Case Number: 3400219/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr E Fallahi	**v**	TWI Limited

Heard at: Bury St Edmunds **On:** 9, 10, 11, 12 July 2018
In Chambers: 8, 9 October 2018

Before: Employment Judge King

Members: Ms Breslin and Mr Thompson

Appearances
For the Claimant: Mr Jackson, Solicitor
For the Respondent: Miss Reindorf, Counsel

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal fails and is dismissed.

2. The claimant's claim for detriment on the grounds of having made a protected disclosure fails and is dismissed.

RESERVED REASONS

1. The tribunal heard evidence from the claimant. The tribunal heard evidence on behalf of the respondent from Dr John Blackburn, Ms Jane Hockey, Dr Mike Russell, Dr Rob Scudamore, Christof Wiesner and Dr Ian Norris. Whilst the respondent produced three further witness statements belonging to Fiona Snell, Morris Whittaker and Paul Woollin, it was agreed at the outset of the hearing that these witness statements were no longer relied upon and the witnesses would not attend the hearing as their evidence was not relevant to the issues to be determined by this employment tribunal. We therefore had no regard to the final three statement.

2. The claims were identified as ordinary unfair dismissal under s.98 of the Employment Rights Act 1996 and a claim for detriment under s.43B of the Employment Rights Act 1996.

3. The issues as to liability were identified at the outset of the hearing and agreed with the parties as follows:

Protected conversations

3.1 Was there improper behaviour by either side during the settlement discussions? If not the protected conversations must be excluded from considerations.
3.2 If so to what extent do we consider it just that the protected conversation be inadmissible?

Unfair Dismissal

3.3 What was the reason for the claimant's dismissal? The respondent contends that the claimant was dismissed for capability (performance).
3.4 Did the respondent act reasonably in all the circumstances in treating that reason as sufficient to dismiss?
3.5 If the claimant was unfairly dismissed, should any compensation due to him be reduced on the basis that:
  3.5.1 Contribution – The claimant caused or contributed to his dismissal by culpable conduct?
  3.5.2 ACAS Code of Practice – by not attending meetings after 28 July 2016.
3.6 If the claimant was unfairly dismissed should any compensation due to him be uplifted on the basis that the respondent acted in breach of the ACAS Code of practice in the manner set out in paragraph 90 of the ET1?
3.7 Does the respondent prove that if it had adopted a fair procedure the claimant would have been dismissed in any event? Expressed as a % chance/passage of time.

S47B detriment from protected interest disclosure

3.8 Did the claimant make a qualifying disclosure in the public interest within s43(B) (a) (b) or (f) ERA 1996 in his grounds of appeal against dismissal 15 November 2016 in making the statement set out at paragraph 74 of the ET1?
3.9 In particular:
  3.9.1 Was the disclosure information?
  3.9.2 Did it tend to show (a) a criminal offence being committed namely the scientific fraud committed by Jon Blackburn (b) breach of a legal obligation – Jon Blackburn breaching his contract of employment and the duty owed to his employer (f) concealment of the above?
  3.9.3 Did the claimant reasonably believe it was in the public interest?

3.10 If the claimant made a protected disclosure, did the respondent fail to address the claimant's appeal against dismissal fairly and reject it on the ground that the claimant had made the protected disclosure?

3.11 If so, should the claimant's compensation be reduced on the basis that the protected disclosure was not made in good faith?

The Law

Unfair Dismissal

4. Dismissal under s.95 of the Employment Rights Act 1996, not being in dispute the claimant has a right not to be unfairly dismissed by the respondent under s.94 of the Employment Rights Act 1996.

s94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

s98 General

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

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

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

(6) Subsection (4) is subject to—

(a) sections 98A to 107 of this Act, and

(b) sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

5. Regard must also be had to the ACAS Code of Practice on Discipline and Grievance, (COP1). We have also considered the position with final written warnings under Wincanton Group v Stone UK EAT/0011/12

6. The respondent within its written submissions, drew our attention to a number of authorities (to which we have had regard) namely:

Sainsbury Supermarkets v Hitt [2003] IRLR 23 CA;
Taylor v Alidair Ltd [1978] ICR 445;
Cook v Thomas Linnell & Sons Ltd [1977] ICR 770 EAT;
James v Waltham Holy Cross UDC [1973] ICR 398;
Retarded Children's Aid Society Ltd. v Day [1978] ICR 437;
Grant v Ampex (Great Britain) Ltd [1980] IRLR 461;
Henderson v Masson Scott Thrissell Engineering Ltd. [1974] IRLR 98;
Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 EAT;
Gibson v British Transport Docks Board [1982] IRLR 228;
Maris v Rotherham Corporation [1974] 2 ALL ER 776;
Steen v ASP Packaging Ltd [2014] ICR 56 EAT.

7. On the claimant's behalf, his representative drew our attention to the following authorities within his written submissions (to which we have had regard):

Bevan Harris Ltd v Gair [1981] IRLR 520;
F. Burrows v Ace Caravan Company (Hull) Ltd. [1972] IRLR 4;
Steelprint Ltd. v Haynes [1996] UKAEA T467 90 5010;
Evans v George Galloway & Co [1974] IRLR 167;
Sibun v Modern Telephones Ltd [1976] IRLR 81;
Winterhalter Gastronom Ltd. v Webb [1973] IRLR 120;
James v Waltham Holycross UDC [1973] IRLR 202;
E & HH Lancaster v Anchor Hotels & Taverns Ltd [1973] IRLR 13;
Henderson v Masson Scott Thrissell Engineering Ltd [1974] IRLR 98;
Steen v ASP Packaging Ltd [2014] ICR 56.

Whistleblowing claims

8. The law on whistleblowing and specifically detriments can be found at s43B and s47B of the Employment Rights Act 1996 as follows:

s43B Disclosures qualifying for protection.

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

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

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

(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e)that the environment has been, is being or is likely to be damaged, or

(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

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

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

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

s43C Disclosure to employer or other responsible person.

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

(a)to his employer, or

(b)where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i)the conduct of a person other than his employer, or

(ii)any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

s47B Protected disclosures (ERA 1996)

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

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

(2) This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K.

9. In addition, we have had regard to the ACAS Code of Practice on Settlement Agreements (2013), and the tribunals attention was drawn to a number of cases on the claimant's side (to which we have had regard) within the written submissions:

Chesterton Global Ltd v Nurmohamed [2017] IRLR 837;
Babula v Waltham Forest College [2007] EWCA CIV 174;
Nagarajan v London Regional Transport [1999] ICR 877, HL;
London Borough of Harrow v Knight [2003] IRLR 140 EAT;
Fecitt & Others v NHS Manchester [2011] EWCA CIV 1190;
Street v Derbyshire Unemployed Workers Centre [2004] IRLR 687;
Soh v Imperial College of Science, Technology & Medicine UKA EA T/0350/14.

10. And on the respondent's side (to which we have had regard) within their written submissions:

Cavendish Monroe Professional Risk Management Ltd. v Geduld [2010] IRLR 38 EAT;
Smith v London Metropolitan University [2011] IRLR 884 EAT;
Parsons v Airplus International Ltd. UKEAT/0111/17;
Boulding v Land Securities Trillium (Media Services) Ltd. UK EAT/0023/06;
London Borough Harrow v Knight [2003] IRLR 140 EAT
NHS Manchester v Fecitt [2012] IRLR 64 CA;

Protected Conversations

11. The law concerning protected conversations is set out in the Employment Right Act 1996 as follows:

s111A Confidentiality of negotiations before termination of employment

(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111. This is subject to subsections (3) to (5).

(2) In subsection (1) " pre-termination negotiations " means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

(4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

(5) Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved.

12. We also had regard to the ACAS Code of Practice on Settlement Agreements (2013) and the case of *Faithorn Farrell Timms LLP v Bailey [2016] ICR 1054 EAT.*

Findings of Fact

13. The claimant was employed by the respondent commencing on 30 June 2014. The claimant was employed as a Senior Project Leader – Technology in the laser section of the joining group.

14. The respondent is an independent research and technology organisation supplying consultancy and research and development services to industry. The scope of services includes paper-based reports (literature review), to the supply of a fully integrated production system. Projects range in duration and the respondent operates in a commercially competitive environment deriving its income from direct income or competitive bids.

15. Prior to joining the respondent, the claimant was living in Belgium studying for a PHD for five years whilst working. The claimant moved to the UK to join the respondent. The claimant's topic of his PHD was monitoring and control of laser cutting. The respondent therefore considered the claimant to be very knowledgeable and an expert in his field.

16. The claimant was recruited by and reported to Dr Jon Blackburn. The claimant was at all relevant times managed by Dr Blackburn. A Senior Project Leader - Technology, at the respondent proposes and manages projects, using their own technical expertise to enhance the respondent's products and business development activities. All senior project leaders at the respondent are assessed on financial and non-financial contributions to the business. They are set targets and appraised accordingly. Financial contributions include orders, the value of projects managed that are met and billable hours, ie billed income. Non-financial contributions are wide ranging and include marketing activities, strategy development, health and safety activities, coaching and mentoring.

17. The claimant was given a six-month probation period which he completed successfully, this was confirmed by HR on 12 January 2015. During the period from commencing employment until just after completing his probationary period, the claimant spent approximately eight months managing and delivering a large project on behalf of the respondent. This was successful and during this period the claimant was not, (nor was he expected to be), undertaking business development in line with the usual responsibilities of the Senior Project Leader as set out in his job description. At this time the claimant was focusing very much on item one of his job description namely to deliver projects of a high technical quality.

18. The claimant had an appraisal in February 2015 which reviewed his year 2014. During his appraisal Jon Blackburn highlighted to the claimant that he needed more focus on report writing and business winning. He needed to build external reputation and focus needed on business development. He was to focus on business development skills, collaborations and SCP and that training was available. The manager's summary concluded that he "had a solid start to his career at TWI". He had "ood, evidence of project delivery skills, focus needed to develop business develop skills, (training available), and SCP collaborations.

19. The claimant was set seven objectives, two with a delivery date of June 2015 / September 2015, (2016 stated in error on the form), and the remaining five in January 2016.

20. The claimant was set clear objectives broken down with clear activities that were measurable, for example, under "SCP Business Development": that he should conduct 3 x external visits with BD (business development) colleagues. Under "Collaborative Business Development" he should submit 1 x collaborative proposal of good quality with in excess of £50,000 income for TWI, and under "Reputation" he should carry out 2 x external presentations, 1 x published paper and 2 x smaller marketing activities.

21. The claimant signed his appraisal, *"to agree to your objectives and to your personal development plan for the current year"*.

22. The claimant attended a mid-year review with Dr Jon Blackburn on 17 August 2015, which highlighted issues with the claimant's performance over the past six months. He was told under objective two "SCP Business Development" that he had conducted only one visit with no visit report but resulted in £6,300, SCP income £5,000 year to date, some opportunities with Element Six circa £10,000, and that "he needed focus". Under "Collaborative Business Development" he was told, "submitted late and needed rewriting by JB to meet quality requirements, second stage submission also very poor and needed reworking substantially prior to submission, needs substantially more focus". Under objective six, "Personal Development" – "one collaborative writing course attended, laser welding course attended, CENG ongoing." Under "Single Client Project - SCP Business Development" he had made only one external visit against the target of three for the year and had not submitted a visit report, he had won £5,000 of SCP income against the end of year target of £50,000. Under "Collaborative Business Development", he had been involved in a submission of a collaborative proposal but the quality of his submission had been "exceptionally poor" and "needed a complete rewrite at both stages of submission" by Dr Jon Blackburn and his colleague Simon McCaldin. Under "Personal Development" he had attended two training courses against a target of four and was making progress against achieving his CENG. Under "Reputation", he had given two presentations and published a paper as per his objectives with the smaller marking activities still needing to be undertaken. Again, the claimant signed his mid-year appraisal to agree it. At this point Dr Jon Blackburn felt that the claimant was under performing against project delivery and order winning and made adequate progress in his non-financial objectives.

23. It was a disputed point between the parties that Dr Jon Blackburn had raised issues of concern in August 2015 in the mid-year appraisal and offered adequate support as the claimant felt he was well placed to meet these objectives. The claimant denies this version of the meeting. We find that the claimant declined further support as he felt he was well placed to meet those objectives. Although the appraisal does not reference this element of the discussion, on cross examination the claimant accepted

that Jon Blackburn had raised concerns, but he was not personally concerned as the targets were annual targets and the time had in effect not elapsed. Further, in the paper prepared for the capability hearing in May 2016 (see further below), Dr Jon Blackburn references this conversation and that the claimant felt that no further support was needed. The claimant did not, when asked in the meeting of 29 May 2016, whether he disagreed with that document, raise the fact he felt that such a conversation did not happen. On balance we believe the claimant did decline any additional support as he firmly believed he still had time to meet his objectives. He was not concerned and did not share Dr Jon Blackburn's concerns.

24. The claimant continued to receive two-weekly review meetings with Dr Jon Blackburn. During these meetings, coaching / guidance was provided, albeit we accept not formerly at this time.

25. On 26 January 2016, the claimant met Dr Jon Blackburn for his annual appraisal. 2015 was reviewed. And in the manager's summary, Jon Blackburn highlighted that "Ethan's performance in 2015 did not meet expectations in several areas, he has good delivery skills but needs to focus on improving business development skills, (SCP Collaboration), and ensuring other peripheral activities are progressed as needed". Some activities to support improvement were discussed. Dr Jon Blackburn reviewed last year's targets with the claimant, overall rating is consistent that he did not meet expectations in several areas, out of seven objectives, (six live objectives), one was achieved / exceeded, one was 85% achieved and the rest were all partially achieved. Courses were identified and objectives for 2016 set. These 2016 objectives mirrored the six live objective areas in 2015. The objectives had precise targets as to how they could be met and measured, one fell due in June 2016, one in October 2016 and the remaining four in January 2017. By this point the Claimant should have been quiet clear that he was now being measured and what he had to do to meet expectations.

26. It is agreed between the parties, and we adopt that, at this point the informal performance management process commenced and that two-weekly meetings increased in frequency to one meeting a week. It was unhelpful that the respondent failed to articulate this in writing to the claimant by way of letter, which would have clarified for all parties that the claimant was now in an informal management process. However, the signed appraisal of 2016, (and indeed 2015), makes it clear that issues were being raised at this stage.

27. There was some confusion caused by Dr Jon Blackburn's oral evidence that the informal process commenced in 2015, (contrary to his witness statement and the respondent's case), the claimant submits that this was perjury and Dr Jon Blackburn was seeking to mislead the tribunal. The tribunal does not accept this, although finds the confusion unhelpful. It is clear to us that the parties, at the relevant time, regarded the informal process as commencing in January 2016 and it is equally clear to us,

based on the above findings of fact that Dr Jon Blackburn had both raised performance issues in 2015 and was seeking to guide / coach the claimant to improve during this period. Whether one calls this informal process or not, is irrelevant, as it was clear January 2016 was not the first time performance was being raised as an issue. Given by 2016, it was clear that performance issues were raised, we do not accept that there were no significant performance issues, that arose during his employment as the claimant now contends. This flies in the face of the clear evidence in his appraisals to the contrary. He was only meeting expectations in 1/6 of his live objectives for 2015, had met a second at 85% complete and the remaining 4/6 were only partially completed. In our view this is clear evidence of significant performance issues which had arisen as early as 2015 and continued throughout his employment until he was dismissed. Any objective reading of his appraisal documents (which the claimant signed) makes this quite clear.

28. Dr Jon Blackburn stated in his evidence that he reviewed TWI's capability procedure with the claimant at this time. As found above, we accept that he raised issues and increased the review meetings and made it clear that a performance process was underway, but we do not accept he expressly went through a written policy with the claimant at that meeting. The factor of the increased review meetings in our view are significant to illustrate a change of approach at this time.

29. During this period, Dr Jon Blackburn became increasingly concerned with the claimant's lack of progress towards his 2016 objectives. Jon Blackburn produced a review outlining his initial concerns and the claimant's performance during the informal process since January 2016. This document highlighted failure to meet the quantifiable targets to date but more underlying issues around the claimant's documentation were set out including outlining that these needed significant reviews, failure to network and the need to develop verbal communications as the claimant preferred to use email communication.

30. By letter dated 23 May 2016, the claimant was sent this report and invited to attend a formal hearing on 26 May 2016 with Dr Rob Scudamore. He was given the right to be accompanied and alerted to potential outcomes including a final written warning.

31. At the meeting on 26 May 2016, the claimant was taken through the capability report written by Dr Jon Blackburn and given the opportunity to comment. He provided background as to why he had not made progress but felt his performance was better now than last year and that he was only five months into the year. The claimant confirmed he could ask Dr Jon Blackburn for support if he needed it and had always asked for help. He did not feel there was anything else Dr Jon Blackburn could do to help.

32. At the conclusion of the meeting, Dr Rob Scudamore gave the claimant a final written warning. He explained that the claimant had said he, Jon Blackburn supported him and there was nothing further he could provide

the claimant with. Further, that colleagues had supported the claimant as well. He felt that there was an issue of underperformance and that this was not just over the past six months, it was a trend since the claimant had joined listing as an example, one external client visit is far below the expectations of the claimant's role. He felt that the nature of the additional support given and continued long term concerns about the claimant's performance and the issue of his job grade meant that he proposed moving to a final written warning. At this point the claimant had not had any formal warnings.

33. The claimant was placed on a formal performance improvement plan (PIP). By email dated 1 June 2016, the claimant was sent a set of objectives for the performance management period which would run to the 26 August 2016. Meetings continued weekly and he was offered additional support.

34. The formal PIP set out eight improvement objectives with required standards, how they would be measured and the time scale for delivery. The claimant signed this document and made no additional comments concerning the attainability of the objectives save as to say that the external presentation requirement was subject to availability of suitable events.

35. On 3 June 2016, the outcome of the capability hearing was given to the claimant in writing. The final written warning would be kept on his file for 12 months and there would be a three month review period. He was given a right to appeal. The claimant did not appeal the final written warning. At this point the claimant did not have two years service but was in essence given a second chance.

36. The claimant had a review meeting on 6 June 2016, each meeting necessitated a form to be completed indicating the progress since the last meeting, aims for the next review period, the date of that review and gave the claimant and Dr Jon Blackburn space to sign and add any comments. Further reviews took place on 20 June 2016, 27 June 2016, 4 July 2016, 11 July 2016, 18 July 2016. On each occasion, the claimant entered no comments.

37. On 25 July 2016, the claimant and Dr Jon Blackburn met for their weekly review meeting. Dr Jon Blackburn raised concerns about the claimant meeting his agreed objectives within the PIP. He was two months into the three month review period. The claimant was 2/3 of the way through but the claimant had no achieved anywhere near 2/3 of the objectives set for the review period.

38. It was agreed that the employment tribunal would hear all evidence including evidence connected with the protected conversation under s.111A of the Employment Rights Act 1996, before making a decision as to whether improper conduct had occurred so as to allow the inclusion of s.111A related evidence or not, in so far as we consider it just.

39. Both parties agreed that the 'without prejudice' rule was not applicable. We therefore made the following findings of fact in connection with s.111A issue accordingly. Depending on our conclusions it may be necessary to exclude some of the following paragraphs from our considerations when considering the legal issues for unfair dismissal.

40. At the meeting on 25 July 2016, Dr Jon Blackburn told the claimant that he could either continue with the PIP or as an alternative, sign a settlement agreement with one month's compensation and his notice. Dr Jon Blackburn had previously discussed this as a potential option with HR. We have heard no evidence to say that either party referred to this as a protected conversation at the relevant time.

41. Later that day, the claimant messaged Dr Jon Blackburn with two alternative options; namely redundancy or a settlement with four months' salary. Dr Jon Blackburn told the claimant he needed to consult with HR.

42. There was a dispute between the parties as to whether at the meeting on 25 July, the claimant alleges that he was told by Dr Jon Blackburn that if he was dismissed he would leave immediately, not be able to speak to anyone and his reference would reflect dismissal. Dr Jon Blackburn denies making such comments, there is no documented evidence before us that either party recorded their respective positions in writing around that time. We find that we prefer Dr Jon Blackburn's evidence on this point. The respondent had a known policy of providing standard references and during the relevant period the claimant did not raise the issue of a reference specifically. We find that Dr Jon Blackburn did warn the claimant that one outcome could be dismissal. We do not accept that a discussion at this point went beyond that to threaten the claimant with dismissal or a bad reference.

43. We also note the ET1, (revised), makes reference only to a risk of dismissal not as the case is now put that the claimant was threatened with dismissal/bad reference, we do not find that in this meeting the claimant was threatened with a bad reference. If any discussion around the reference took place it would have been that a reference would have been agreed as part of the settlement agreement. Indeed, the settlement agreement refers to a reference in a standard form. The claimant asked that Dr Jon Blackburn not get back to HR until the claimant spoke to him on Thursday by text message that day.

44. By text Dr Jon Blackburn reminded the claimant that he needed a decision on the two options, (PIP / settlement), by Thursday lunchtime.

45. On 28 July 2016, the claimant met Dr Jon Blackburn and Jane Hockey (HR), as planned. The claimant requested four months' money or redundancy. These were both rejected by the respondent and it was agreed that the claimant would finish his PIP as a result of that conversation. The respondent thought that a settlement agreement was not required or desired.

46. By email at 1319 hrs on 28 July 2016, the claimant was invited to a formal review meeting on 24 August 2016. The claimant replied to enquire if a Director would be involved in that process. Jane Hockey replied the same day to set out the purpose of that meeting. The claimant replied the same day asking for the meeting to be cancelled as he was not willing to complete the three month period and requested a mutual settlement of four months.

47. Jane Hockey and Dr Jon Blackburn met the claimant again that day to make it clear the respondent would not consider a settlement at that level. Dr Jon Blackburn wrote the options down for the claimant, which have not been re-produced at the tribunal hearing. The claimant accepts that he said that he would leave the following day. Dr Jon Blackburn asked for clarification as to whether he was resigning, the claimant instead pointed to the settlement option Dr Jon Blackburn had written down and all parties understood at this point, the claimant was going down the settlement agreement route at the level the respondent offered.

48. Dr Jon Blackburn raised with the claimant what message he wanted him to communicate with the team. A discussion took place whereby the claimant said he did not care what they would say to his colleagues as to the reason for departure, (which the claimant confirmed in his evidence). Jane Hockey suggested that they say he had left to explore other opportunities and the claimant did not object. Again, there was no evidence that either party referred to this as a protected conversation. We do not find that in this meeting the claimant was threatened with a bad reference. If any discussion around the reference took place it would have been a reference that would have been agreed as part of the settlement agreement. Indeed, the settlement agreement refers to a reference in the standard form. We accept Dr Jon Blackburn's evidence that managers were trained not to give references within the respondent.

49. Dr Jon Blackburn sent an email on 28 July at 1656 hrs, to say that a verbal agreement had been reached and the claimant was leaving today and further that "*once the document was signed we can let the team know he decided to move on and seek alternative opportunities*".

50. Later that evening the claimant texted Dr Jon Blackburn to advise, *"I am afraid I need to come and collect my stuff tomorrow as I am going on a long trip and I need to take some of those things with me."* It was arranged that he was coming in at 0900 hrs the following day.

51. On 29 July 2016, the claimant attended work. He was asked to return his laptop and ID badge. He went to his desk to collect personal belongings and in oral evidence it was accepted that he tore up his CPD certificate but could not recall where this was left. He did not speak to his colleagues. We find his intention at this point was to leave and not come back. All of his communications and behaviour is consistent with his approach to that point.

52. On 1 August 2016, the claimant was sent by email from Jane Hockey a copy of the settlement agreement containing the offer the respondent had understood the claimant had agreed. The document was marked 'without prejudice' and 'subject to contract' making no reference to a protected conversation under s.111A Employment Rights Act 1996 either in the document or covering email.

53. On 2 August 2016, Jon Blackburn emailed the team to notify them the claimant had left employment. By 10 August 2016, the claimant had instructed Mr Jackson to provide advice on a settlement agreement.

54. On 11 August 2016, Mr Jackson emailed Jane Hockey confirming the claimant was looking for four months or classification as redundancy. On Friday 12 August 2016, Jane Hockey rejected the offer and advised that if the claimant no longer wished to take the settlement agreement, she would ask that he return to work immediately and without delay. The claimant from this point expressed no indication that he wanted to pursue the settlement agreement as offered any further and there were no further discussions on the point.

55. On 15 August 2016, the claimant submitted a fit note saying that he was not fit for work due to an acute stress reaction and was signed off work until 12 September 2016. The covering email advised that he was currently on medication and not in a stable condition. He asked that in order not to complicate the situation further that he was not contacted for any reason whilst on medical leave and that Mr Jackson as his solicitor should be his point of contact. At all times he remained an employee and was able to provide detailed instructions to his solicitor in the form of grievances etc that followed.

56. On 16 August 2016, an employee of the respondent told a third party that the claimant was no longer there. The claimant brought proceedings in the County Court for breach of data protection which we are told are settled. The only relevance to these proceedings is that the issue formed the basis of a formal grievance submitted by Mr Jackson on the claimant's behalf on 18 August 2016. The grievance was investigated and reported back to the claimant.

57. On 22 August 2016, the claimant via Mr Jackson, raised a grievance about the performance management process. On 23 August 2016, the claimant submitted a Data Subject Access request which was dealt with.

58. On 26 August 2016, Jane Hockey wrote to the claimant via Mr Jackson to advise that the performance management issue should be dealt with as part of the performance management process, not as a separate grievance. The grievance had the desired effect to delay matters and the review meeting scheduled for 24 August 2016 was postponed and Mr Jackson was asked whether, given the claimant had submitted extensive documentation in his absence, he wished to proceed with the review

meeting. He was told that alternatively, a decision may be made in his absence and she requested advice as to what steps the claimant had taken to facilitate his return to work.

59. The claimant was signed off work from 8 September 2016 to 22 September 2016, with work stress and submitted a fit note accordingly.

60. The claimant was signed off with work stress from 21 September 2016 to 5 October 2016 and again submitted a fit note accordingly. During this period the claimant was on full pay.

61. By letter dated 23 September 2016, the claimant was invited to a performance management meeting on 30 September 2016, by Dr Rob Scudamore. The claimant was given the option, if he felt unable to attend in person, to participate by phone or provide written submissions. The claimant had of course during this period felt able to submit lengthy grievances on a variety of matters. The claimant was provided with a report by Dr Jon Blackburn which found two of the eight objectives for the review period were on track to be 90 – 100% complete, but the remaining objectives were between 0% and 30% complete. The claimant did not attend the meeting. The review period had now passed some 4 weeks earlier but the claimant had only completed 2/3 of the review period at work.

62. On 3 October 2016, the claimant was invited to attend an Occupational Health appointment on 6 October 2016. By email dated 5 October 2016 the claimant asked to rearrange the Occupational Health appointment as he was suffering from flu. This took place instead on 13 October 2016.

63. By letter dated 6 October 2016, the claimant was advised that the review meeting concluded that the matter should move to the next stage of the formal procedure. By letter of the same date, the claimant was invited to attend a capability hearing on 13 October 2016. He was given the right to be accompanied and given a possible outcome of the meeting as dismissal. He was invited in the alternative to submit written considerations. The meeting was said to be with Mike Russell.

64. By email on 12 October 2016 at 2234 hrs, the claimant confirmed he would not attend the meeting the following day and submitted a seven page document for consideration. In light of this email, Mike Russell decided to postpone the meeting to investigate the points the claimant raised. We were also shown a document which showed that the claimant had more SCP opportunities entered in the CRM system than his colleagues, yet zero conversions compared to a 50% rate of conversion for others.

65. On 13 October 2016, the claimant had a telephone appointment with Occupational Health. This was supposed to be face to face but the claimant did not attend, instead he had a telephone assessment. The Occupational Health report recommended that the claimant was well enough to attend the meeting to discuss his performance. The claimant

told Occupational Health that he was seeking a legal resolution to the dispute and therefore could see no point in meeting with the said parties. However, he did state that he was in contact with HR and the directors, although he had not been in touch with his line manager.

66. On 18 October 2016, Jane Hockey wrote to the claimant to confirm an investigation was undertaking into the allegations he raised about the performance management process.

67. The claimant was signed off with stress at work and a chest infection from 20 October 2016 and 3 November 2016. He provided a fit note to the respondent to that effect.

68. By letter dated 25 October 2016, the claimant was invited to a reconvened capability hearing on 28 October 2016. Given the occupational health report the respondent expected the claimant to attend. The claimant was sent the outcome of Dr Russell's investigations into the issues he had raised.

69. By email from Mr Jackson on the claimant's behalf on 27 October 2016, he confirmed the claimant would not be attending the capability meeting the following day.

70. The claimant was signed off with stress at work from 2 November 2016 to 16 November 2016. The claimant submitted a fit note confirming this to be the case.

71. By letter dated 8 November 2016, the claimant was informed that he was dismissed on the grounds of performance. His last day of employment would be 8 December 2016. By this time (unlike when he was given his final written warning) the claimant had acquired two years service. Accompanying the letter Dr Russell detailed rationale for his conclusions including the outcome:

"Following receipt of the final written warning on 3 June 2016, (which I note you did not appeal), and given your continued under performance and the apparent lack of understanding on your part as to what is required of you and how to achieve the level of performance that is expected as a project leader, despite clear achievable targets having been set as part of the performance process, I feel now we have no choice but to move to dismissal on notice on the grounds of performance."

72. On 8 November 2016, the claimant emailed a number of directors informing them he had appealed his dismissal and highlighting that he had submitted a statement explaining incidents of scientific fraud made by Jon Blackburn some time ago during his employment. The statement ran to six pages of extensive information which must have been written by the claimant or on the basis of detailed instructions given by him.

73. By letter dated 15 November 2016, the claimant was made aware that the allegations he raised against Jon Blackburn which were potentially very damaging personally and professionally, would be dealt with by way of a disciplinary investigation upon his return to work. No such disciplinary investigation ever took place as the claimant never returned to work given he was already under notice at this point.

74. By emails dated 15 November 2016, Mr Jackson submitted an appeal on the claimant's behalf. There then followed a lengthy set of correspondence with Mr Jackson and the respondent over the contents of that appeal. Throughout this period the claimant continued to be in a position to provide his solicitor with detailed instructions as to the various matters and there was extensive correspondence between Mr Jackson and the respondent in addition to the detailed statement at paragraph 72 above.

75. The claimant was signed off from 16 November 2016 for three weeks for 'stress related problems'. The claimant submitted a fit note confirming this to be the case.

76. By letter dated 24 November 2016, the claimant was invited by Sarah Smith (HR), to an appeal meeting on 29 November 2016 with Christopher Wiesner (CEO). The claimant was given the right to be accompanied and invited to provide any documentation in advance of that meeting.

77. By email dated 28 November 2016, Mr Jackson confirmed on the claimant's behalf that he would not attend the appeal hearing.

78. During this period, Dr Norris completed an investigation into the claimant's 'protected disclosure' and 'whistle blowing' claim. He prepared a report which ran to two sides and concluded, based on his investigations, there was no evidence to support the allegations regarding scientific fraud made by the claimant. This report was sent under cover of a letter dated 11 December 2016 to the claimant from Sarah Smith (HR). Unhelpfully this was then signed off with the wrong name but we found Dr Norris to be an honest witness. Dr Norris confirmed that it was not possible to recreate the events to examine the scientific data produced and thus establish as a fact whether or not fraud had taken place and that the alleged witness, a colleague of the claimant's denied the events had occurred. We also heard evidence from the claimant and Dr Blackburn on the fraud issue. The funding was not dependant on the outcome so there was no financial advantage to Dr Blackburn carrying out the scientific fraud either personally or for the company and the risks to his professional reputation would be great.

79. By letter dated 19 December 2016, the claimant was informed that his appeal was not upheld. The rationale for the decision was set out in detail over seven pages. The outcome letter made reference to the settlement as a situation covered by protected conversations.

80. Sometime later after proceedings commenced by email dated 22 June 2017, Mr Jackson on the claimant's behalf, corresponded with the respondent's solicitor and Jane Hockey requesting confirmation of the wording for a reference as the claimant's new job required a satisfactory reference. No reference is made in this email, as the claimant now alleges to any conversation concerning references at that meeting on the 27 July 2016 meeting. On 26 June 2017, the respondent's solicitors replied to confirm that a reference would be in the standard format providing employment dates and a job title. We have considered that if the claimant had been told as he now alleges this would have been referenced here or in the ET1. We have considered this as a factor in why we preferred the respondent's evidence on this point as set out above.

81. The respondent has not directly replaced the claimant since dismissal. The respondent's evidence was that it had been extremely difficult to recruit a replacement for the claimant due to his speciality in laser cutting. It was difficult to recruit laser cutting expertise in the UK. We accept that evidence.

Conclusions

Protected conversations

82. Dealing first with s.111A Employment Rights Act 1996 there is a potential overlap between this and the without prejudice rule. It was agreed between the parties that neither party relied on the 'without prejudice' rule so we did not consider the without prejudice rule further, as this had been waived by agreement.

83. We noted that neither party referred to protected conversations at any of the July meetings or in the settlement agreement or covering email, but they clearly fall within s.111A (2) of the Employment Rights Act 1996.

84. We considered whether the parties can agree to admit as evidence protected conversations in the same way that without prejudice conversations can admitted into evidence if the without prejudice rule is waived by agreement. We have considered the decision of the Employment Appeal Tribunal in Faithorn Farrell Timms LLP v Bailey [2016] and that the waiving by agreement is not true for protected conversations. They case law is clear that they cannot be included by agreement or by waiving the usual protected conversation rules. They can only be admitted in evidence in so far as the tribunal considers it just if either party has committed improper behaviour during the settlement agreement negotiations.

85. We have considered s.111A (4) Employment Rights At 1996 and whether anything said or done in the tribunal's opinion was improper or connected with improper behaviour and if so, the protected conversation is only inadmissible in so far as we consider it just.

86. The ACAS Code of Practice on Settlement Agreements (2013), paragraph 17, states that improper behaviour includes that which is regarded as unambiguous impropriety under the 'without prejudice' rule. The ACAS Code gives examples of non-exclusive improper behaviour at paragraph 18 which we have consulted.

87. We have applied the two stage test set out in Faithorn Farrell Timms LLP v Bailey,

Was there improper behaviour by either party during the settlement agreement negotiations?

88. The first step is to decide when the settlement agreement negotiations took place. We conclude that the settlement agreement negotiations started on 25 July and that on 28 July, and the correspondence around that time, the negotiations continued. The negotiations had concluded by 15 August which was a Monday when the claimant submitted his sick notes. The parties in the preliminary hearing, before Employment Judge Sigsworth on 29 August 2017, referred to a period of 25 – 29 July. In our view this is too limited as it is clear that the settlement agreement sent on 1 August, and the emails concerning it, are also included within the settlement negotiations. Therefore, the first decision is to consider the period in which we are examining before determining whether there was any improper behaviour. We find that the relevant period was 25 July 2016 to 12 August 2016, or at the very latest, 15 August 2016 given there was only a weekend in between which was not a working day. The relevant findings of fact included in this period are paragraphs 38-54 inclusive.

89. We have first considered the claimant's case for what he alleges constituted improper behaviour by the respondent. The claimant relies upon the events on 25 July where his case is that he was told he would be dismissed. We find, as above at paragraph 42-43 , that this is not what was said, but we prefer the case as pleaded in the ET1 paragraph 22, that the claimant was told that he was at risk of being dismissed.

90. We have considered the claimant's case that he was told he would be dismissed, he would have to leave immediately, he had no right to speak to anyone, that he not be able to get a satisfactory reference and that it would reference dismissal. This is said to include both the discussions on 25 July 2016 and those with Jane Hockey on 28 July 2016, where she reiterated the reference point. Given our findings of fact we do not accept that this is a correct recollection of what happened. Nor do we accept that the claimant felt that he had to accept the settlement agreement, *"under heavy indoctrination".* He has a choice.

91. We do not find that he was told he was dismissed as a findings of fact. The wording in the ACAS Code of Practice, 18B (2) references language like you will be dismissed, not may, or at risk of, as we have found one

option have been said in this case. It therefore follows that it was not improper conduct because it did not happen as alleged.

92. The claimant relies on the fact he was told he had to leave immediately and not speak to anyone. Again, we have found that this did not happen on our findings of fact. We therefore cannot accept that it is improper conduct.

93. Similarly, with regard to being told that he would not get provided with a satisfactory reference, we have found on our findings of fact that this did not happen and therefore it follows that on these findings of fact, it cannot constitute improper conduct.

94. Turning to the allegation of improper conduct by Jane Hockey and the reiteration of the bad reference, again, we have found on the findings of fact that this did not happen and therefore this cannot be improper conduct. We have considered the claimant's submissions that the undue pressure he was put under amounts to improper conduct. We have considered this in terms of timing. Paragraph 12 of the ACAS Code of Practice says that, *"In order to consider the proposed settlement agreement, the general rule is 10 calendar days to consider proposed formal written terms of the settlement agreement and seek independent advice."*

95. The claimant was asked to consider both options, (PIP / settlement), and there was to be a discussion on Thursday. There was a text the same day that the claimant had to provide a decision by lunch time as set out in paragraph 44 of our findings of fact. We accept that this is a short time scale, but this was to consider option A or B, (PIP/ settlement), not as paragraph 12 of the ACAS Code of Practice suggests, the formal written terms of a settlement agreement. It needs to be taken in context.

96. The written terms of the settlement agreement were sent to the claimant to consider on 1 August 2016. Mr Jackson first approached the respondent in that period on 12 August 2016. There is no evidence after 1 August, (written terms sent), that the respondent contacted the claimant. He was not chased, he was off work, no one had questioned his whereabouts having collected his belongings. He was not chased with regard to where the signed settlement agreement was, he was not under any pressure to agree to sign, he was not given deadlines or ultimatums, but they simply urged him to take independent advice without a deadline. The text above was taken out of context when you consider the facts of this case. If one took the text in isolation, one may consider that the claimant was placed under undue pressure, but not in the context of these proceedings and the fact that the claimant, for ten days had the settlement agreement yet did not return it to the respondent, and that at no time was he chased on the written terms. The text was not to return the settlement agreement or sign it merely to indicate if he was interested in the principle.

97. The next matter that the claimant relies upon as improper conduct is the email sent on 2 August 2016, by Jon Blackburn, concerning the claimant and that he had left the respondent. It is said that this was improper, unauthorised and untrue. As at 2 August 2016 when the email was sent, the claimant had collected his belongings on 29 July 2016, stating he was going on a long trip and had agreed the proposal of the settlement agreement, cancelling the meeting for the three month review. The respondent, understandably, was under the clear impression that he was leaving. The communication reasons were agreed expressly in the meeting on 28 July 2016 by the claimant. We have therefore found as a fact that this email was not expressly untrue and as the claimant had raised no issues with its contents, in effect he was in agreement with its contents.

98. The claimant was on a period of authorised leave, but not annual leave. At the time the email was sent, he was entertaining a deal and had agreed, albeit the settlement agreement was not signed. To say it is untrue and unauthorised is not correct. Clearly it is not ideal and in an ordinary case the respondent should have waited until the signed settlement agreement was sent back. Jon Blackburn understood the need to wait, however, we accept the respondent's explanation as to why that email of 2 August was sent when it was sent. Staff had witnessed the claimant collecting his belongings and ripping up his CPD certificate and were questioning where the claimant was. In these circumstances we do not find it unreasonable, let alone improper conduct by Jon Blackburn. As set out in oral evidence, the claimant had taken his possessions, left the building. He had not left the company but he was absent without leave and given the extensive discussions, it is clear that the respondent felt that they had an agreement.

99. Now turning to the respondent's allegations as to improper conduct. The respondent relies on the 29 July 2016 incident where he tore up his CPD certificate. We found that the claimant did rip up his CPD certificate, something the claimant accepts himself. It is agreed that this happened, but the question is whether this is improper conduct. We do not feel this is anywhere near sufficient to constitute harassment, bullying, intimidating, aggressive behaviour or threatening and physical assault as set out in the ACAS code of practice. So, in our view it is not improper behaviour. It must be more than unreasonable. We have considered unambiguous impropriety and considered that this has an even narrower definition than improper behaviour. This is designed to cover perjury, blackmail and other equally serious forms of conduct akin to criminal behaviour and so is not applicable here. The claimant acted unwisely and unreasonably but not improperly.

100. The second kind of improper behaviour relied on by the respondent is the fact the claimant made omissions as to the protected conversations in his ET1 to paint an alternative picture. We do not find that this to be improper conduct in this context as it is not within the period concerning the negotiations firstly so is not relevant as the conduct must take place within the scope of the protected conversation not sometime later. In light of

s.111A Employment Rights Act 1996 and the issue that the parties' cannot consent, we have taken on board with Mr Jackson's comments, in paragraph 48 of his reply to the respondent's closing submissions that he did not disclose details because he believed he should not as this was a protected conversation under s.111A Employment Rights Act 1996. We therefore find, not only did this not occur within the relevant period, but even if it had that this would not constitute improper conduct. It was proper for Mr Jackson to so exclude it given the nature of the claim.

101. Given our conclusions that during negotiations, neither party committed or conducted improper behaviour. We find that paragraphs 38 to 54 inclusive need to be excluded from evidence as they relate to pre-term negotiations in respect of the unfair dismissal claim. We agree with Employment Judge Sigsworth that it is all or nothing in this period where the protected conversation was taking place, ie 25 July 2016 to 15 August 2016. We cannot cherry pick which parts to include to complete the picture.

102. This leaves us in a position where we must consider the case again against the following factual background for the purposes of the unfair dismissal complaint. The findings of fact that can be relied upon for the unfair dismissal claim in lieu of paragraph 38-54 are that the claimant concluded two out of three months of his review period. He was absent from 25 July to 15 August, at which point he went off on long term sick and did not return. As he was absent from work he did not conclude the third month of the review period. We therefore cast the other findings of fact from our mind to consider the issues in relation to the unfair dismissal claim.

Unfair Dismissal

What was the reason for the claimant's dismissal?

103. The respondent contends capability, the claimant submits that his dismissal was for redundancy and that there was a breakdown in the working relationship.

104. We do not accept that redundancy was the real reason for the claimant's dismissal. The claimant was not directly replaced but this was due to a difficulty with recruitment. It is clear that Mike Russell the dismissing officer, had in his mind the evidence of the claimant's poor performance over a prolonged period of time. This had gone on and been discussed with the claimant over a prolonged period before giving him a final written warning and a PIP issued after the meeting on 26 May 2016. At that point the claimant did not have sufficient service to bring a claim so if the respondent wanted to dismiss him for any reason other than capability that was the time to do so. But the respondent's evidence was that they set a PIP to try and help the claimant meet the required standards. In our view the evidence of capability is overwhelming and discharges the respondent's burden of proof as to the reason of dismissal.

105. For completeness, we also consider the suggestion that there was a break down in the working relationship. This came about more latterly given a comment by the appeal officer following the claimant's allegation of fraud against Dr Jon Blackburn and that the two could not work together again. It did not factor in the decision of Mike Russell who was the dismissing officer. At that time the claimant had been off sick for a prolonged period and in the run up to that sickness the claimant and Dr Jon Blackburn had weekly meetings and Dr Jon Blackburn provided support to the claimant to meet his PIP. They were working together at the time of his dismissal, apart from the fact that he was off sick.

106. It is also highly relevant that the allegations the claimant made came after the dismissal itself and whilst they may well have affected the working relationship, this was not the case at the time of dismissal. In essence the claimant accused his line manager of fraud and this may have impacted on the relationship but this came after dismissal. Dismissal was totally unconnected with the allegations the claimant made and there was no relationship breakdown before he accused his line manager of fraud. It was therefore not a factor in the respondent's mind or that of the dismissing officer and cannot be the reason for dismissal.

107. Whilst the claimant has criticised the respondent's application of the capability process which we have dealt with below, it was clear to us that the claimant was on a final written warning and his performance had not improved sufficiently. He had not met his PIP and whilst he clearly still does not accept that, the evidence in that regard is overwhelming. The respondent has clearly established that the reason for dismissal was capability.

Did the respondent act reasonably in all the circumstances in treating that reason as sufficient to dismiss?

108. In regards to the process, we find that the respondent did follow the ACAS Code of Practice and that steps were taken, warnings given and invitations to meetings sent. The claimant was given written outcomes and given the right of appeal. The position, as at the 26 May 2016, was that the claimant was given a final written warning which he did not appeal. He recognised his performance was an issue certainly at that stage. This is the starting point for what follows and the dismissal.

109. The claimant invited us to find the final written warning wholly inappropriate now. In Wincanton Group v Stone (UK EAT/0011/12, albeit the case was related to conduct rather than capability), the EAT gave guidance on how previous warning should be weighed in assessing fairness of a decision to dismiss. We cannot go behind that warning as being manifestly inappropriate. In fact the respondent did not chose to dismiss the claimant then despite him not having the requisite service to bring a complaint. He was given a clear final warning and a chance to improve which unfortunately failed.

110. Again, we look at the evidential background of appraisals and mid-year appraisals since August 2015. The claimant was aware, or certainly ought to have been aware that there were issues with his performance. Fortnightly meetings were in place. By January 2016 he did not meet expectations in several areas in his appraisal. Meetings went to weekly. He entered informal performance management at that point. By May he had once again failed to progress sufficiently.

111. We do not accept the claimant's submission that the targets were uncertain. By this time there were six objectives which clearly break down into specific tasks, quantifiable visits or straight forward monetary targets. Targets were in our view SMART. It was not that the claimant was for example told he needed to improve his marketing under reputation. He was told he should carry out two external presentations, one published paper and two smaller marketing activities. There was no room for doubt as to what was expected of him. It is not always the case that an employer makes it so explicit what was expected of the employee but this is certainly not one of those sorts of cases.

112. The claimant submits that the time period had not been met. We do not accept that the respondent needed to wait until the end of the financial year before taking action. The significant failings that were evident in May 2016, were such that a formal warning was appropriate. As Dr Jon Blackburn said in his evidence, he would be failing in his line management duties to take no action. Objectives have to be progressed incrementally and a lack of progression cannot be ignored. We remind ourselves that what warning we would have given the claimant is not a consideration as we cannot substitute our view. At that time the claimant did not have two years' service so could have been dismissed without the ability to bring an unfair dismissal complaint. He could have been given a first written warning or a final written warning. We cannot say that a final written warning is so manifestly inappropriate to go behind the final written warning. It is clearly within the range of reasonable responses in a case with such a clear background of performance issues.

113. What then followed was the PIP. We find that these targets were clear. Again, broken down clearly into specific targets and completion dates said to be at the latest, three months later. The claimant agreed the document as he clearly considered them achievable, with the exception of the external presentation as he commented that this was caveated with the availability of events. Until the claimant left work he understood the targets and agreed to them. He agreed to the PIP that was set on 1st June 2016 to run to 26 August 2016 by signing the appropriate forms no less than six times in this period without raising any issue other than the availability of suitable events for the external presentation.

114. We have considered the capability procedure and the claimant's submission that the outcome of stage two is a verbal or written warning We note that in serious cases of unsatisfactory performance, the final stage can be used. This includes final written warning / dismissal. The

letter inviting the claimant to the meeting in May refers to a final written warning as a potential outcome, this is under the disciplinary policy. We were referred to the disciplinary policy which permits a final written warning for a first offence if it is sufficiently serious and it is clear that disciplinary policies are intended to cover, *"standards of work"* and failure to improve as these are expressly covered. Grounds of dismissal include capability under that procedure.

115. Given the respondent's position is that the disciplinary policy is used and that this was made clear to the claimant in the invite to disciplinary, and this is a permitted use, it is not correct to say that the respondent did not use its capability procedure correctly. The respondent has a discretion to use either policy as both are said to apply. It chose the disciplinary policy and made this clear to the claimant. Even if it had chosen the capability procedure it could have taken the view that the final stage should have been used given the history of performance issues. Given our conclusions above, that a final written warning was in the range of reasonable responses given the background, we cannot find it manifestly inappropriate and go behind it. This is the starting point for what followed

116. Therefore, we move onto consider the events between the final written warning and dismissal. We know from our findings of fact, that weekly meetings occurred and we have seen notes of these meetings where progress was discussed and lack of progress highlighted. It is agreed two months of this review period was completed. We now turn our mind to whether the claimant should have the opportunity to complete the third month and effect on the respondent's decision to dismiss for in effect performance over a period of two thirds of set down period for the PIP.

117. Although he only completed two months, he was employed for a period when he was off sick. The performance review meeting scheduled to 24 August 2016 was rescheduled due to his ill health absence to 30 September 2016. A decision was taken in his absence to proceed to the next stage of the performance management process. He was invited to a meeting on 13 October 2016 and during this period Occupational Health, on 13 October 2016 stated the claimant was fit to attend the meeting. The claimant did not so attend. By this time, he had been off sick eight weeks and it was six weeks after the review period would have ended. At this point the respondent could either have made a decision on the evidence it had, or await the claimant's return for four weeks to complete the period.

118. In the circumstances where we have found as a fact that two of the targets were on track and six were between 0 – 30% complete, against this background we do not consider the respondent's decision to proceed on two thirds of the final period of evidence unreasonable. We may have taken a different view if the claimant was closer to meeting his targets when such a high proportion of his objectives were neither partially met or at best 30% met. We fail to see then how an additional one month, (one third of the period), would have made sufficient difference to allow any

substantial effect. The claimant is in essence asking us to consider that following a period of lengthy absence he could immediately come back to work, turn it around and perform a miracle. He is asking us to find that in essence he would achieve 70-100% of the remaining objectives in just 4 weeks which is simply not credible.

119. We have considered whether the claimant had a reasonable opportunity to improve. What constitutes a reasonable improvement period would depend on each case. In this case he was given three months after the final written warning but completed two months. Was this a reasonable opportunity to improve? Taken in isolation, this period of two months in two plus years of employment may not be sufficient, but in this case the two month period was in the context of three month targets which were clear and reasonable. Further, the claimant had the same objectives for 2016 as he did for 2015, albeit some of the values had changed. The goal posts had not moved. The claimant ought to have been clear what was expected of him and between August 2015 and July 2016, (completion of two month period), he had failed to meet in full or significantly, these objectives.

120. Further still, after the final written warning the respondent had set out a clear PIP which gave a three-month target. The claimant ought to have been clear following the final written warning (even if it escaped him before) that if his performance did not improve, he could be dismissed. He had a clear warning in the letter and clear specific tasks to meet his target. Even two thirds of the way through in terms of time, that specific task list was only on track to meet two objectives and at best 30% of the remaining six. In the context of the overall picture, the claimant had a reasonable opportunity to improve. Even taking the two-month window, we also find that the claimant had a reasonable opportunity to improve, as the claimant knew what expected, had weekly meetings in which he agreed everything recorded in the written record, and yet was significantly failing to meet those targets. This was despite the fact that it would have been apparent to him that he was running out of time. His time to meet his objectives or even come close to doing so was fast eroding. The decision to place him in the formal process was not taken out of the blue but against the backdrop of underperformance at any time.

121. We have considered the allegation the claimant makes, that there was a lack of training that makes the respondent's actions unreasonable. The claimant has failed to establish what training in his case would have made a difference to meeting his targets, particularly in the PIP period. He made no such requests for specific training.

122. In addition, we have in our mind that the claimant did receive some training which was set out in his annual appraisals. The claimant's position and his evidence to the tribunal was that the claimant did not feel he needed such help. This was certainly the impression he gave the respondent's witnesses. As found above, the claimant also confirmed in the final written warning meeting that there were no question of Dr Jon

Blackburn not supporting him and there was not anything else Dr Jon Blackburn could do to help. This is entirely consistent with the claimant's evidence and Dr Jon Blackburn's evidence that the claimant did not feel he required additional training. This is borne out in the circumstances of this case where the claimant is in denial that really there is an issue. It is evident that he failed to recognise that there were issues with his performance that required addressing. He felt he did not require help so it is not clear what steps the respondent could have taken when faced with this denial.

123. When analysing the PIP, it was clear that many of the targets do not require formal training, just action. For example, performing an external visit, performing one small marketing activity, identifying two internal courses relevant to your skills, the latter of which is one the claimant had actually achieved. We do not find that the claimant ever asked for anything specific with regard to training and it was clear from his evidence he felt that any failings were down to others not as a result of any lack of knowledge or application on his part.

124. The claimant also makes an allegation about lack of support and favouritism. This is despite the claimant identifying in the final written warning meeting that he could ask Dr Jon Blackburn for support, if he needed it, he had always asked for help and that there was nothing further Dr Blackburn could do. Nevertheless, this allegation was put to Dr Jon Blackburn in cross examination and denied. The claimant had more SCP opportunities entered in the CRM system than his colleagues, yet zero conversions compared to 50% rate of conversion for others. We note that the PIP targets were largely business development related rather than conversion of leads. Even if the claimant is right, (which we do not accept), this would have related to some objectives and still not made a difference to the overall result. Many of the objectives were within his gift but he simply felt that he needed no help, there was no need for improvement and everything was fine.

125. The claimant submits that the dismissal was not reasonable because he was subject to unrealistic targets. As we have set out above, the claimant never raised this at the time and indeed contrary to Mr Jackson's submissions, we heard that the claimant did agree the PIP and indeed raised one caveat, (and only one), which he was concerned about. We reject the suggestion that he did not have an opportunity to disagree with those targets. He made one suggestion which was taken onboard and signed the PIP off. Given the targets were largely within his gift not totally sales dependant he could have turned his mind to them

126. The claimant further submits that no explanation has ever been given for why failure to meet annual targets should mean automatic dismissal. We do not accept this. The claimant failed to achieve his annual targets. In 2014 these were adapted but concerns raised as early as February 2015 yet even by May 2016 those same target topics still showed as a concern. Those targets were given in 2016 and 2015 and formed a fundamental

part of his job description and thus the job he was employed to do. His role was not a purely academic one and there was the need to cross into the commercial world and get results. This appeared to be the nub of the issue.

127. We have considered that the performance management process concluded whilst the claimant was off sick impacts on the fairness of the dismissal. There was no clear indication that the claimant would be in a position to return to work anytime soon. He had disengaged himself from the process instead giving Mr Jackson his voice to deal with all internal meetings from mid-August 2016. He asked the respondent to correspond with Mr Jackson instead of him from 15th August 2016. He did not attend the subsequent performance management meeting or appeal meeting. This was despite the occupational health evidence from the 13th October 2016 that he was well enough to do so. The claimant told occupational health he was seeking a legal resolution to the dispute and saw no point in meeting the parties. This was prior to dismissal. As such we felt that the respondent was left with no alternative but to proceed in his absence and had due regard to the written submissions he made. We do not find that this was unreasonable when the occupational health evidence was that he was fit enough to attend and the delays could not continue. The claimant had not been in work since 25th July and there was a delay in over three months before he was dismissed.

128. We do not accept the claimant's submissions as the various management failings of Dr Jon Blackburn. He followed a process, it may not be the one Mr Jackson would advise but there is not an expectation on Dr Jon Blackburn to leave no stone unturned. He offered support even when it wasn't wanted or needed in the claimant's eyes. In our view there is an ongoing failure of the claimant to recognise there is an issue which needed to be addressed and that he needed to personally take responsibility for some of the issues and address them. We are not suggesting as Mr Jackson submits that the respondent considered that the claimant is stupid, whilst he was clearly the opposite and incredibly bright he simply refused and still refuses to accept that there were issues with his performance. In order to improve there needs to be some recognition that this is the case so help can be accepted and provided.

129. In light of the above we do not find dismissal against the factual background and the final written warning to be outside the range of reasonable responses. The claimant has not highlighted any vacancies he ought to have been considered for and Dr Russell considered this point at the dismissal stage and that there were no alternatives. It is not for us to substitute our view. This was within the range of reasonable responses given the overwhelming evidence and prolonged period of underperformance.

If the claimant was unfairly dismissed, should any compensation due to him be reduced on the basis that:

Contribution – The claimant caused or contributed to his dismissal by culpable conduct?
ACAS Code of Practice – by not attending meetings after 28 July 2016

If the claimant was unfairly dismissed should any compensation due to him be uplifted on the basis that the respondent acted in breach of the ACAS Code of practice in the manner set out in paragraph 90 of the ET1?

130. We have not considered the reductions if the dismissal was found to be unfair as any contribution or uplift would at best be minimal.

131. We have considered the size of administrative resources of the respondent. We consider the expectation on this to be greater due to their size and resources. However, for the reasons set out above, we do not consider the dismissal was unfair in all the circumstances of this case.

Does the respondent prove that it adopted a fair procedure the claimant would have been dismissed in any event, expressed as a percentage chance/passage of time?

132. We are bound to say that if we had, (contrary to the above conclusions), found that dismissal was procedurally unfair in the ways the claimant alleges, we feel it would have been inevitable the claimant would have been dismissed. It was 100% likely given his performance towards the PIP, the question is therefore, what further passage of time would that dismissal have occurred. We believe at best this would have been one month, ie allowing the claimant to complete month three out of three. However, for the reasons already stated we do not consider that it was likely the claimant would have met those targets even in another three months. The gulf was huge and we do not think he could perform such a miracle.

Section 43B detriment from protected interest disclosure

Did the claimant make a qualifying disclosure in the public interest within s43(B) (a) (b) or (f) ERA 1996 in his grounds of appeal against dismissal 15 November 2016 in making the statement set out at paragraph 74 of the ET1?

In particular - Was the disclosure information?

133. The respondent accepted at the final hearing for the first time that the information disclosed on 15 November 2016 was disclosure of information. We accept that concession.

Did it tend to show (a) a criminal offence being committed namely the scientific fraud committed by Jon Blackburn (b) breach of a legal obligation – Jon Blackburn breaching his contract of employment and the duty owed to his employer (f) concealment of the above?

134. The respondent accepted at the final hearing for the first time that the information disclosed on 15 November 2016 tended to show that a criminal offence had been committed. We accept that concession. The information disclosed was in principle a disclosure of information within s43B.

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

135. The respondent does not accept that the claimant reasonably believed the disclosure was in the public interest. Considering the limited relevance of the protected disclosure to only one issue (the appeal) it occupied both a significant amount of hearing time and deliberation time by the panel.

136. We accept that the subject matter of itself could be in the public interest. It was an issue that went beyond the claimant personally, it went to alleged criminal offences and the validity of scientific results produced by the respondent.

137. The question is did the claimant reasonably believe this to be the case. We have considered the Court of Appeal guidance in Chesterton Global Ltd v Nurmohamed [2017] IRLR 837 (a) whether the worker subjectively believed at the time that the disclosure was in the public interest (b) if so whether that belief was objectively reasonable. We accept the claimant's submission that belief in the public interest need not be the predominant motive for making the disclosure.

138. According to Babula v Waltham Forest College [2007] EWCA CIV 174 the claimant does not have to prove the facts/allegations were true as long as the worker subjectively believes that the relevant failure occurred or is likely to occur. In essence if the claimant believes this to have happened, we find it would be in the public interest but if the claimant made that statement knowing it to be false it cannot be said that he subjectively believes that failure.

139. We are invited by the claimant in his submissions to find that the claimant at the time he made the disclosure had an attack on conscience because of the continuing dishonesty of Dr Blackburn and the respondent's blind eye in relation to this as well as repercussions within the scientific world itself requiring utmost good faith, that the truth needed to be revealed in the public interest.

140. The claimant chose to make the disclosure in his appeal letter. He circulated it to a number of directors within the business. The disclosure came only after he had been dismissed. The disclosure document stated that "*if this matter is not satisfactorily resolved I will resort to the Employment Tribunal. Because I believe that I have been unfairly dismissed. We have already lodged a County Court claim under the Data Protection Act. You will understand that I do not make idle threats*."

141. For the purposes of the detriment claim we do not need to disregard paragraphs 38-54. We can therefore consider the full background. The

claimant asked for more money under a settlement agreement which was rejected and then he appeared to take it. He sought advice and an increased offer was sought which was again rejected. He was then seeking legal advice and Mr Jackson corresponded with the respondent from mid August until he was dismissed. Matters were delayed by the claimant not attending meetings and being signed off sick. The claimant is then inevitably dismissed and it is only at that point that he asks us to accept that his conscious meant he felt he needed to say something. We can understand whilst still employed an employee may not fee comfortable with raising matters. The claimant took no steps whilst in employment to bring this matter to the attention of management above Dr Blackburn.

142. The timing of the disclosure is questionable as some significant period of time (close to 2 years) had by the time he made the disclosure past. We spent a considerable amount of time debating the issue of reasonable belief as a panel. One member of the panel felt extremely strongly that the claimant did not have a reasonable belief. The manner and timing of the disclosure at a time when the claimant was making “threats” (to use his own words from the same document) and trying to settle his dispute with the respondent are in all our minds relevant to whether the claimant reasonably believed the disclosure was in the public interest.

143. We are not assisted by the investigation into the allegations as we are told and accept that it is not possible to exactly recreate the subject matter of the scientific fraud allegation. Therefore as a matter of fact we are not assisted by an analyse of the scientific data. Mr Morris confirmed that the alleged witness to the scientific fraud denied such an event had taken place. Further, what puzzles the tribunal is that there would be no advantage for Dr Blackburn to carry out the alleged scientific fraud as the results did not impact on the funding. As a professional experienced specialist we find it had to be satisfied that Dr Blackburn would have any motivation for the scientific fraud, at best it made no difference and at worst would totally destroy his professional reputation.

144. We have not found that Dr Blackburn has been dishonest as alleged and we were not convinced by the claimant’s submissions that he had had a sudden attack of consciousness at this precise moment given the factual background and taking the disclosure in context. We believe on the balance of probabilities that the claimant produced this allegation not because he reasonably believed it to be true or that he reasonably believed such an event to have taken place but instead to support his case, leverage if you like. By this time, he had a score to settle with Dr Blackburn and saw this as a way to damage his reputation.

145. We believe this does go to whether he reasonably believed it has occurred in the first place in this case. If he had such a reasonable belief he has not provided any credible explanation as to why it was made when it was, why it was not made at any point sooner. We find that if he truly had a guilty conscious he would not have waited two years to relieve it.

146. We accept that tactics could be a factor in his decision to make the disclosure and it could still be in his reasonable belief that it was in the public interest but we do not think this is such a case. The claimant could have an element of self-interest in making the disclosure yet it still be in the public interest. The Court of Appeal guidance in Chesterton Global Ltd v Nurmohamed [2017] IRLR 837 shows that belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation. "In the belief…" is not same as "motivated by the belief…"

147. We are invited by the claimant to either prefer his evidence to that of Dr Blackburn. We do not find it as simple as this on this issue although we found Dr Blackburn to be a credible witness. We could believe Dr Blackburn that he did not commit an act of scientific fraud but this would prevent automatically the claimant for having a reasonable belief he did. The claimant of course does not have to establish that such an act actually took place just that he had a reasonable belief in the public interest that tended to show it had occurred. He can be wrong provided he had a reasonable belief that tended to show it.

148. The apparent lack of rationale for the scientific fraud, the delays and the timing lead us to conclude that the claimant on the balance of probabilities did not reasonably believe it to be true or that such an event did take place. As such we do not find that there was a protected disclosure as the claimant falls on the last hurdle of the test.

If the claimant made a protected disclosure, did the respondent fail to address the claimant's appeal against dismissal fairly and reject it on the ground that the claimant had made the protected disclosure?

149. If we are wrong and there was indeed a protected disclosure (contrary to our conclusions above) then we do not accept that the claimant was subject to a detriment on the grounds of having made a protected disclosure.

150. The allegations were investigated by Dr Norris and the appeal was looked at by Mr Weisner. Whist he will have been aware of the allegations given that they were copied to multiple directors and contained in the grounds of appeal he was asked to look at, we do not find that it was a factor in his decision to dismiss the appeal or that he did not address the appeal fairly on the grounds of the protected disclosure.

151. We found Mr Weisner to be a credible witness. He gave detailed evidence as to why he did not uphold the appeal and confirmed the reasons to the claimant in writing over seven pages. It is not a case where the appeal flies in the face of the evidence or the outcome was a surprise given the length of time that the claimant had underperformed against his annual targets and the fact that he was already on a final warning for the same. It is not a case where the outcome is odd.

152. The claimant did not attend the appeal hearing despite being by that time well enough to do so and being asked to attend. It is of course agreed that the appeal was not upheld, this was not in dispute. However, we do not find as a fact that the appeal was unfair as the issues the claimant raised were not dealt with. The allegations of scientific fraud were made and investigated by Dr Norris and Mr Wiesner did set out at length a response to the claimant's points. The suggestion now made by the claimant that Dr Blackburn was dishonest with the inference being that he was making up a performance related scenario (he couldn't be trusted) and this should been investigated is contrary to the clear documentation that there was a genuine issue. To a degree this merely underlies the inevitability of the claimant's dismissal as he is saying that there is no performance issue here it is Dr Blackburn that cannot be trusted, nothing to do with him.

153. Mr Weisner was entitled to consider the evidence before him. There was a wealth of documents each showing a failure to meet targets from annual appraisals to the PIP reviews. The claimant took no issue at the relevant time with the PIP or annual targets and did not appeal the final written warning. The claimant was already on a final written warning for capability and accepted in that process that there was no support Dr Blackburn could offer him. He raised no issues about the relationship and there is ample evidence upon which Mr Weisner was entitled to draw the conclusions he did and not uphold the appeal.

154. We have considered the grounds on which he acts require an analysis of the conscious and subconscious mental processes which caused the employer to act in the way it did. The reason why the appeal was dismissed was not on the grounds of the protected disclosure but on the grounds that it was doomed to fail as the claimant did not establish that he could meet the targets within a short period or indeed that contrary to the evidence he had already met them. There was no vacancy for him so no clear alternative to dismissal. He was underperforming and simply failed to see the issue.

155. As we have set out above, we do not find as fact that the respondent failed to deal with the appeal fairly in the way the claimant alleges. Whilst it is correct to say that the appeal as a matter of fact was not upheld this was inevitable and totally unconnected with any alleged protected disclosure.

If so, should the claimant's compensation be reduced on the basis that the protected disclosure was not made in good faith?

156. We need not consider the test of good faith further given our findings above but given the timing of the "disclosure", the threats made and the motive for saying what he said we would have reduced the award by the maximum permissible.

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Employment Judge King

Date: ……15.01.19……..

Sent to the parties on: .15.01.19.....

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For the Tribunal Office