EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms L. Finch	v	Fidelity Information Services Limited

Heard at: Watford **On**: 8-11 and 14-16 May 2018 (17 May in chambers)

Before: Employment Judge Heal
Mrs. A. Brosnan
Mr. A. Scott

Appearances

For the Claimant: in person
For the Respondent: Mr. S. Nicholls, counsel

JUDGMENT

The claims of dismissal and detriment on ground of public interest disclosure are dismissed.

REASONS

1. By a claim form received on 13 January 2017, the claimant made complaints of unfair dismissal by reason of protected disclosure and detriment on grounds of protected disclosure.

2. We have had the benefit of an agreed bundle running to 400 pages. Page 202A was added to the bundle by the respondent by consent.

3. We evidence from the following witnesses, giving their job titles as at the time they worked for the respondent:

Ms Lisa Finch, the claimant,
Mr Robert Thacker, Chief Risk Officer,
Mr Andrew Lloyd, Technical Financial Controller,
Mr Martin Barber, Chief Operations Officer,
Mr Gurinder Sumra, Chief Financial Officer,

Ms Hema Wara, HR People Partner,
Ms Rekha Jhamat, HR Business Partner,
Ms Amanda Owens, HR Director.

4. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement which we read before the witness was called to give evidence. Each witness was then cross-examined and re-examined in the usual way.

5. In order to work around the travel commitments and availability of some of the witnesses, with the consent of the parties, we allowed the evidence of Mr Thacker, Mr Lloyd and Mr Barber to be interposed during the course of the claimant's cross examination.

6. At a preliminary hearing held on 19 June 2017, Employment Judge Tuck identified the issues. At the outset this hearing we confirmed with the parties that these were the issues in the case, that these issues would help us to identify which evidence was relevant, and that we would make our decision based upon these issues. From time to time we reminded the claimant of these issues in order to ensure that we were hearing relevant evidence.

The Issues

Protected disclosure

7. On 25 May 2016 the claimant had a verbal conversation with Mr X, who was the managing director of the respondent's EMEA area. She took various documents, including financial forecasts, to that meeting. The claimant claims that she made a qualifying disclosure within section 43 (b) (1) (a) and (b) on that date.

8. The information which she disclosed was that the ATOM programme was not being well-managed and forecasts were not being produced with any accuracy. The treatment of costs have to be categorised under normal accountancy rules as either capital expenditure or revenue and a number of areas the claimant gave information that there had been a re-classification of capital expenditure as revenue.

9. The reasonable belief of the claimant, she says, is that this tended to show either a criminal offence because of breach of accountancy principles and/or a failure to comply with legal obligations and in particular the failure to comply with the regulatory regime of the FCA.

10. The claimant states that this was a disclosure made in the public interest for two reasons: firstly, as members of staff will be receiving bonuses on the basis of accounts which had been falsely inflated as overly profitable; and secondly, because numbers from the results from the UK company are used in calculating the correct price of the parent company, FIS Global, which is a publicly listed company and is therefore of relevance to shareholders.

Section 47B(1) Employment Rights Act 1996

11. The claimant claims that she was subjected to a number of detriments on the ground that she had made a protected disclosure. These are:

11.1 from 6 June 2016 being instructed by Hema Wara not to attend the respondent's Watford office;

11.2 on 7 June 2016 Mr Sumra of the respondent asking the claimant to lie about the reasons for her absence from the office;

11.3 between 7 July 2016 31 August 2016 the claimant was line managed by Mr Barber and in this period he failed to set performance objectives for her and failed to conduct any one-to-ones which ought to have been held weekly; he also in this period prepared a structural chart from which her name and position were missing;

11.4 the content of the meeting with Mr Barber on 31 August 2016;

11.5 the claimant's ex-probationary period being extended on 11 November 2016;

11.6 the claimant's salary being stopped from 11 November 2016;

11.7 on 17 November 2016 being invited to an investigatory exploratory meeting to consider the disciplinary issues.

Section 103A Employment Rights Act 1996

12. The claimant resigned her employment by letter dated 22 November 2016 received by the respondent on 23 November 2016. The claimant claims that the principal reason for the constructive dismissal was her having made the protected disclosure.

Time limits.

13. At the preliminary hearing the respondent reserved its right to contend that a number of the claims were time-barred. The claim form was presented on 13 January 2017. Day A was 25 November 2016 and day B was 25 December 2016. Accordingly, any act or omission which took place before 26 August 2016 is potentially out of time.

Missing document

14. At the outset of the hearing the claimant was concerned that a document was missing from the respondent's disclosure. The respondent continued to pursue enquiries about this document during the early part of the hearing and produced the document that now appears at page 202A bundle shortly after 9.30am at the beginning of the hearing on day 5: 14 May 2018. This became known as the 'retraction email' and was added to our bundle by consent.

15. The claimant attached some additional documents to her witness statement. One of these was a timeline which appears at first sight to be the same as a document in the bundle (pp 31 to 32) in that it was formatted and set out in the same way. We did not at first read the document attached to the witness statement separately, not appreciating that the claimant intended it to be part of her witness statement. When, during the course of her cross examination, she made it clear it was that it was different to the document already in the bundle and that she intended it to be part of her statement, we read it before progressing further with her evidence.

16. The claimant also attached to her witness statement a 7-page letter from Amanda Owens dated 19 October 2016 with manuscript additions made by the claimant. These were she said the '84 errors' to which we will refer below. The respondent told us that it first saw this annotated version of the document on the first morning of the hearing. There was also a 5-page timeline of events from Amanda Owens which the claimant had also annotated. As it turned out, the detail of those annotations was not explored in evidence before us.

Rule 50 application

17. At the close of submissions, the respondent applied for an order under rule 50(1) and (3)(c) of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) 2013. Mr Nicholls pointed out that three of the respondent's managers had been accused of serious matters, including criminality, during the course of this hearing but had not appeared to give evidence and had not had an opportunity to defend themselves against those accusations. Therefore, he asked us to anonymise the names of those 3 individuals in our judgment particularly in the light of the practice of placing employment tribunal judgments on a website so that they are available online.

18. The claimant objected to this application. She referred to two of those managers (Y and Z) who she said have a responsibility to behave in a way that is right and proper. She said that the respondent found them to have fallen short. She said that that was all very much part of what she calls her public interest disclosure. She thought that it was all very unfortunate and said that it should be 'captured now' and filed where things are filed.

19. Rule 50 says that a tribunal may at any stage of the proceedings make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings as far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act 1996.

20. We do not consider that the circumstances of section 10A apply. Convention rights are set out in schedule 1 to the Human Rights Act 1998.

21. Mr Nicholls at first relied upon article 8: right to respect for private and family life and the possible impact on the individuals' children of their parents' names being published in the circumstances.

22. It is the claimant's case that she reasonably believed and believes that 2 of her managers were engaged in activities at work which involved breaches of legal obligations and/or criminal activity. She has asserted that the third manager together with others was complicit and corrupt, and individually she said that he was dishonest.

23. We have not made findings about the truth or not of any of these allegations: we have focused strictly on the issues in this case.

24. We have referred to *British Broadcasting Corporation v Roden* [2015] IRLR 627. We start with the principle of open justice: the default position is that tribunal judgments should be published in full, including the names of the individuals involved. The mere publication of embarrassing or damaging material is insufficient to grant an order which undermines that principle.

25. We consider that to place the names of these individuals openly on a publicly available document in the circumstances is to make public the fact that the accusations have been made against them. We bear in mind the potential for damage to the reputations of the three individuals concerned. They have not however had those accusations determined in a fair and public hearing. They have not been present at this hearing. Furthermore, this tribunal, while it is public and - we trust - fair, is concerned with the issues actually before us, not with the truth or otherwise of all the accusations made by the claimant. We do not determine the truth of the claimant's particular allegations of criminality, breach of legal obligation, complicity, corruption or dishonesty.

26. Therefore, we consider that the 3 individuals have article 6 convention rights in relation to these matters. We give full weight to the principle of open justice and to the Convention right to freedom of expression. However, we have to balance that against the need to protect the Convention rights of those who have not appeared before us and have not had an opportunity to have the allegations made against them determined fairly. In balancing the competing needs, we consider that in the circumstances of this case the convention rights of the 3 individuals as set out above outweigh the need for their identities to be published in this judgment.

27. For those reasons we allow the respondent's application and the 3 individuals concerned are identified below as Messrs X, Y and Z.

Facts

28. We have made the following findings of fact on the balance of probability. We do not possess a method of discovering absolute truth; therefore, we listen to and read the evidence placed before us by the parties and on that evidence and that evidence only we decide what is more likely to have happened than not. That is what the balance of probability means.

29. There have been some substantial disputes of fact before us. There are also key matters about which the respondent has made non-admissions. For those

reasons the weight that we place upon the evidence of certain witnesses may be decisive.

30. We regret that we have not been able to find the claimant's evidence reliable. As Mr Nicholls pointed out, she had a marked tendency not to answer the actual question she was asked but instead to provide a great deal of oral evidence advancing her own case but which failed to focus on the point in hand. This happened so consistently that we drew the conclusion that she was being evasive rather than misunderstanding what we sought from her. She tended to exaggerate, at times gave key evidence which had appeared nowhere in her case before, and at times advanced a case which was directly contradicted by the contemporaneous documents, including documents which she herself had produced.

31. We have therefore weighed the evidence on each point with care. We do not feel able to rely upon the claimant's evidence where it is at odds with the evidence of the respondent's witnesses or the contemporaneous documents. We do not feel able to rely upon her uncorroborated evidence.

32. By contrast, we found the respondent's witnesses consistent with each other and with the contemporaneous documents. We found that they gave evidence carefully, answered questions directly and were ready to discuss what they thought was potentially financial mismanagement or inappropriate behaviour where they found it within their own organisation.

33. The respondent is a global technology company providing banking and payment technologies within the financial services sector. It employs approximately 1000 staff in the UK. It has headquarters in Birmingham and offices in London, Watford and Cumbernauld. It is part of the FIS of companies.

34. There was only one FCA regulated company in the UK group: Certegy Card Services. The respondent itself was not FCA regulated.

35. The claimant had worked together with Mr Gurinder Sumra at Vocalink during previous employments.

Chronology

36. The claimant started work for the respondent on 11 April 2016. The offer letter described her as Project Manager Specialist-Technology. She was employed on a salary of £130,000 per annum.

37. There were express terms of her contact that:

Sickness and Absence

'… *On satisfactory completion of your probationary period, you will be entitled to Company Sick Pay, as detailed in the Company Absence Policy. You will not be entitled to Company Sick Pay during your probationary period.*

Location

Your normal place of work will be the FIS office at FIS EMEA HQ office at 41-43 Clarendon Road, Watford…; However you will be expected to work from other locations, particularly client offices, both within the UK and overseas. Significant travel may be required for the proper performance of your duties under the terms of this contract. This may include travel for periods of more than one month. Additional details will be provided at the relevant time. The Company reserves the right to change your place of work giving at least one months notice of any such change.'

Probationary Period

'*The first 6 months' of your employment are a probationary period during which, either you or the Company may terminate your employment by giving one week's notice (or in the Company's case by making a payment in lieu of notice).*

Notice

Upon successful completion of your probation period, if you decide to leave the Company you will be required to give one month's notice in writing of this decision. The Company's notice to you will be one month, rising in line with statutory requirements…

38. The claimant was assigned to the 'Atom Project' and was managed by Mr Z who reported to Mr Y.

39. This project involved working for the Atom Bank.

40. As time progressed, the claimant began to develop concerns about the inappropriate use of language and financial management of the project by Y and Z.

41. On 18 May 2016 the claimant met informally with Mr Sumra, who she knew from past employment, and she shared her concerns with him.

42. Mr Sumra had himself been developing concerns about the financial management of the project. He had had these concerns before the claimant joined the company and he had spoken to one other person already who was unwilling to go on the record about the issues. Mr Sumra had in fact already asked the claimant to be aware of these issues and had asked her to come and tell him about it.

43. Mr Sumra's concerns were these. The respondent agrees a contract price with the client which is based on a set number of 'resource days' (i.e. days' work) per month. When the number of actual resource days exceeds what was agreed, then the respondent runs at a loss. This is bad financial management.

44. Mr Sumra was worried that the forecast for the Atom project had not changed for 5 months. He had been looking for an opportunity to have the situation tested and the claimant's discussion with him gave him that opportunity.

45. Mr Sumra asked the claimant to share concerns with Mr X, the Managing Director for the EMEA business. (EMEA stands for European, Middle Eastern and African).

46. The claimant confirmed by a friendly text to Mr Sumra that she was to meet with Mr X on 25 May. She did meet with him on that date.

47. We have not heard evidence from Mr X, who is no longer employed by the respondent. However, he gave his bound notebooks to Ms Owens on his departure. From those notes we can see that he has taken notes of events both before and after his meeting with the claimant. Neither pages nor additional notes have been inserted into the progression of Mr X's personal handwritten notes. We are satisfied that these are authentic notes and they are the most reliable evidence we have as to what was said.

48. The claimant's timeline (latest version) describes a meeting in which she shared written evidence of financial concerns and described appalling behaviour. She records saying that team members were being bullied to make numbers fit the original budget. She says that she shared that Mr Sumra had accepted the same forecast for 5 months and that the treatment of capitalised cost and revenue was inappropriate.

49. Mr X's notes confirm that the claimant spoke to him on 25 May. She told him that she had spoken to Mr Sumra. She reported the offensive language used in the team. She said that there was no forecast plan to underpin the delivery programme. There was a 'gung ho' mentality. She said that Birmingham was worse and made reference to the people on the programme. She said that Mr Y and Mr Z did not share 'financials' with Mr Sumra. She said the financials will tie into the budget and made reference to 'no audit of the numbers'. She said that she was picking up the financials. There is a note, 'only looking at month on month' and 'variance at the end to end is huge!' She said that there were multiple reasons, 'into end-to-end forecast'. 8000 additional 'man days' [were needed] to deliver the project. She said that governance and rigour was not there. She said that financials have not got the latest plan and Mr Y and Mr Z had given Scott [Kendrick] the 3+9 forecast to carry on.She said that there were no updates to the financials being given to finance (that is, Scott Kendrick the financial guy 'being played').

50. Mr X's notes end with a summary: '*no utility being developed, no score capability, multiple clients-no chance. Infrastructure issue, BAU – v DOV, create investigation - terms of reference- Rob Thacker, meet in a week with evidence! Consider linking to financial per week of 7th'*.

51. Mr X's notes appear than to move on to a different subject.

52. We find that the claimant gave information to Mr X on 25 May 2016 about offensive language being used at work by managers and about a situation that amounted to financial mismanagement. She did not overtly mention VAT or any criminal offence and she did not mention change requests. She did not say anything at that stage about capital expenditure or operating expenditure. We do not think that what she said tended to show that there been any criminal offence or breach of any legal obligation: she was complaining about bad language and bad financial management.

53. We note that subsequent notes made by Mr X in a meeting with Mr Y did make a reference to capital expenditure. We think that if the claimant had made a reference to capital expenditure Mr X would have written it down.

54. After the meeting with Mr X, the claimant began to gather the detailed evidence for which he had asked.

55. She approached Mr Andy Lloyd who helped her put together that evidence.

56. The claimant met with Mr X again on 2 June 2016. At this meeting, Mr X told her that there would be a review into the Atom project, the behaviours complained of and the forecast.

57. By email dated 3 June, Mr X thanked the claimant for her efforts in this matter. He said that he had briefed Martin Barber who would follow up directly with the claimant and that if the claimant needed anything else from him, she should call Mr X.

58. Accordingly, the claimant and Mr Barber arranged to speak to each other.

59. By email dated 6 June, the claimant wrote to Mr Sumra, '*to let you know I am not going to be in the office*.' She said that she was due to be in Watford that day but she felt that she was in a '*pretty hostile situation'*. Mr Sumra spoke to Mr Barber about the claimant's email and accordingly Mr Barber wrote to her and said that she must not feel under pressure to do anything that made her feel uncomfortable or compromised in any way. He said that if necessary she must say that she was working from home at his direction and that was the end of it.

60. The effect of that was that it was the claimant who first raised the issue of her working at home, not the respondent. Mr Barber agreed to her working at home at her own suggestion.

61. Meanwhile, the claimant's managers began to wonder where she was. Worried, they contacted her next-of-kin. However, the claimant did not want her immediate managers to know why she was off work because the accurate reason for her being absent was her desire to avoid contact with those whom she had criticised to their managing director.

62. By email dated 7 June Mr Sumra raised with the claimant what reason for her absence should be given to her immediate managers.

63. On the same day, the claimant spoke to Mr Sumra about this issue on the telephone. She asked Mr Sumra what reason she could give for her absence. He said that that was not up to him but that there were times when he had needed to be absent from the office to look after his child. He told the claimant to choose whatever reason she wanted to choose. He did not tell or instruct the claimant to lie about the reason for her absence. He did give her permission to say whatever she thought was appropriate in circumstances in which she did not wish to tell the truth.

64. By email dated 13 June 2016 Mr Barber wrote to Mr Y and Mr Z. He said that he had real concerns relating to the accuracy of the Atom programme financials and that similar concerns had been flagged to him by Mr X and Mr Sumra. He said that he had asked Rob Thacker to oversee an audit of the programme to produce a complete financial view. They expected the review to cover actual and forecast ‘man days’, the end-to-end consolidated plan for the programme, the capex (capital expenditure) status and treatment of the costs allocated to that category of expense and so on. The review would also look at process and procedures and programme reporting in general. It would be managed day to day by Mr Sumra and supported by Mr Kendrick.

65. Ms Hema Wara of Human Resources was appointed to be the claimant’s point of contact.

66. On 14 June by email to Ms Wara, the claimant gave further precise detail about some of the language and behaviour she had witnessed. In addition, she gave two further bullet points about forecasting issues. She ended, ‘this is falsification and makes it untenable to undertake my role with integrity and in line with FIS Business Code and Ethical Standards.’

67. On the same day the terms of reference of the review were formally agreed between Mr Barber and Mr X. They covered:

‘*Financial reporting and forecasting-plans against actual and forecast*
End to End Consolidated Plan-constructed in line with standard policies and procedures
Capital expenditure and Deferred/ BAU Operation Expenditure-status and allocations
Management oversight and direct influence on the Financial Reporting processes.’

68. A meeting took place on 15 June 2016 at Watford. Those present were: Mr Sumra, Mr Thacker, Ms Wara, the claimant and Mr Lloyd. Mr Thacker told them that concerns had been raised to and by senior FIS EMEA executives about the accuracy, transparency and management behaviours surrounding the financial reporting processes of the Atom bank programme. Mr Barber had instructed Mr Thacker and Mr Sumra to undertake an independent fact based review of the actual financial reporting processes being performed and the management oversight undertaken within the programme to determine the substance or otherwise of these concerns. He said the terms of reference had been agreed in relation to the four matters already set out above.

69. The claimant and Mr Lloyd presented the documentary information they had put together, some 1000 pages. Mr Sumra and Mr Thacker undertook to review that information and they thanked the claimant and Mr Lloyd for their courage in bringing ‘this’ to the attention of management. They undertook to conduct a robust fact-based review.

70. At the end of the meeting, the claimant said that she expected to be interviewed separately. Ms Wara told her that if there was the need she would be interviewed separately. As it turned out, Mr Thacker and Mr Sumra took the view that the detailed documentary evidence which the claimant had provided was sufficient. They went on to carry out a number of interviews but they did not again interview the claimant.

71. We find that Mr Thacker was chosen by the respondent to conduct the review because of his financial knowledge, his ability and his integrity. That he was appointed indicates to us that the respondent took this review seriously and intended the investigation to be authentic.

72. The claimant submitted a document to the 15 June meeting. It starts, ‘Executive Summary-based on Lisa’s summary to X’. Her ‘Top-Line Questions’ are:

‘Are the program cost forecasts considered to be in controlled and well managed? No
Have updated detailed program cost forecasts been regularly reviewed by Finance? No
Are the programme forecasts/budget at risk? Yes-overspend already in a number of areas
Has there been transparency across the programme financials? No
Is the expected level of governance in place to ensure program cost, revenue and margin is well understood? No
Is the programme being managed with the level of integrity expected? No’

73. The claimant’s document makes complaints about behaviours (largely making team members feel pressurised to make it appear that the programme was within budget) and about forecasting. ‘Capex’ is mentioned in the sense that the programme might be showing a higher level of implementation spend against capital expenditure which, if true, might mean that the respondent had overstated revenue (income) from Atom. Change requests are mentioned, but not in the detail or context that the claimant emphasised in her responses to cross-examination. We read this document as a summary of concerns about business planning and forecasting, not as corroborative evidence that on 25 May the claimant disclosed information which tended to show that there had been a criminal offence committed or breach of any legal obligation. At its highest, it is a report of internal employee misconduct.

74. The claimant gave to us very detailed evidence about the incorrect allocation of resource to ‘change requests’ during the course of the project. She gave evidence about an alleged effect on share prices and VAT. We consider that her case on these matters has changed and developed as the proceedings and hearing have progressed. We note that these matters do not appear in the

document which she produced on 15 June 2016. We find that these matters did not form part of her original disclosure on 25 May.

75. On 16 June, Ms Wara spoke to the claimant and reiterated the agreement about working at home which Ms Wara understood had already been made with the claimant. Ms Wara did not have authority to tell the claimant to work at home. What she did was to confirm to the claimant her (correct) understanding of the existing position.

76. By email dated 16 June the claimant wrote to Mr Thacker, Mr Sumra and Ms Wara saying that she wanted to be sure that she and Mr Lloyd were not regarded as a double act. She said that she drew her conclusions independently of Mr Lloyd. She said that she was available for calls and meetings when needed but did not repeat the request for a separate interview.

77. On or about 21 or 22 June, a telephone meeting took place between Amanda Owens, Mr Sumra, Mr Thacker, and Mr X about the Atom review. Mr Barber was involved for the first 10 minutes but he then excused himself because he was involved in the Atom relationship. Mr X talked about what had been said on 25 May: he referred to problems with the governance of the programme, 13,000 ‘man days’ missed, a gung ho mentality and the behaviour of Mr Y and Mr Z.

78. At this stage Ms Owens could not give advice to Mr X about which procedure he should be following because the details of the situation was still too uncertain.

79. On 24 June Mr Y and Mr Z were suspended pending the investigation. As a result, Mr Barber became the claimant’s line manager.

80. The review was completed on 1 July and a copy was sent to Mr Barber.

81. In early July Mr Barber agreed with Mr Lloyd that Mr Lloyd could work from home and indeed Mr Lloyd has visited the office on only 13 occasions since.

82. On 4 July, Mr Barber was contacted by the FIS global organisation to ask for a point of contact from within the EMEA business to lead on the rollout of an Enterprise Program and Project Management Methodology (‘EPMM’) within the region. Mr Barber saw this as a perfect opportunity for the claimant. He saw it as a significant piece of work but one which the claimant would find relatively straightforward, it had a high profile would bring the claimant into contact with senior colleagues from the global organisation.

83. During the same period Mr Barber also was trying to find for Mr Lloyd roles which would keep him busy but were not too arduous because he was concerned about the stress of the situation for Mr Lloyd.

84. On 7 July, in a meeting which the claimant has accepted was a ‘one-to-one’ meeting, Mr Barber met with the claimant at a coffee shop in Juries Inn in Watford. This was her first meeting with Mr Barber as her line manager and

was the first time they met in person. We find that Mr Barber did not tell the claimant at this meeting that Mr Z and Mr Y were to leave by way of a compromise agreement. (We note that by email dated 2 August from the claimant to Mr Barber she says that the 'word on the street' was that the respondent had entered into compromise agreements with Mr Y and Mr Z which included a financial element. The email says that Mr Barber had promised the claimant that this was not true. We find this to be at odds with the claimant's evidence to the contrary that Mr Barber said that Mr Z and Mr Y were to leave by way of compromise agreement.)

85. At that meeting Mr Barber did tell the claimant that he wanted her to be part of the solution to the Atom program and he introduced her to the concept of the EPMM role.

86. The claimant went on holiday from 15-19 July, returning to work on 19 July. Mr Barber himself was in Rome during this period.

87. While the claimant was away, on 18 July Mr Barber sent an email to the claimant and to those interested in the EPMM role, including Mr Verma, electronically introducing her to them, and saying that she was going to take a lead role in EMEA to ensure that the EPMM disciplines were adopted.

88. By email dated 20 July Mr Verma wrote to the claimant amongst others, and welcomed her to the team.

89. The claimant and Mr Barber met on 27 July at the respondent's Birmingham office in order to discuss her returning to work. The claimant had not attended at the respondent's offices for work since 6 June and she had not been engaged in any other project since that date. Her salary was being paid and she tells us that she was logging on and available for work, but in fact she had no role and no actual work to do.

90. The claimant had expressed concerns about attending at the Watford office which was why Mr Barber met her in Birmingham. He raised the EPMM role with her but she was noncommittal and mainly negative in her response. She said that she thought the role was too low level for someone of her experience and it was not something that appealed to her or that she wished to do. Mr Barber attempted to encourage her by saying that it was a significant role and a logical and reasonable step further to take as part of her integration into the business.

91. Mr Barber and the claimant also discussed the possibility of the claimant becoming involved in program leadership, possibly in the Atom project. However, the claimant told Mr Barber that working on the Atom program was, '*not part of the deal that I have to be in Durham*.'

92. As a result of this conversation, Mr Barber told Ms Owens to check the claimant's contract to offer letter close to discover what, 'the deal' had been.

93. The claimant never did engage with Mr Verma or the EPMM role.

94. By email dated 1 August 2016 Mr Y communicated with his colleagues, including the claimant, to say that he had decided to leave the respondent. His email is framed in positive terms, makes no reference to the review, and gives the impression that Mr Y has simply decided to leave and move on.

95. The claimant responded on 2 August by an email to Mr Barber with copies to Mr Sumra and Ms Wara. Her email says that she is 'absolutely staggered' by Mr Y's email. She says that the word on the street is that the respondent had entered into compromise agreements with Mr Y and Mr Z which included a financial element. She complains that there is no clear message to say that unethical behaviour will not be tolerated. She complains that she was not interviewed in private through the investigation and says, '*I couldn't feel more sad this morning.*'

96. Mr Barber replied to the claimant saying that the terms of Mr Y and Mr Z's departure from the respondent were confidential. Their departure was as a result of the review and it was wrong to think that they had been rewarded. He did not accept the inference that he was not a man of his word.

97. Mr Barber then sent an email on the same day to Mr X, Mr Sumra and Ms Owens commenting on the claimant's email. He says:

'*We need to discuss LF. I have gone out of my way to listen, support and try to encourage [her] to move forward. In return I have endured too much time listening to constant complaint, overly emotional meetings, calls and texts and criticism of colleagues including all of us (probably slanderously in one case). I have bent over backwards to be reasonable, but even by my standards I am at a loss of what more I can and feel inclined to do*

I have been told that working in Durham was not part of the deal when joining us, which LF being a Program Manager makes no sense that I have challenged. The response was non-committal… I have asked Lisa several times to take the opportunity to help me fix things given that she seems to see areas that needs to be addressed and changeds for the better, but got nothing in return.

I have been told that a meeting with HR is going to be sought to discuss her options, though when asked what that meant, Lisa said did not know.

I think we have a significant management issue with this colleague and having now had my integrity questioned, my patience is at an end.

If the probation period is still valid which I believe it to be, then I have no desire to make permanent on the basis that performance and behaviours are not supported such a decision.'

98. Both Mr X and Ms Owens thought that the claimant's reaction to Mr Y's email was irrational. So far as Mr X was concerned, the claimant had raised an issue and it had been dealt with objectively. Mr Sumra thought that the claimant was '*out of line'*.

99. By email dated 3 August to Ms Owens, Mr Barber expressed his frustration about the difficulties managing the claimant. In his view she had an extremely high opinion of her skills but had been unprepared to take opportunities actually to demonstrate them, apart of course, from raising concerns about the Atom project. He said that he was fully aware that her actions were probably well intended and some of the issues raised had been serious and had to be addressed. From a behavioural perspective however, he would not have his integrity and honesty questioned by anyone and he would not have his leadership and professionalism publicly questioned by a subordinate. He thought it untenable that the claimant was retained by the respondent unless she made a dramatic shift of approach, mindset and attitude. He was not prepared to continue to invest an inordinate amount of his time in one employee with nothing to show for it.

100. The claimant sent Mr Barber a further email on 3 August in which she made a number of other criticisms, mainly about the departure of Mr Z and Mr Y. One of those criticisms was that Mr Barber had said that her being interviewed in the review would have been unlikely to change the outcome. She said in the light of the above and the '*increasingly emotive discussions*' with Mr Barber, they should pause any more interaction. The claimant therefore cut off communication with Mr Barber.

101. Mr Barber forwarded that email (with his own comments on the claimant's critical points added in bold) to Mr X and Ms Owens. He commented that the claimant had been interviewed, with Andy Lloyd and he asked, rhetorically, '*what else does Lisa think this would have achieved - exiting Y and Z from FIS twice*?' He described the claimant's emails as an increasingly lengthy catalogue of groundless accusations based upon innuendo, inaccuracy and irrelevancy, underpinned by implicit threat. He described her as someone on probation who a number of people including himself bent over backwards to support, encourage and increasingly try to accommodate. These efforts had been extremely time-consuming but yielded no positive contribution to the business of any value at all. He said that he was reasonably certain that the claimant could not actually fulfil the demands of the programme/project leadership role to which she had been employed at a technical level and therefore she had no place in the respondent. The last few days showed that she was temperamentally incompatible.

102. Meanwhile on 2 August the claimant sent email to Justin Snoxall, Thomas Grayling and Jay Desai saying that Mr Barber asked them to get their heads together to agree what they think the Atom management structure needed to be to ensure programme success. Mr Barber had given the instruction to the claimant to do this and she arranged the meeting.

103. Without Mr Barber being involved, on 4 August the claimant, Mr Snoxall, Mr Grayling and Mr Desai agreed the management structure for the Atom team in which the claimant was not included. They made this decision because they agreed that the team needed a '*heavy hitting programme director from the north-east*.' The claimant had the opportunity to put her own name in the

structure but she did not do so. Mr Desai drew up the resulting structure chart. Mr Barber had nothing to do with the decision not to include the claimant on the structure chart.

104. On 8 August the claimant met with Ms Owens and Mr X. No notes were taken of this meeting. Mr X shared with the claimant the outcome of the review so far as he was able. He told her that misconduct had been identified, that the respondent needed to put rigour in place on the programme and that Mr Barber wanted the claimant to be part of shaping the solutions. The claimant challenged the fact that she had not been interviewed in the review process. However, she agreed to be part of the solution. At this stage the respondent believed that the claimant was moving forward. This meeting was the first occasion on which the claimant mentioned that she viewed her involvement as 'whistleblowing'.

105. The claimant was away on holiday from 22 to 26 August.

106. The claimant then met with Mr Barber in Mr Barber's office at Watford on 31 August. We accept Mr Barber's account of this meeting which he recorded in an email at 16:36 that day while the matter was still fresh in his mind.

107. Mr Barber opened the meeting by saying that he understood the claimant's concerns in relation to the Atom program were now behind them and he wanted to discuss what claimant might do for the respondent. She responded,

'*oh, do you think it's all over do you?*'

108. Mr Barber found the claimant's response aggressive and sarcastic.

109. The claimant then criticised Mr Barber for allowing Mr Y's leaving email to be circulated. She told him that his credibility had been diminished and that the respondent had missed a trick by not interviewing her. She said that senior executives had suppressed information and told her to lie about the Atom position but she did not give details. She called him incompetent and questioned his integrity.

110. Mr Barber told her that he rejected her view of him and he took exception to the constant questioning of his competence and integrity. He said that her comment was inappropriate and she was making sweeping judgments and jumping to conclusions without possession of the facts.

111. Mr Barber asked the claimant what she actually wanted to do for the respondent. She did not identify any role or type of role, but said she wanted to work in an organisation with integrity with a culture where people who whistleblow were given the credit they deserve. Mr Barber told her that whistleblowing was to her credit.

112. The discussion continued along those lines as Mr Barber attempted to focus the claimant on moving forward but she refused to do so. Mr Barber found her scornful and passive aggressive.

113. Mr Barber tried to explore what was the 'deal' that she had in mind when she said previously that Durham was 'not part of the deal'. She said that Mr Z had indicated that Atom would not be the likely client.

114. Mr Barber then explored with the claimant the possibility of her working for Sainsbury's in Edinburgh 5 days a week. She said that this was something she would prefer not to do and said that 3 days a week away for a single parent was the most the respondent could expect.

115. Mr Barber ended by telling the claimant that she needed to have a good think about whether she felt that the respondent was a place in which she wished to develop a career while he looked at opportunities for her to work on.

116. We find that the claimant did not ask Mr Barber to set objectives in this meeting. His email makes no reference to such a request and we think that the request for objectives is inconsistent with the claimant's failure to engage with his attempts to focus on finding work. We think that this employer could not sensibly set objectives until it knew in which project the claimant would be working.

117. The claimant says that the 'content' of that meeting is a detriment because of her disclosure. Mr Barber behaved as he did at that meeting because he wanted the claimant to move on and to do productive work for the respondent, yet he found that she would not respond positively to his attempts to encourage her to do so. Insofar as he was frustrated with her, this was because of her criticism of him and her demeanour, and because of her negative reactions. He did not react as he did because she had made the disclosure, but because she would not do some productive work.

118. Later, on 31 August at 18:02, Mr Barber sent the claimant an email saying that the team working on the Sainsbury's account desperately needed some short-term additional help. He said that he would like the claimant to make arrangements to support them (and he copied them in to the email) on site in Edinburgh from the following Monday. This would be for an initial period of 3 weeks with a possible extension. He said that he had explained that the claimant's ability to be on site was limited but she could be there at least 3 days a week. He asked her to liaise with the Sainsbury's colleagues on that basis.

119. Meanwhile, Mr Barber spoke to Ms Owens who advised against pursuing his request to the claimant to go to Scotland. Ms Owens was concerned that the respondent should not be moving the claimant's behaviour to their client or to the team behind the Sainsbury's programme. She also thought that because arrangements had been made for the claimant to follow through programme practices with Jay Desai, that should be followed through.

120. However, before Mr Barber's communication in response to that reached the claimant's eyes, the claimant on 1 September 2016 at 22:39 wrote a lengthy email from her private email address to Ms Owens and Ms Wara. In that email the claimant began to make legal references, including to mutual trust and confidence, length of service and to a duty to protect and care. She said that Mr Barber's behaviour on 31 August could be described as a verbal personal attack relating to the whistleblowing or grievance process. She said that she was in a hostile situation and she thought it best that all of her dealings with the respondent should be through human resources. She asked that Mr Barber could let the team in Scotland know that the claimant would not be arriving on 5 September.

121. We find it more likely than not that the claimant wrote this without seeing the 'retraction email' dated 1 September 2016 at 20:32. This email was sent by Mr Barber to the claimant's work email address and simply said that the situation had changed to the extent that she could stand down from having to be in Edinburgh next week after all. We think that the sequence and wording of the emails shows that the claimant for her part was not prepared to go to work in Edinburgh.

122. There was no interaction between the claimant and Mr Barber after 31 August.

123. On 16 September, the claimant met offsite with Amanda Owens. Ms Jahmat was present as a notetaker. The notes were sent to the claimant and she approved them. This meeting was set up in response to the claimant's email of 1 September. The purpose of the meeting was for Ms Owens to understand the nature of the claimant's concerns and how she wished to engage to resolve those and move forward.

124. Ms Owens said that she thought the Atom concerns had been closed following the meeting on 8 August between the claimant and Mr X. The claimant said that she had raised her concerns about wrongdoings in good faith and in accordance with the Public Interest Disclosure Act. She said that there was a possibility of wrongdoings within the programme in that the behaviours and processes were not being followed in accordance with financial services standards. She believed that the review had not been carried out in an independent way. There was substantial discussion about the review and the claimant's criticisms of it and she made allegations that a 'prolific gambler' had been put in place to run the programme.

125. Ms Owens asked the claimant if she been involved in the Atom programme since the review. The claimant said, 'no', because she did not have a job at that moment and had not had a job since joining in April. This was new information to Ms Owens.

126. The claimant said she believed that the EMEA team were complicit, corrupt and incompetent.

127. At the end of a lengthy meeting, Ms Owens said that she saw 2 strands of action required as next steps:

‘*Work through formally addressing concerns raised and work through getting [the claimant] productive at work*.’

128. The claimant said that she believed her options were to follow up with a second ‘whistleblowing’. She suggested that she would be prepared to meet with the US HR/US Manager as she believed the matter also affected the global organisation. She said that it should not be dealt with in a small company way and alternatively she suggested that the company might wish to exit her and they could look at how that could happen.

129. Ms Owens closed the meeting, thanking the claimant for her honesty and courage.

130. On 19 September, Mr Chris McAlees joined the respondent company.

131. The claimant was sent the minutes of the meeting on 16 September on 28 September.

132. On 28 September there was a further meeting between the claimant and Ms Owens with Ms Jahmat as a notetaker. This was a follow-up meeting from 16 September.

133. At this meeting, amongst other things, the claimant accused Mr Sumra of lying, ‘on a point’ but when Ms Owens asked her for details, the claimant said that they could go into the detail at a later date. The meeting revisited some of the matters covered at the previous meeting. Ms Owens said that if the claimant wanted to escalate her concerns further then there were avenues available such as, ‘escalation to Raja’ or use of the ethics line which was administered independently. Later in the meeting she also told the claimant that she could take out a grievance.

134. Towards the end of the lengthy meeting, Ms Owens said that she did not believe the relationship had deteriorated and said to the claimant that in the previous meeting she, the claimant, had said that if the respondent was sick of her raising complaints they could reach an exit by a settlement agreement. Ms Owens said that employees could raise complaints at any time through their employment and are encouraged to do so: it was right that the claimant brought these to the respondent’s attention. Ms Owens said that she had set out the avenues for the claimant but she did not believe that a settlement agreement was the right approach or that the relationship with the claimant was untenable. Ms Owens reminded the claimant of the possible avenues through which she could make a complaint. It was important that the claimant had stability in the employment relationship with her new line manager, Chris McAlees and that work was provided for her.

135. At the end of the meeting, the claimant said that there was no way that she had a future in the respondent and she had been overlooked for a job she

was capable of doing. She said that the relationship was broken and she needed to take legal advice.

136. By email dated 28 September 2016, Ms Owens sent the claimant a copy of the grievance procedure, along with details of the ‘ethics point’ to raise any whistleblowing concerns. She also attached a copy of the grievance and complaints procedure and a link to the ethics point which she said was administered by an external party.

137. By letter dated 4 October 2016, Ms Owens confirmed her summary of the meeting of 28 September to the claimant. In that letter she also provided an answer to queries raised by the claimant about approaching an external regulator. Ms Owens told the claimant that in accordance with the respondent’s policies she could contact whatever regulator she believed was necessary as the respondent did not direct or restrict any reporting and the claimant was not required to alert the respondent if she wished to pursue this avenue. She also directed the claimant’s attention to the Employee Assistance Program which provided free advice and counselling.

138. Ms Owens confirmed that Mr McAlees would be the claimant’s direct line manager and she proposed a meeting for the claimant and Mr McAlees on 10 October 2016.

139. A member of the HR team sent an invitation to the claimant to attend a probation review meeting on 11 October. However, that invitation was sent by a person who was not aware of the concerns raised by the claimant. Accordingly, by letter dated 5 October Ms Owens wrote to the claimant saying that Mr Barber had not been able to assess the claimant’s performance in her role. Moreover, the claimant had indicated that she had not had a role since joining the organisation in April 2016. Therefore, the organisation had not been able adequately to assess her competences so as to satisfy the company’s probation sign off criteria. Therefore, the invitation to a probation review was cancelled. Ms Owens said that the most pragmatic approach in the circumstances was to extend the claimant’s probation period by a further 6 months. Mr McAlees would work with the claimant to set goals and deliverables within the program office.

140. Ms Owens sent this letter because the claimant herself had made her aware that she had not had a role in the organisation and the claimant had said that she had had no role since April 2016 when she joined. She acted on the claimant’s own assertion.

141. The claimant responded by email to Ms Owens dated 6 October. She said that she found the proposal to extend her probationary period by 6 months unacceptable. She pointed out the impact on her terms and conditions to do with sickness, bonus and notice periods. She said that she was suffering a detriment because of her whistleblowing.

142. Ms Owens replied by a 5-page letter dated 19 October 2016. She attached a timeline of events to that letter. Ms Owens answered several

concerns made by the claimant. In particular she revised the extension of the probationary period to 5 instead of 6 months because she now understood that the claimant had not had work provided since 4 July 2016. She proposed that the claimant should meet Mr McAlees on 21 October. She said that the respondent had made several attempts to arrange for a return to work. To date the claimant had failed to return to work. Ms Owens asked that if the claimant was unable to return to work as result of sickness she should let Ms Owens know. She said that she considered the invitation to the meeting with Mr McAlees to be a reasonable management request. The claimant's failure to attend that meeting might result in her pay being affected because she would have no alternative but to assume that the claimant was not ready and available until she received other information to the contrary.

143. The claimant had not met with Mr McAlees on 10 or 21 October.

144. Ms Owens' letter of 19 October was held in 'quarantine' while she was absent from work because it was password protected. Therefore, the claimant received it on 1 November. The claimant requested time to respond. By subsequent email she said that she would reply by the end of 2 November. Ms Owens then realised that her letter of 19 October had asked the claimant to contact her to arrange a meeting with Mr McAlees on 21 October. The claimant had not however received the letter and Ms Owens therefore asked the claimant by email sent at 14:33 on 1 November if she was available to attend an introduction meeting, 'tomorrow' that is 2 November.

145. The claimant replied without in fact saying whether she could attend the meeting. Ms Owens therefore sent a further email on 1 November saying that it was important that the claimant had the fullest opportunity to demonstrate her abilities in post. If they were to move forward the respondent required her cooperation and engagement in this process. Although Ms Owens appreciated that the claimant might want to consider the contents of her letter, she said that that should not impede the claimant's ability to attend a meeting tomorrow. The claimant was being paid on the basis that she was ready and available to work. This included attending any meetings which were scheduled during working time. She said that she therefore looked forward to arranging a meeting between the claimant and Mr McAlees the following day. If the claimant was not in fact ready and available to work, Ms Owens asked her to confirm the reason why as a matter of urgency.

146. Within minutes, the claimant had replied saying that there were currently 53 errors in the information that Ms Owens had sent her. She asked to be allowed to complete the review of the information and to respond and that 'beyond that' they could determine whether a meeting with Mr McAlees was appropriate. The claimant said that she was frightened of Mr X, Mr Barber and Mr Sumra.

147. Ms Owens replied at 13:11 on 2 November. She repeated that she understood the claimant would like time to review the documentation but she did not feel that the email response explained why the claimant was not ready and available to return to work. The meeting with Mr McAlees was by way of

introduction. There would be no contact with Mr X, Mr Barber and Mr Sumra who were not aware of the concerns raised by the claimant. The issues raised by the claimant in her meetings with Ms Owens were not relevant to Mr McAlees. Therefore, Ms Owens did not feel there was any issue in requesting for the meeting to go ahead as this was a reasonable management request. She suggested that they arrange the meeting to take place on 3 November. If at this stage the claimant failed to attend the meeting then that might be considered to be a refusal to adhere to a reasonable management request. She appreciated that the claimant had concerns and she encouraged the claimant to raise them: she had provided numerous avenues for the claimant to do so. She did not feel that by raising concerns the claimant was prevented from attending at her contractual place of work.

148. By email dated 2 November 2016 at the claimant wrote to Mr X with a copy to Ms Owens. She said that she had reviewed Ms Owens letter of 19 October and, '*on the basis of identifying 84 errors, omissions, inaccuracies, context,- due to the volume I have no option but to reject the letter and its contents completely*.'

149. The claimant said that only suggestion was for her to meet with Mr X to discuss the situation candidly. She said that she was quite frightened and due to the painful nature of attending the respondent's offices she suggested Luton Hoo Hotel at junction 10 of the M1 as a place to meet. Addressing herself to Ms Owens, the claimant said that until she and Mr X met, she and Ms Owens should put on hold any further discussion between themselves or meeting with Mr McAlees.

150. Mr X replied to the claimant's email 2 November on 4 November. He said that he had not received any information to support the claimant's assertion of inaccuracy in the letter of 19 October. He understood that the letter had been prepared based on the documented information available. Therefore, he did not accept the claimant's assertion that the letter should be rejected in its entirety. He said that its content still stood. He noted that the claimant had made further allegations about the Atom programme. He understood that the claimant had been provided with details of the company's escalation procedure. He encouraged the claimant to use the avenues which Ms Owens had already suggested to her. He encouraged her clearly to articulate facts and detail into her concerns so that they could be fully addressed and escalated.

151. Mr X said that he was shocked and surprised to hear that the claimant was frightened of the FIS executive team and said that she had not specified any factual basis for that assertion. He was surprised in that context that the claimant had requested for a private meeting with him. He said that he was happy to meet with the claimant but she should understand that anything raised might need to be escalated in accordance with the company's policy and procedures. Rather than Luton Hoo, he suggested the Watford office as a venue to meet on 7 November.

152. He said that the claimant's requests to meet off-site had been accommodated before because the nature of her concerns had not been

known. However, he would like to hold meeting at the Watford office and he reassured her that reprisal would not be tolerated.

153. He said that it was important, given that the claimant felt excluded from the Technology services team, that an introduction meeting take place between the claimant and Mr McAlees. He would arrange for this to take place on 7 November after his meeting with the claimant.

154. If the claimant was unwell and unable to attend the meeting, he asked her to let the respondent know sickness absence procedures would apply. He says that the claimant's lack of engagement was causing concern. The respondent expected employees to raise concerns as they saw fit but it also expected employees to engage and to be ready and available for work. If such issues continued then the respondent may have to withhold the claimant's pay.

155. The claimant replied by email on 4 November. She said that Mr X was not in receipt of the full facts. She said that they were partway through an ongoing whistleblowing case which had not been dealt with to her satisfaction and therefore remained open. She said that she was frightened and affected by all that had happened and requested again that they meet off-site, suggesting Luton Hoo.

156. The claimant followed that email with a further email on 8 November saying that it would be inappropriate to make deductions from her monthly salary until they had resolved '*the complete mess from a position of understanding the full facts*'.

157. By letter dated 8 November, Ms Owens responded to the claimant's 4 November email on Mr X's behalf. Amongst other things she said that the Atom review did not remain open. The claimant had not asserted that before. The respondent took seriously any suggestion that the claimant had been subjected to a detriment as a result of raising concerns and Ms Owens encouraged the claimant again to explore the avenues she had set out for her if she was not satisfied with the Atom review.

158. Ms Owens said that it was not feasible for Mr X to meet off-site at a crucial stage in the year end. He had to attend numerous meetings for 2017 planning. She said that the meeting had to take place at the Watford office and she gave a date of 10 November and suggested 2 different possible times.

159. Ms Owens asked the claimant to let her know in advance that she would be attending the meeting. This would mean that she could ensure that Chris McAlees was available to meet the claimant after the meeting with Mr X. It would also enable her to arrange the attendance of a note taker. She said that attendance at a meeting with Chris McAlees on Thursday was a reasonable management request and if the claimant failed to attend this meeting without good reason, her actions would constitute a refusal to follow a reasonable management request and may be investigated in accordance with the company's disciplinary procedure.

160. The claimant replied by email dated 9 November, reiterating her position that the whistleblowing case was open. She repeated that she was frightened and that Ms Owens letter contained 84 errors. She repeated her request that they meet off-site and again suggested Luton Hoo.

161. Mr X and Ms Owens concluded that the claimant was unwilling to attend either of the meetings arranged on 10 November. Ms Owens wrote to the claimant accordingly on 10 November referring to that conclusion. She said that the email correspondence offered no reasonable explanation as to why the claimant was not able to attend the contractual place of work. The claimant had failed to explain why she felt frightened. The Atom review was closed and the claimant had been provided with procedures to follow in the event that she was not satisfied. She had not invoked those procedures. Ms Owens saw no reason why the claimant could not invoke those procedures while attending her contractual place of work. She set out a list of the dates when the claimant had been invited to attend a meeting with Mr McAlees. Those were: 10 October, 21 October (re-arranged for 2 November), 3 November, 7 November and 10 November. The claimant had not attended any meetings with Mr McAlees. Ms Owens noted that she had placed the claimant on notice on 4 November that failure to attend the arranged meetings with Mr McAlees would result in pay being withheld. Therefore, the claimant's pay would be suspended with immediate effect.

162. Ms Owens said that this was because the claimant was not making herself ready and available to work or willing to fulfil her contractual obligations and nor had she provided Ms Owens with any information to her satisfaction as to why she was not able to attend. On the evidence, we accept that this was Ms Owens' only reason for deciding to withhold the claimant's pay.

163. Ms Owens ended her letter by stating that the claimant's actions amounted to failing to follow a reasonable management request in that the claimant had failed to attend meetings with her line manager. The respondent's disciplinary procedure would now be invoked as a result. On the evidence, we accept that this was Ms Owens' only reason for deciding to instigate the investigatory meeting.

164. The claimant responded by email the same day asking Mr X to confirm when he would be available to meet with her at Luton Hoo. She understood from Ms Owens' letter that Mr X was unlikely to be available to meet off-site until 2017.

165. Ms Owens replied on 11 November confirming to the claimant that she said she was unwilling to meet Mr X on 10 November or at any other time at any other of the respondent's locations or offices. She said that it was not feasible for Mr X to meet her before the year end and it was not appropriate that he meet off-site other than in a controlled office environment in the light of the claimant's previous comments about being frightened of him. This was to safeguard both sides against potential accusations. She confirmed again that the Atom review was closed. She had not rearranged the meeting with Mr X because the claimant was refusing to attend any office location. She reminded

the claimant again that she had given her information about the appropriate procedures to follow if she wished to take matters further.

166. The claimant replied on 14 November repeating the history from her point of view. She requested no more emails, letters, threats or incompetence from Ms Owens. She requested that her pay be continued in full until they had agreed a way forward: which would be an agreement to settle, or a claim to the employment tribunal was triggered. She said that that decision would be made immediately following a meeting with Mr X and therefore the sooner they met the better.

167. Mr X replied by email on 16 November. His letter is a detailed review of the history from the respondent's point of view. He noted the claimant's proposed next steps. He confirmed that he would be available to meet with her on 17 November at Watford office for 18 November at the Birmingham office. Those against whom she had made allegations would not be in the office at those times. He said that nothing in the correspondence suggested that she could not attend either location. A note taker would be present. He asked her to confirm her chosen date and time. He said that if she failed to attend either of the arranged meetings he would ask that all the correspondence was gathered and he would provide it as part of the escalation procedure to conduct the necessary investigations into the claimant claims.

168. In fact, on 17 November, Mr X and the claimant agreed to meet at the Marriot Hotel in Birmingham on 18 November.

169. On 17 November the claimant was invited to attend a disciplinary investigation meeting on 22 November at the respondent's offices in Birmingham. This was to consider allegations of potential misconduct in refusing to carry out reasonable and legitimate management requests and the claimant's continued absence from work without explanation.

170. The claimant met with Mr X on 18 November 2016 at the Marriot Hotel in Birmingham. Ms Jhamat was present to take notes. The claimant said that her pay had been stopped. Mr X said that when she had been asked to attend the workplace she had not attended. Mr X told the claimant that he was there to listen to her concerns and address them if he could. He confirmed that he still regarded the claimant as an employee. The claimant replied, *'ok that's all I needed to know we need to push ahead with a public tribunal because the pages of inaccuracies that we have here*'.

171. Ms Jhamat asked for details of the inaccuracies. Mr X assured the claimant that there was time to go through the concerns however she wished to do so. She did not give details of the inaccuracies. The claimant said she was concerned about the way Mr Barber had managed her.

172. Mr X said that pretty much everyone who had tried to help the claimant had been accused of something without any foundation. He said he believed that the situation had been created by the claimant but he was there to listen and there were several processes underway. The claimant asked about the

respondent's bullying and harassment policy and Mr X responded that bullying would not be tolerated. Ms Jhamat said that the policy was within the handbook. The claimant said that from the set of emails and the letter she received on 31 October with 84 errors, Ms Owens was bullying her.

173. Mr X asked the claimant what were the errors and asked if she had given the respondent a copy of the errors. Ms Jhamat asked the claimant to share what were the errors and the claimant said that was the purpose of the meeting, to go through them. Mr X accordingly asked the claimant to go through the errors. The claimant responded by telling him,

'*Do you know what, your attitude really sucks, right'*

Mr X responded, '*I'm sorry?*'

The claimant replied, '*yeah you should be, because you're appalling'*.

174. The claimant repeated that Mr X was appalling and later said that he was shocking. Later, she said,

'*Bloody hell you're amazing you are*.'

175. Still later, she said,

'*You're not an honest man, you are not an honest man'*.

176. The claimant said that Mr X had effectively put her in a position where she had no option but to leave. Mr X asked her to clarify if she was suggesting that they were inhibiting her exit because he did not see how the respondent was doing that. Mr X said he did not believe the relationship was untenable.

177. The claimant said that they may need to go down the employment tribunal route and '*make it public'*.

178. By email dated 21 November 2016 Mr X wrote to Ms Owens that they had bent over backwards to accommodate claimant's increasingly irrational and unfounded accusations. He described his meeting with her as the same series of irrational, personal and defamatory allegations with no foundation. He did not believe that the claimant had any intention of returning to work.

179. The claimant did not attend the investigatory meeting on 22 November. She did not give reasons for her non-attendance.

180. By email dated 22 November the claimant resigned.

Concise statement of the law

181. Once - as in this case - it is shown that a disclosure of information has been made, a tribunal must consider whether or not that disclosure was a qualifying disclosure. Therefore, we must examine the nature of the information

revealed. The worker making the disclosure must have a reasonable belief that the disclosure is in the public interest and that it tends to show one of the 6 statutory categories of 'failure' set out in section 43B(1) of the Employment Rights Act 1996. The construction of that section is not in dispute between us, and so we do not set out its exact wording here.

182. What is required is only that the worker has a reasonable belief. It is not necessary for the information itself to be true.

183. The statutory test is a subjective one. This is because the 1996 Act states that there must be a reasonable belief of the worker making the disclosure. The relevant test is not whether a hypothetical reasonable worker could have held such a reasonable belief.

184. We remind ourselves that the burden of proof to be applied is different in a detriment case to a case of dismissal.

185. Section 48 (2) applies to all detriment claims brought under section 47B, including whistleblowing cases. It states:

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

186. Those words require that the act or deliberate failure to act of the employer must be done, '*on the ground that'* the worker in question has made a protected disclosure. This requires an analysis of the mental processes (conscious or unconscious) which caused the employer so to act. The test is not satisfied by the simple application of a 'but for' test. It may be that, *but for* the protected disclosure, certain later acts or omissions detrimental to the claimant would not have taken place. That does not mean that the act or omission was done *on the ground of* the protected disclosure.

187. The employer must prove on the balance of probabilities that the act, or deliberate failure, complained of was not on the ground that the employee had done the protected act; meaning that the protected act did not materially influence (in the sense of being more than a trivial influence) the employer's treatment of whistleblower (*Fecitt v NHS Manchester* [2011] EWCA Civ 1190, [2012] IRLR 64, [2012] ICR 372).

188. The wording of section 103A of the 1996 Act states that the protected disclosure must have been the reason or principal reason for the dismissal. This test differs from the test in a detriment case. In a dismissal case, the test is whether the whistleblowing was the reason (or, if more than one, the principal reason) for the dismissal.

189. In a case where the claim is one of constructive dismissal then we consider that we have to apply that test to the structure of a constructive dismissal claim. So, we have to ask whether the respondent was in fundamental breach of contract. We ask whether the claimant has resigned in response to the breach of contract and whether she has waived any breach which she might

have proved. If she proves a constructive dismissal and if the fundamental breach of contract in response to which she resigned consisted of detriments, the reason (or if more than one the principal reason) for which was the protected disclosure, then the protected disclosure was the reason or principal reason for the dismissal. Therefore, the dismissal would be automatically unfair. On the specific issue of dismissal, the claimant must prove that she was dismissed.

190. Where a claimant does not have 2 years' service so as to qualify to claim unfair dismissal under section 98, the burden lies upon her to prove jurisdiction.

191. We discussed this complex burden of proof situation with the parties at the outset of the hearing. We have reminded ourselves, then and while deliberating, of *Kuzel v Roche Products Ltd* [2008] EWCA Civ 380, [2008] ICR 799, [2008] IRLR 530, paragraphs 46 – 61.

192. We remind ourselves not only of the rather technical structure of the burden of proof in a case such as this, and of the fact that lawyers get worked up about it, but also that in reality, few cases actually turn upon it.

Analysis

193. In the circumstances of this case it appears to us sensible to reverse our usual order of consideration of the issues. We do this because, whether or not the claimant made a protected disclosure on 25 May, we consider that our findings of fact about the causation of the alleged detriments provide a straightforward answer to the matters raised by the claimant.

Detriment 1

194. Ms Wara did not instruct the claimant not to attend the respondent's Watford office on or after 6 June 2016. We have found that the claimant herself suggested that she should not attend the Watford office. Mr Barber agreed with that suggestion and Ms Wara simply confirmed what she correctly understood to be a pre-existing agreement.

195. The respondent has proved therefore that Ms Wara did not give the claimant the instruction alleged, and in any event that the reason for Ms Wara's confirming the agreement as she did was that the claimant herself did not wish to attend the office and Mr Barber had agreed to it. Neither Ms Wara nor Mr Barber were motivated in this by the protected disclosure.

Detriment 2

196. Mr Sumra did not ask the claimant to lie about the reasons for her absence from the office. The claimant herself did not wish to tell the truth about the reason for her absence and Mr Sumra acquiesced in that and gave her permission to put forward whatever reason she thought was appropriate.

197. The claimant has failed therefore to prove that Mr Sumra asked her to lie and in any event the respondent has proved that reason for he what actually did was that she herself did not wish to tell the truth. He was not motivated by the claimant's disclosure but by her own desire to avoid telling her managers the real reason for her absence.

Detriment 3

198. Mr Barber did not set performance objectives for the claimant between 7 July and 31 August 2016. In this, he was not motivated by the claimant's disclosure. He was unable to set performance objectives because she did not have a role to perform and it was therefore not possible or sensible for him to set objectives.

199. In the 7 weeks between 7 July and 31 August there were in fact only 4 weeks when because of absences on leave and the claimant declining communication, it was possible to have a one-to-one meeting between the claimant and Mr Barber. In fact, Mr Barber carried out 3 one-to-one meetings with the claimant during that period. The claimant agreed to this analysis in cross-examination. She agreed in evidence that she did not assert as part of her case that the reason he held 3 meetings instead of 4 was because she had made a public interest disclosure.

200. Mr Barber did not prepare a structure chart from which the claimant's name and position were missing. The reason why the claimant's name and position were missing from the structure chart is that the team which put that chart together - which team included the claimant herself - omitted the claimant because they took the view that the programme needed a '*heavy hitter from the North East'*. It is impossible to make findings about Mr Barber's motivation for the omission, because he was not responsible for it. The claimant herself was responsible and the omission was not on the ground of the protected disclosure.

Detriment 4

201. We have found as a fact that the meeting on 31 August had its content because Mr Barber wanted to encourage the claimant to move forward and to do some productive work for the respondent but she reacted negatively to that approach. Mr Barber was frustrated because of the claimant's reaction. We do not consider that he acted in any way during that meeting to the claimant's detriment on the ground of, or by reason of her disclosure on 25 May.

Detriment 5

202. The claimant's probationary period was extended initially because she told Ms Owens that she had not had any role since she started employment in April 2016. Ms Owens then modified the extension of the probationary period to reflect the fact that the claimant had in fact had a substantive role during the early part of her employment. The entire reason Ms Owens acted as she did was because the claimant had not been performing productive work for the respondent for most of her probationary period and therefore it had not been

possible to assess her performance. The respondent has proved that Ms Owens did not act as she did at all because the claimant had made a disclosure.

Detriment 6

202. Our findings of fact show that the reason the claimant's salary was stopped on 11 November 2016 was because Ms Owens believed that although the claimant was able to work, she was not ready or willing to do so. The claimant had provided no medical evidence to support her allegations that she was too frightened to attend the office and she had not satisfactorily explained her fear. She provided no medical evidence to explain her absence from work. Ms Owens did not believe that the claimant's reasons for not attending meetings with her line manager were adequate reasons to justify a failure to comply with a reasonable management instruction. Therefore, after giving due warning, Ms Owens took the decision to stop the claimant's salary.

203. Ms Owens was not at all motivated in doing so by the fact that the claimant had made a disclosure.

Detriment 7

204. The claimant was invited to an investigatory meeting on 17 November because Ms Owens genuinely considered that the claimant had been given reasonable management instructions to attend meetings but she had not complied with them and that the claimant had not been attending work without good reason. These were matters which, if confirmed after investigation, might validly have been viewed as misconduct. The claimant was not invited to the investigatory meeting because she had made a disclosure.

205. For those reasons alone, either the claimant has failed to prove the primary facts alleged or the respondent has proved that any of the acts or omissions actually shown to have been its acts or omissions did not take place on the ground of or by reason of the disclosure on 25 May 2016. This applies whether we apply the test for detriment, or the test relevant to dismissal. We therefore dismiss the complaint of detriment on the ground of public interest disclosure.

206. Furthermore, the claimant has not established that she resigned in response to a repudiatory breach of contract which consisted of the respondent subjecting her to a detriment(s) the principal reason for which was a public interest disclosure. Therefore, her complaint of unfair dismissal also fails.

207. In those circumstances the question of whether the disclosure made on 25 May was in fact a protected disclosure becomes academic. Nonetheless, we examine it.

208. The claimant did make a disclosure of information to Mr X on 25 May 2016. That disclosure was of a serious nature. It was a disclosure about the behaviour of managers, that is their swearing in the workplace, and about the behaviour of those managers in handling the forecasts of resources needed for

the programme. The claimant's case is that she disclosed information which tended to show a reasonable belief that a criminal offence or breach of legal obligation had been or was being carried out.

209. We have heard a great deal of detailed evidence about this during the course of this hearing, however we examined that evidence carefully in making our findings of fact. We have found that the best evidence of what was actually said on 25 May was Mr X's own manuscript note. We have not found the claimant's account of that conversation, or her explanations of what the information tended to show, to be reliable or convincing. We consider that she was disclosing information about language and attitudes and poor financial management. Those were serious matters to disclose to the respondent. The claimant said nothing at the time to indicate an actual belief that a criminal offence or breach of legal obligation was taking place. Even if she did hold that belief it was not, in the circumstances, reasonable. So although she disclosed information and information of a serious nature to her employer, she did not make a public interest disclosure.

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Employment Judge Heal

Date: 24 / 5 / 2018

Sent to the parties on: ....

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For the Tribunal Office