on her timekeeping. She had become confrontational at every point. Her relationship with the business was difficult and had to be smoothed over by Ms Dreyer. There seemed to Mr Mayall to be no hope of improvement. The claimant rejected the offer of mediation. She ignored the criticisms of her communication style in the grievance outcome letters and continued in the same vein. The tone of her 1 December 2015 email was confrontational. In the meeting on 4 December 2015, she said she did not have a great working relationship with Ms Dreyer and therefore did not feel comfortable discussing the hours with her. After the 4 December 2015 meeting, she escalated the matter not only to Mr Greatorex, a director on the Board, but also to the Chief Executive and two Chief Operating Officers,

before Mr Greatorex had even had a chance to respond. She then ignored Mr Mayall's instruction to deal first through the chain of line management and started reopening matters she had raised at her grievance.

147. It was not the content of the matters which the claimant was raising on 1 and 7 December 2015, but the way she went about it which was a continuation of her approach which had made the working relationship untenable. Mr Mayall was willing to work around the claimant's refusal to do the extended year-end hours. The difficulty was the working relationship. Ms Dreyer had herself told Mr Mayall that she believed her high blood pressure was caused by the stresses of trying to manage the claimant. Ms Dreyer felt she was undermined at every turn.

148. This reason is a substantial reason of a kind which can justify dismissal. The question is whether it was within the band of reasonable responses to dismiss for that reason.

149. Mr Mayall had reasonable grounds for his belief that there was a breakdown in the working relationship. As stated above, he had seen the evidence with his own eyes of the claimant's approach, tone, and constant escalation when she did not agree with management views. He was aware the business had asked the claimant to be removed and that Ms Dreyer was managing the relationship. He himself was often drawn into the email disputes. He saw the claimant's attitude towards Ms Dreyer. On 12 February 2015, the claimant had asked whether Ms Dreyer was trying to push her out of her job. On 26 February 2015, the claimant had copied Mr Mayall into an email accusing Ms Dreyer of bias in the allocation of duties. On 3 March 2015, Ms Dreyer was complaining to HR that she did not how to communicate with the claimant because there was always a backlash and reporting that Ms Madej had said she could not continue to work in this hostile/toxic environment. On 18 March 2015, the claimant had emailed Mr Mayall stating, 'One again Janine has disregarded my position in order to indulge (pander) to the business'. On 29 June 2015, the claimant had lodged a grievance stating Ms Dreyer sought to undermine her at every stage. Mr Mayall had told the claimant that the long emails were unhelpful and he hoped the grievance would be a watershed. It was not.

150. The claimant told Mr McCloskey in September 2015 that the working relationship was broken and then refused the offer of mediation. Ms Dreyer had told Mr Mayall her blood pressure was rocketing because she found the claimant unmanageable. In October/November 2015, Mr Mayall had to instruct the claimant to deal with Ms Dreyer on a particular matter and not come to him. Then on 4 December 2015 the claimant said she did not have a great working relationship with Ms Dreyer. Following that meeting, the claimant ignored Mr Mayall's instruction to take the complaint through him first, and she escalated not only to Mr Greatorex, but also to the Chief Executive and two Chief Operating Officers even before Mr Greatorex had had a chance to deal with the matter. Subject to our concerns below, we would have found that a reasonable employer could dismiss for these reasons.

151. We deal with the issue of whether there was a proper and adequate investigation in the context of the two matters which we find render the dismissal unfair.

152. Despite the above causes for serious concern, we find that no reasonable employer would have dismissed the claimant without having told her formally at some point that her behaviour was unacceptable and that her job was at risk because of the relationship breakdown. This is where the unfairness lies. The respondents never managed the claimant. They let the claimant control the relationship. Once their informal approach to correcting the claimant's tone with the business and tendency to escalate had failed, they should have made her aware how seriously they regarded the matter. We can understand why they may have felt it inappropriate to take action during the period she was going through the grievance process, but they did not grasp the nettle once it was completed and she had refused mediation. They did not follow up on Mr McCloskey's statement in the grievance outcome letter that should either party not wish to engage in mediation or the working relationship not improve, the company would have to decide on the next steps. At this point at least, they should have sat her down and told her what they expected in terms of her communication with Asset Services and with her line manager, regarding timekeeping and self-certification, and regarding escalation. They should have told her that if she did not take heed, it may lead to dismissal. We have reservations about how much difference this would have made, but the claimant should at least have been given the chance. Although it might be argued that Mr McCloskey's words contained sufficient warning to the claimant, they were in the context of an outcome to her own grievance and they did not explicitly mention the risk of dismissal. What was required was a meeting focused on management's view of her own conduct.

153. We also find the dismissal procedurally unfair because of the shocking way in which the claimant was dismissed. She should have been invited to a meeting, given advance notice about its content and told she could bring a companion, so that she had a chance to answer the allegations against her before a final decision was made. Instead, she was summoned into Mr Mayall's office and told on the spot that she was dismissed. HR were present but do not appear to have intervened in this process. The claimant was told simply that there had been a breakdown in the working relationship with no further elucidation. She was told she would be paid in lieu of notice and then escorted to her desk to collect her belongings and escorted out of the building in a most humiliating manner. Mr Mayall believed it would be pointless talking to the claimant at that point. Again, we can understand why Mr Mayall felt pessimistic, but we are not satisfied an employer could reasonably take the view it would have been utterly futile.

154. The holding of an appeal hearing did not correct the unfairness. Indeed it added to it. Mr Terry carried out no investigation beyond speaking to the claimant and reading the correspondence from 1 December 2015. He never spoke to Mr Mayall. He had no idea what examples founded Mr Mayall's view that the relationship had broken down. He asked the claimant to argue her

case, but she also had not been given examples by Mr Mayall. Moreover, Mr Terry was unaware that Mr Mayall's view was based on the entire working relationship, whereas Mr Terry only looked at events from 1 December 2015 onwards. They were on different tram lines. The events from 1 December 2015 could not reasonably be looked at in themselves to form a balanced picture.

155. For these reasons, we find the dismissal unfair.

Breach of the ACAS Code

156. The respondents accepted that the ACAS Code applied to the circumstances. We consider the nature of the reason for dismissal and the claimant's actions sufficient for the provisions of the Code on procedure prior to dismissal to apply.

157. We award 25% uplift to the compensatory award for the respondents' significant breach of the guidance in the ACAS Code. The claimant should have been notified there was a case to answer with sufficient information about the issues to enable her to answer at a hearing. She should have been allowed to set out her case and answer the allegations before any decision was made. She should have had the opportunity to call witnesses and ask questions. She should have been told she could bring a companion. While we appreciate how Mr Mayall may have come to the view that a meeting prior to dismissal would have made little difference, the claimant should still have been given a chance, especially as she also had not had the benefit of a formal warning regarding the likely consequences of her behaviour and deterioration in the working relationship. For a company of the respondents' size and with their administrative resources including, it seems, numerous HR officers, the way the claimant was dismissed was very poor practice. Mr Mayall may have had no previous experience of dismissing anyone, but he was accompanied by someone from HR. None of this was corrected by the inadequate way in which the appeal was dealt with.

Contributory fault

158. The claimant's conduct caused her dismissal. She was confrontational and inflexible. She upset her supervisor, Ms Madej, such that she had to be moved to the team of the other supervisor. When she did not agree with Ms Dreyer, her line manager, she escalated to Mr Mayall. When she did not agree with Mr Mayall, she escalated above him. On occasions she escalated directly to Mr Greatorex. She spoke to and about Ms Dreyer as if she was the manager and Ms Dreyer was the subordinate. She was disrespectful to Ms Dreyer and to certain senior managers in the business with which she dealt. She challenged every criticism. She refused to cooperate with requirements for self-certification and arriving on time. She repeatedly ignored instructions not to escalate issues. She ignored Mr Latner's advice when rejecting her second level grievance to work collaboratively and avoid regular escalation.

She ignored Mr McLoskey's advice on the outcome of the third level grievance that her communication style was not in line with what Capita would deem acceptable. Indeed, she ignored Ms Dreyer even more following that outcome. She ignored Mr McLoskey's suggestion that she attend mediation. Her tone and mode of address towards Ms Dreyer became increasingly antagonistic. She ignored Mr Mayall's final request to try to sort out matters with him first before further escalating, and she flagrantly escalated above Mr Greatorex to the Chief Executive and Chief Operating Officers. Mr Mayall had not said that she was not permitted to raise matters at all with Mr Greatorex, but that she should go through the line management chain including Ms Waters first. The claimant wrote in her email of 7 December that she had 'proven exceptional relationships with all her business contacts over the past two years', yet she had been told in her appraisal that she risked damaging some business relationships with her inflexible approach. In the end, the claimant became unmanageable. This was the cause of her dismissal and we find her conduct culpable and blameworthy.

159. We consider it just and equitable to reduce the claimant's compensatory award by 80% for her contributory fault. She was disrespectful, she ignored instructions not to escalate, she ignored advice about her behaviour and she ignored the suggestion of mediation, becoming increasingly antagonistic instead.

Conduct prior to dismissal

160. For the same reasons itemised in respect of contributory fault, we consider it just and equitable to reduce the claimant's basic award by 80% for her conduct prior to dismissal.

Polkey

161. We find that had the respondents acted fairly and given the claimant a focused warning prior to her dismissal, as well as going through a proper dismissal hearing, there is an 80% chance she would nevertheless have been fairly dismissed four weeks later. The history of the claimant's employment indicates that she was not responsive to criticism or instructions, and was unable to see on any occasion that she was wrong. Even during her evidence in the tribunal, making very full allowance for her position as a party defending her own case and also being a litigant in person, she demonstrated an inability to accept her managers' criticisms at the time as genuinely meant, let alone justified. The history of her employment also shows a pattern whereby the claimant prolonged arguments. The relationship was already in substantial difficulty by the end of the grievance when the claimant ignored the suggestion of mediation. Even with due warnings, we believe there is only a 20% chance that her employment would have continued longer than four weeks following the dismissal.

162. Considering what is just and equitable by way of a compensatory award in the round, and considering our heavy deduction for contributory fault, we do not make any further deduction to the compensatory award by reason of Polkey. The total deduction will remain at 80%.

Employment Judge Lewis
15 March 2017