EMPLOYMENT TRIBUNALS

Claimant: Mr W. Matthaus (C)

Respondent: MBNA Ltd (R1)
Paymaster (1836) t/a Equiniti Hazell Carr (R2)

HELD BY: CVP **ON:** 26-29th July 4th August 14-15th & 17th September 2021
In chambers: 22nd September 2021

BEFORE: Employment Judge T. Vincent Ryan
Ms S. Atkinson
Ms C Peel

REPRESENTATION:

Claimant: Mr I. Ahmed
Respondent: Ms M. Murphy, Counsel (R1)
Ms N. Owen, Counsel (R2)

RESERVED LIABILITY JUDGMENT

The unanimous judgment of the tribunal is:

1. Preliminary issues:

    1.1. The claimant's application to adduce additional documents: this application is refused for the reasons given orally at the time; written reasons will be provided if requested by any party in writing within 7 days of this judgment being sent to the parties.

    1.2. The claimant's application to introduce additional witnesses: this application is refused for the reasons given orally at the time; written reasons will be provided if requested by any party in writing within 7 days of this judgment being sent to the parties.

1.3. The claimant's application to add additional issues for determination: this application is refused for the reasons given orally at the time; written reasons will be provided if requested by any party in writing within 7 days of this judgment being sent to the parties.

2. **Jurisdiction – employment status:**

2.1. The claimant was at all material times a worker engaged by both R1 and R2;

2.2. The claimant was not at such times an employee or Contract Worker in respect of either respondent.

3. **Contract:** The claimant's claim that the respondents, or either of them, breached his contract regarding notice of termination or otherwise fails as he was not an employee of either of them; that claim is dismissed.

4. **Unlawful deductions from wages (s.13 Employment Rights Act 1996 (ERA)):** The claimant's claim that the respondents made unauthorised deductions from his wages fails and is dismissed. The claimant has to date failed to follow the applicable procedure for authorisation of due payment.

5. **Public Interest Disclosure ("whistleblowing") – (s.43A – 43L ERA):** The claimant made the following protected disclosures:

5.1. On 27th and 29th June 2018 (during training) the claimant disclosed information to R1 and R2 tending to show that the respondents had failed, were failing and were likely to fail to comply with legal obligations to which they were subject and/or that the health and safety of individuals had been, was being and was likely to be endangered.

5.2. On 19th July 2018 (to Mr. S. Hellens, of R2) the claimant disclosed information tending to show that the respondents had failed, were failing and were likely to fail to comply with legal obligations to which they were subject and/or that the health and safety of individuals had been, was being and was likely to be endangered.

6. **Public Interest Disclosure ("whistleblowing") – detriment (S47b(1) ERA):**

6.1. The claimant was subjected to the following detriments by the respondents on the ground that he had made protected disclosures in that they had a material influence on the respondent's conduct and decision making, and these claims are well-founded and succeed:

6.1.1. He was not permitted to remain as a worker for either respondent on the contract in question, ostensibly for reasons related to his performance (whether timekeeping or otherwise) when others who performed less well according to the same criteria were allowed to transition from training to full engagement;

6.1.2. He was required to attend an investigatory meeting on 25th July 2018 when he was subjected to persistent questioning about his said meeting with Mr Hellens on 19th July 2018, payrates and pay statements

6.1.3. He was required more strictly to adhere to the working times and practices imposed by the respondents and held more rigorously to account in relation to them, than were comparable workers.

6.2. The claimant's claims that he was subjected to further detriments fail and are dismissed.

7. **Public Interest Disclosure ("whistleblowing") – dismissal (S.103A ERA):** The principal reason for the claimant's dismissal, with notice on 6th August 2018, and summarily during the notice period (foreshortening that period) on 21st August 2018, was that the claimant made protected disclosures, in that they had a material influence on the respondent's conduct and decision making. The effective date of dismissal was 21st August 2018 (and not the date specified in the Notice given on 6th August 2018). The claimant's claim that he was automatically unfairly dismissed is well-founded and succeeds.

8. **Direct discrimination on the ground of religion or belief S.13 Equality Act 2010 (EqA)):** This claim fails and is dismissed.

9. **Direct discrimination on the ground of race (s.13 EqA):** This claim fails and is dismissed.

10. **Harassment related to religion or belief and/or race (s.26 EqA):** This claim fails and is dismissed.

11. **Victimisation (S.27 EqA):**

11.1. The claimant's email of 3rd August 2018 addressed to Mr Hellens did not constitute a protected act and his claim of victimisation because of it fails and is dismissed;

11.2. The claimant did a protected act on 19th July 2018 at a meeting with Mr Hellens when he alleged contraventions of the EqA by the respondents in relation to two colleagues and their protected characteristic of disability.

11.3. The claimant was subjected to the following detriments because of his protected act, in that it had a material influence on the respondent's conduct and decision making:

11.3.1. He was not permitted to remain as a worker for either respondent on the contract in question, ostensibly for reasons related to his performance (whether timekeeping or otherwise) when others who performed less well according to the same criteria were allowed to transition from training to full engagement;

11.3.2. He was required to attend an investigatory meeting on 25th July 2018 when he was subjected to persistent questioning about his said meeting with Mr Hellens on 19th July 2018, payrates and pay statements

11.3.3. He was required more strictly to adhere to the working times and practices imposed by the respondents and held more rigorously to account in relation to them, than were comparable workers.

11.3.4. His engagement with the respondents was terminated, firstly with notice but then effectively summarily during the notice period.

REASONS

The Issues

The parties provided an "Amended Agreed List of Issues" ("L.o.I"); part-way through the hearing the claimant sought to amend the agreed issues by introducing additional matters, but the application was refused. I have copied the L.o.I below; the paragraph numbering is exclusive to it and when reference is made in the remainder of the judgment to any paragraphs in the L.o.I I will make this clear; I hope that maintaining the original L.o.I paragraph numbering will assist in cross-referencing the parties' respective written submissions which refer. The agreed issues that the Tribunal addressed and sought to resolve were as follows:

The Claimant brings the following claims against the Respondents:

1 *Breach of contract*

2 *Unlawful deduction from wages (s13 Employment Rights Act 1996* ***(ERA))***

3 *Whistleblowing detriment (s47B (1) ERA)*

4 *Whistleblowing dismissal (s103A ERA)*

5 *Direct discrimination on the ground of religion or belief (s13 Equality Act 2010)*

6 *Direct discrimination on the ground of race (s13 Equality Act 2010)*

7 *Harassment related to religion or belief and/or race (s26 Equality Act 2010)*

8 *Victimisation (s27 Equality Act 2010)*

Issues

1 Jurisdiction - Employment status

1.1 For the purpose of his breach of contract complaint, was the Claimant an employee (in accordance with s3 Employment Tribunals Act 1996) of either the First or Second Respondent at the relevant time and, if so, which one?

1.2 For the purpose of the unlawful deduction from wages claim, was the Claimant a worker under s 230 (3) ERA at the relevant time of either the First Respondent or the Second Respondent and, if so, which one?

1.3 For the purpose of his whistleblowing detriment claim, was the Claimant a worker under s 230

(3) and s 43(k) ERA of either the First Respondent or the Second Respondent at the relevant time and, if so, which one?

1.4 For the purpose of his whistleblowing dismissal claim, was the Claimant an employee of either the First Respondent or the Second Respondent at the relevant time under s 230(1) ERA and, if so, which one?

1.5 For the purpose of the direct discrimination claim, and the harassment and victimisation claims, was the Claimant a contract worker under s 41 Equality Act 2010 of either the First Respondent or the Second Respondent at the relevant time and, if so, which one?

2 Breach of contract

In respect of any a/legation upon which the Tribunal has jurisdiction to rule:

2.1 Was either the First Respondent or the Second Respondent under a contractual obligation to pay the Claimant any sums not paid to him during the period 1 - 20 August 2018?

3 Unlawful deductions from wages

In respect of any allegation upon which the Tribunal has jurisdiction to rule:

3.1 Are the monies claimed by the Claimant wages properly payable to him?

3.2 Has there been a deduction from the Claimant's wages?

3.3 If so, was that deduction required or authorised by a provision in the Claimant's contract, orhad the Claimant consented to the deduction?

4 Whistleblowing detriment

In respect of any allegation upon which the Tribunal has jurisdiction to rule:

4.1 Did the Claimant, as a matter of fact, on 27 June 2018 and 29 June 2018 (during training), to Lian Chadwick, Carolyn Brunins (identified by the Claimant as "Kaz") (trainers}, a male trainer (identified by the Claimant as "Colin") and Miss Helen Foulkes and on 19 July 2019 to Mr. Hellens of the Second Respondent make any of the following disclosures:

4.1.1 raise concerns about the working conditions of himself and others in the project team which impacted on customers (due to the fatigue of the workers) in that thecustomer was not getting the full experience? Specifically:

(a) *that unrealistic targets were set which meant the project team were discouraged from taking breaks from their computer screens as required by Health and Safety Regulations*

(b) *that the project team were discouraged from taking a lunch break; and*

(c) *that Richard Blything and Greg Hutchinson had dyslexia and learning difficulties which impeded their performance.*

4.1.2 raise concerns as to himself and others being appointed to deal with "Complex Complaints" issues when in fact he and others were appointed to deal with PPI, a different project. Specifically, that they lacked experience to deal with "Complex Complaints" and were inadequately trained and supported to deal with it.

4.1.3 raise concerns about the First Respondent's alleged strategy to get customers to cancel a loss leading "Affinity Card" which the First Respondent underwrote?

4.2 If yes, in relation to 4.1.1 to 4.1.3, was there a disclosure of information?

4.3 If yes:

4.3.1 in relation to 4.1.1, did the Claimant hold a reasonable belief that the information tended to show that malpractice was taking place or was likely to take place, specifically that there was a breach of a legal obligation and/or a danger to the healthand safety of the

individual?

4.3.2 In relation to 4.1.2, did the Claimant hold a reasonable belief that the information tended to show that malpractice was taking place or was likely to take place, specifically that there was a breach of a legal obligation and/or a danger to the health and safety of the individual?

4.3.3 in relation to 4.1.3, did the Claimant hold a reasonable belief that the information tended to show that malpractice was taking place or was likely to take place, specifically that there was a breach of a legal obligation?

4.4 Did the following occur as a matter of fact:

4.4.1 Was the Claimant excluded by Susan Turner from "small group" meetings?

4.4.2 Did Susan Turner address the team but exclude the Claimant by turning her back to him during "floor meetings"?

4.4.3 Did Lian Chadwick, Carolyn Brunins and "Lisa" withdraw the support that the Claimant required (namely one to one coaching) to adequately perform his duties during his notice period?

4.4.4 Did Susan Turner allocate work (the SCOTT claim) to the Claimant in circumstances where it should have been allocated to a more senior person?

4.4.5 Did the Claimant fail to transition because his workload consisted of more complicated cases than colleagues, specifically the SCOTT claim?

4.4.6 Did other colleagues transition whose performance was worse than the Claimant's?

4.4.7 Was the Claimant required to attend a meeting with Richard Blything and interrogated about day rates of pay such that this amounted to bullying behaviour (on the basis that the complaint involved Richard and it was never suggested that the Claimant had breached any confidentiality).

4.4.8 Was the Claimant required to strictly adhere to the working times and practices where other team members were not in particular:

(a) *Was the Claimant required to attend at 9am whilst others were allowed to attend for 1Dam or later?*

(b) *Was the Claimant penalised for being late in June 2018 despite travel difficulties caused by train route cancellation chaos and moors fire when others were not? Was the Claimant required to adhere to his contractual hours when others were permitted to leave "at a reasonable time" to catch public transport thereby extending his working day?*

4.4.9 Was the Claimant's name included on an email from Ms. Foulkes on 15 August 2018 to vilify the Claimant?

4.5 If yes, was this treatment detrimental treatment on the ground that he made a protected disclosure (i.e., was the disclosure the real or core reason for any such treatment)?

4.6 Was the fact his engagement was terminated detrimental treatment on the ground that he made a protected disclosure?

5 Whistleblowing dismissal

In respect of any allegation upon which the Tribunal has jurisdiction to rule:

Paragraphs 4.1 to 4.3 are repeated.

5.1 Was the reason or principal reason for the dismissal that the Claimant made either or all of the disclosures at paragraphs 4.1.1, 4.1.2 and 4.1.3 above?

6 Direct discrimination on the ground of religion or belief

In respect of any a/legation upon which the Tribunal has jurisdiction to rule:

6.1 Did Mr. Denyer call the Claimant during Eid on 21 August 2018?

6.2 If yes, did the alleged treatment amount to a detriment?

6.3 If yes, did either the First Respondent or the Second Respondent treat the Claimant less favourably than it treated or would treat a real or a hypothetical comparator in circumstances that were the same or not materially different?

6.4 If yes, did either the First Respondent or the Second Respondent treat the Claimant less favourably because of his religion or belief?

7 Direct discrimination on the ground of race

In respect of any allegation upon which the Tribunal has jurisdiction to rule:

7.1 Did the following occur as a matter of fact?

7.1.1 On a date between 6 and 8 August 2018, did Ms. Turner make the following comment to the Claimant: "Your kind don't belong here, bye bye" and mime 'bye bye' using hand gestures?

7.1.2 Was the Claimant required to attend work at particular times whilst other team members were allowed to attend at 10am onwards?

7.1.3 Was the Claimant required to achieve specific targets; and/or reach certain productivity levels?

7.1.4 Was the Claimant prevented from moving department when Richard Blything and Greg Hutchinson were presented with this opportunity?

7.1.5 Was the Claimant incorrectly informed that he would not get paid if he did not hit target thus applying added unjustified pressure?

7.1.6 Was Greg Hutchinson allowed side by side coaching and QCU coaching when it was deemed he was struggling on the project yet the Claimant was not?

7.1.7 Did management put provisions in place to afford Greg Hutchinson and other Caucasian staff private meetings to discuss their performance on the project and how they would move forward, and not offer this to the Claimant?

7.1.8 Was the Claimant dismissed and/or his engagement and/or contract terminated because of his race by either the First Respondent or the Second Respondent (i) on notice on 6 August 2018 and/or (ii) with immediate effect on 20/21 August 2018.

7.2 If yes, did the alleged treatment amount to detriment?

7.3 If yes, did either the First Respondent or the Second Respondent treat the Claimant less favourably than it treated or would treat a real or a hypothetical comparator in circumstances that were the same or not materially different?

7.4 If yes, did either the First Respondent or the Second Respondent treat the Claimant less favourably because of his race?

8 Harassment related to religion or belief and/or race

In respect of any a/legation upon which the Tribunal has jurisdiction to rule:

8.1 Did the following occur as a matter of fact?

8.1.1 Did Mr. Denyer of the Second Respondent call him during Eid on 21 August2018?

8.1.2 Did Ms. Turner of the Second Respondent make the following comment to the Claimant? "Your kind don't belong here, bye bye" and mime 'bye bye' with handgestures?

8.1.3 Was the Claimant required to attend work at particular times whilst other teammembers were allowed to attend at 10am or later?

8.1.4 Was the Claimant required to achieve specific targets; and/or reach certainproductivity levels?

8.1.5 Was the Claimant incorrectly informed that he would not get paid if he did not hittarget thus applying added unjustified pressure?

8.2 If so, did the conduct relate to the Claimant's religion or belief and/or race?

8.3 If so, did it have the purpose or effect of violating the Claimant's dignity or creating anintimidating, hostile, degrading, humiliating, or offensive environment for him?

8.4 f the Claimant considered that it did have that effect, was it reasonable for the conduct tohave had that effect with regard to the perception of the Claimant, and the other circumstances of the case?

9 Victimisation

In respect of any allegation upon which the Tribunal has jurisdiction to rule:

9.1 As per paragraph 26 of the Tribunal Order dated 13 June 2019:

9.1.1 did the Claimant send an email on 3 August 2018 which related to Ms. Turner'salleged style of management which amounted to discriminatory treatment?

9.1.2 did the Claimant make a complaint on 19 July 2019 regarding colleagues' (Richard Blything and Greg Hutchinson) perceived (by the Claimant) dyslexia and learning difficulties?

9.2 Were either or both of 9.1.1 and 9.1.2 protected acts under section 27(2) Equality Act 2010?

9.3 Did either the First Respondent or the Second Respondent believe that the Claimant had done a protected act?

9.4 Was the Claimant subject to any or all of the treatment alleged at 4.4.1 to 4.4.8 above?

9.5 If yes, was the treatment at 9.4 detrimental treatment because the Claimant had made either or both of the alleged protected acts at 9.1.1 and/or 9.1.2?

9.6 Was the termination of the Claimant's engagement detrimental treatment because the Claimant had made either or both of the alleged protected acts at 9.1.1 and/or 9.1.2?

The paragraphs in the remainder of the judgment are numbered sequentially and exclusive of the L.o.I above.

The Facts

1. **R1:** R1 is a multi-national bank with offices in Chester; it is now part of the Lloyds Banking Group (LBG). Amongst other functions it operates a complaints function from Chester. It has a section dealing with PPI complaints and a section dealing with complex customer complaints (CRT – although no one seemed to know what this stood for). At the material time ownership of R1 was passing from Bank of America (BoA) to LBG; this involved the transition of products and working methods including increasing the telephone handling of complaints as opposed to a written approach. R1 had operated Affinity cards (it is not clear whether credit or debit cards or both) and these were being replaced by a new product called an Horizon Card. The Affinity cards carried with them the benefit of Air Miles; R1 was moving away from partner deals such as involved in the Affinity cards and wanted its own sole involvement in Horizon. C understood and believed from his training in dealing with complaints, because this is what he was told during training, that customers would cancel their Affinity cards without realising that Horizon did not attract Air Miles; on discovering this however they would then cancel their Horizon cards without appreciating the favourable other benefits such that they would have to apply anew. This all gave rise to complicated complaints.

2. **R2:** R2 provides technically skilled people to R1. Its practice was to set up an arrangement labelled a consultancy agreement for work placement with R1. Typically, R2 would expect individuals to set up management companies and for

that company to enter into its consultancy agreement, in which the management company contracted to supply "placement resource" (technically skilled people) for "placement work" with a customer of R2 (in this case R1). The expected term in this case was 14 months but it would always be for a particular project with an estimated duration, subject to early termination provisions. The Agreement in this case was between R2 and Matthaus Ltd, C's management company in which he was the sole shareholder and officer; C did not adduce any contract between him personally and Matthaus Ltd. R2 then had a separate contractual arrangement with R1 for the supply of its "consultants"; this documentation was not adduced. R2 manages its "consultants" although ultimate responsibility for deciding on "resource" requirements (the number of people needed on the project), methods of work, applicable policies, training, assessment of punctuality, attendance, quality of work and productivity fell on R1. R1 would liaise with R2's onsite management, in this case, Ms Turner and Mr Hellens. Provided there was no shortage of R2 "consultants" R2's managers could approve holiday requests and requests for late starts or early finishes (in this case Ms Turner) but again ultimately, and especially when available people were few, R1 would have the final say (in this case Ms Lloyd-Davies).

3. **The respondents' cast:**

3.1. Carolyn (Kaz) Brunins: CRT Coach (R1) - a trainer employed by R1. C says he made protected disclosures and raised concerns to her. R1 did not adduce witness evidence from Ms Brunins.

3.2. Richard Blything: recruited by R2 for R1 in same in-take as C; Mr Blything lives with dyslexia; he accompanied C raising concerns to trainers and R2's "management" (Mr Hellens, see below); he was moved to a team that dealt with the public on the telephone (Phone a Friend/PAF) as a reasonable adjustment because of difficulties he encountered with written complaint handling. The claimant sought to introduce a witness statement from Mr Blything at the commencement of the hearing; his application was refused.

3.3. Lian Chadwick: a trainer employed by R1. C says he made disclosures and raised concerns to her. R1 did not adduce witness evidence from Ms Chadwick.

3.4. Yvonne Dabbs: employed by R1 as CRT (complaints) Team Manager; she did not line manage C; she reported to Ms c Lloyd-Davies (see below). R1 did not adduce witness evidence from Ms Dabbs.

3.5. Colin ?: a trainer employed by R1. C says he made disclosures and raised concerns to him. R1 did not adduce witness evidence from Colin.

3.6. Daniel Denyer: at various times employed by or contracted to R2; he was the Client Services Director (2016 – 2019), where the clients referred to included R1 as opposed to members of the public. Mr Denyer received notification that C was to be summarily dismissed during his Notice period and he telephoned C to tell him that he was dismissed forthwith; he also conceded in cross examination that the data relied on for the claimant's initial dismissal with

notice did not "stack up" although he says that he dismissed the claimant for failing to reach the accredited pass mark for work on a particular complaint file. Mr Denyer gave evidence at the hearing. Rather surprisingly Mr Denyer stated that when he telephoned C to dismiss him, having been told that C was on holiday for Eid and being advised that for that reason he may wish to defer his call, he did not know that Eid was a religious festival or a special occasion for Muslims; the Tribunal initially shared Mr Ahmed's obvious surprise, however finds that he was ignorant of the special relevance of Eid, the nature of events marking Eid and its duration; he acted insensitively when he failed to make appropriate enquiry once he was told of the reason for C's absence from work 20-21st August 2018 and then rang him regardless.

3.7. Helen Foulkes: R2 's Hazell Carr Resource Manager. a HR professional independent contractor by R1; she reported to R. Minns (see below). C alleges that he made protected disclosures to her. R1 did not adduce witness evidence from Ms Foulkes.

3.8. Stephen Hellens: Senior Operations Manager for PPI and R2's Head of Site. Mr Hellens gave evidence at the hearing. He is a contractor engaged by R2 to work at R1 in the PPI team, but he was the most senior of R2's contractors and considered by Mr Denyer as his "eyes and ears". Contrary to his assertion that he was merely available to give new contractors and others a helping hand because of his longevity at R1 and his experience, he was in fact effectively a senior member of management and he had authority amongst the contractors being consulted and relied upon by managers of both R1 and R2 (not least being Mr Denyer's "eyes and ears" on site). C raised issues with Mr Hellens; Mr Hellens wrote to C criticising him and questioning his commitment; on that day C was dismissed with Notice. We find that Mr. Hellens was an influential and powerful actor in these events. He was aware of how C and the matters he raised could affect R2' operation with R1, and R1's business, and he was wary to protect both. Mr. Hellens' email to C dated 6th August 2018 is illustrative of this; from it, and in the light in part of Mr. Hellens seeming to downplay his significance in R2' management and involvement with R1's management, and the performance data which does not "stack up" against C but was variously relied on to justify his dismissal, we have drawn adverse inferences and find that he took exception to matters raised with him and others by C, saw C as being troublesome and making "noise", such that he was expendable and ought to be released from his engagement as soon as practically possible. Mr Hellens was anxious that R2's operatives would not rock the boat and jeopardise the relationship with R1; he was disapproving of them making "noise" such as by criticising R1's business practices or the working environment and methods.

3.9. Claire Lloyd-Davies: R1's Operations Manager, managing R1's response to customer complaints within regulatory timeframes. She had 70 employees, all MBNA employees, reporting to her at the time (now she also has one R2 contractor reporting to her). Ms Lloyd-Davies ultimately decided that C's engagement in the complaints team (CRT) was to be terminated on notice; she says that there was a reported over-capacity of 1 and C was the most appropriate contractor to be terminated. It became unclear, in the light of the

evidence both oral and documentary, whether the choice of C was due to an alleged lack of punctuality, poor productivity or sub-standard quality. Ms Lloyd-Davies gave evidence at the hearing. Until the June 2018 intake R 1 had not used R2 "consultants" in its complex complaints handling (CRT) but only with PPI complaints (and maybe other functions not relevant to these claims). Ms Lloyd-Davies, who managed CRT, was not used to having such additional human resources. That said, it was clear to us that she was acting and making decisions as to staffing based on information provided to her and it is more likely than not that Ms Turner's and Mr Hellen's views of C were known to her. We accept that Ms Davies was told by her Capacity Team that CRT was over-resourced or close to that situation but her given rationale for choosing C for termination was not substantiated. We find as a fact that her rationale was more likely than not materially influenced by what she heard from R1's management (including Mr Hellens) including as to the issues he raised with the trainers, with Mr Helens, and with others; further we find as a fact that what she heard from them about C included, and was materially influenced by, his concerns over legal obligations and health & safety.

3.10. Tristan Lynes: R1's Supplier Manager at the time, responsible for relationships that supported R1's complaints function, such as that with R2. He was responsible for evaluating and reporting on supplier (R2) performance against contractual obligations, resolving supplier performance issues and supporting negotiations with suppliers such as R2. Mr Lynes adduced the data purporting to record, amongst other things, C's attendance, punctuality, quality, and productivity record. He gave evidence at the hearing.

3.11. Rebecca Minns: R1's Planning & Resources/ Resource & Expenses Team Manager. R1 did not adduce witness evidence from Ms Minns.

3.12. Joel Priest:Placement Administrator

3.13. Jo Race: HR professional with R1 who approved the payments to personnel recruited by R2 to work for R1.

3.14. Susan Turner: R2's contractors' manager; Ms Turner line-managed C. C raised concerns about Ms Turner's management, and he accuses her of mistreatment, less favourable treatment than other's enjoyed, and of making harassing comments (all of which she denies). While Ms. Turner gave evidence that she did not know Mr Hellens well the Tribunal finds that she was underplaying the professional relationship; they had worked together on PPI issues for some years; she had worked at R1's Chester site for a relatively long time in PPI and then latterly in CRT which was in a different building to Mr Hellens and the PPI team. She gave evidence that if Mr Hellens thought she was a good manager, which he did, then it was by reputation. We find that it was because he knew her professionally and worked with her such that he formed his view of her from his personal experience. We infer from all the circumstances and in part in the light of Ms. Turner's unconvincing evidence as to her working relationship with Mr Hellens that there was some liaison between them about C during the relevant period too. Ms Turner gave evidence at the hearing. We found her evidence credible and plausible in respect of some of the allegations made

against her, but she was not candid to us about her view of the claimant in raising the matters he raised, its potential effect on R2's operation with R1, R1's operation and in respect of liaison between interested witnesses about the management of C. We find as a fact that Ms Turner took against C because he kept raising issues and appeared to her to be problematic; her view of him was materially influenced by his complaints about the work and working conditions.

4. **Agreed terminology:**

4.1. Capacity Team – this is principally R1's team that considers and decides matters relating to productivity, capacity and staffing requirements referred to variously as the Productivity or Capacity or Resource Team. It regularly reviews the available staff and the need to retain, reduce, or increase numbers of people engaged on projects; this in turn leads to instructions from R1 to R2 to match its requirements by recruitment or the termination of individual contracts of engagement. The Capacity Team regularly and frequently reviews data that is collected and collated tracking personnel punctuality, attendance, productivity, and quality of output. A considerable amount of data is produced although there were deficiencies and patent errors in the data produced at this hearing, and its interpretation by R1 and R2's witnesses before the tribunal, concluding in a concession (by Mr Denyer) that it did not "stack up" (the words of Mr Ahmed in cross-examination). The working environment was a fast-paced one where needs and output were assessed, and staffing decisions were made at short notice and potentially weekly as business needs were thought to dictate.

4.2. Training: There are three stages of formal training namely Education, Transition1 (or "sign off"), and Transition 2 (or just "transition"). Those engaged in complaint handling were not given productivity or quality targets while they were in education and training. Individuals were marked and given pass or fail marks based on individual complaint case files. They had to pass sufficiently well to progress through the three stages of training, and then they would be given performance targets. In addition to formal training individuals were given coaching and 1:1 assistance where required to get them through the education and training procedures; it was in the interests of the individual and both respondents for candidates to succeed. Complaints handling is a major feature of R1's operations; it is a highly regulated service industry subject to a regulatory framework overseen by the Financial Conduct Authority (FCA), with its many and varied enforcement procedures and sanctions.

5. **C: The Claimant**

5.1. At the material time the claimant was experienced working in the banking industry as a PPI case worker, meaning that he would seek work from financial organisations and institutions principally dealing with customer complaints and issues. C had experience working with both respondents previously.

5.2. To secure such work and because of its tax advantages he set up a limited company, Matthaus Ltd. This was not the only or first company that he had formed as a vehicle for offering his services; he set it up willingly and deliberately. It was a prerequisite of his working relationship with R2, at its insistence, and R2 found an engagement for him with R1. C had no other use for Matthaus Ltd; it had no other shareholders, officers or employees and did not conduct any work at this time. It did not seek engagement directly, advertise, tender for work or quote rates; it did not raise invoices; it did not seek or engage substitute workers for C. Its existence was as a devise or tool, effectively a screen, principally giving the semblance of protection to R1 and R2 from having to respect any employment or workers' rights that C may be entitled to acquire otherwise; its subordinate role was for C's advantage in that while he was responsible through Matthaus Ltd to account for tax/NI he received some tax advantage. Once Matthaus Ltd had secured a contract with R2 such that C could work for R1 and R2 the company served little other practical use. Neither respondent communicated with Matthaus Ltd; all the respondents' dealings were personally and directly with C. C accepted that when he worked for R1 under management of R1 and of R2 he would be personally subject to R1's policies and procedures, including in relation to confidentiality, whole time, and non-solicitation.

5.3. C was disgruntled when working for R1/R2 on the engagement in question. He had expected to work on a PPI team at the Chester site dealing with customer issues related to PPI. He had done this work before. He found it manageable, congenial, and profitable. Matthaus Ltd had signed a contract in relation to a PPI project. C was not placed in the PPI team at the material time regardless of that contract. The implied contract between C and R1 and between him and R2 was that he would instead work in CRT, handling complex issues raised by customers including, and primarily in relation to, matters arising from the transition from BoA to LBG, the phasing out of Affinity cards and the introduction of the new Horizon card. C found this work onerous, technical beyond his experience and uncongenial. He became competent at it through training and coaching such that his performance indicators showed an aptitude as good as most of his cohort and better than many. He regularly achieved pass marks for his file work and was clearly improving as regards quality when he was dismissed. In the early stages of this fractious engagement C was unavoidably late for work owing to extensive (newsworthy at the time) moor fires adjoining his motorway route from home to work; these were exceptional circumstances. C was late for work on a few occasions and sometimes during training substantially late. Some of his colleagues were late often (his colleague T being several hours late on at least two occasions without apparent adverse managerial comment or action) and left work early often. C left work early on occasions but his punctuality in the mornings improved once the moor fires were under control and his overall punctuality record was no worse than most of his cohort; it was better than many others.

5.4. In addition to the above grounds of his disquiet C was further troubled by the nature of the work he was been instructed to do and the conditions pertaining for him and his colleagues. C was concerned that he believed from his

trainers' information that customers were not being given the information they needed, about the benefits, pros- and cons-, of the Affinity cards and Horizon cards respectively and so were not fully informed before being asked to make choices as to cancellation or application. C understood that this amounted to a breach, or breaches, of applicable regulations controlled by the FCA. He was made aware during training of targets that would be set once the initial training was complete and he did not believe that these were achievable and not least given the lack of knowledge and experience both he and some of his colleagues had in the area of complex complaints (as opposed to in handling PPI concerns). He felt out of his depth and therefore that he would be putting customers at risk of misinformation having to work at the required rate of output in the time available; he feared that this too could cause breaches of FCA regulations. Management also indicated that long shifts with shortened breaks, and possibly without breaks, might be required to achieve the required output. The complaint work was regulated to the extent that there were time limits on handling certain complaints carrying financial penalties for R1 if they were not met. It was a fast moving and highly pressured working environment. C was unhappy and felt that he could not meet R1's and R2's expectations reasonably and safely (as regards the best interests of customers and his own well-being, health and safety). C believed all this based on what he was told by representatives of R1 and R2. Two colleagues further made known to him that they lived with disabilities that affected their performance in dealing with written complaints; Mr Blything lives with dyslexia and Mr Hutchinson has learning disabilities; neither was coping with the work and its environment as described in this paragraph.

5.5. C's relationship with R2:

5.5.1. R2 recruited C to work at R1's Chester site ostensibly through the devise of a consultancy agreement with Matthaus Ltd, albeit R2 was only interested in C's personal service as a complex case worker, subject to personal vetting, training, induction, supervision and management.

5.5.2. R2 observed some of C's in-house training by R1;

5.5.3. R2 assumed direct on-site responsibility for C's supervision and line management on behalf of R1, in so far as they were delegated and subject to R1's overall control;

5.5.4. In respect of engagement, supervision, and line management R2 deferred to R1 in respect of need, or capacity requirements, training, work allocation, ultimate holiday approval, permission for late arrivals or early departures, his appointment to the engagement and termination of it. In all such respects R2's relationship with C was direct but delegated and under authority of R1, effectively its principal where R2 was R1's agent on site;

5.5.5. R2 required from Matthaus Ltd in writing, and by implication from C personally, adherence to confidentiality and non-solicitation restrictions;

5.5.6. C was not permitted by either respondent to conduct any other work in his own right, and by extension for Matthaus Ltd (albeit the company had no further business activity) during R1's business hours;

5.5.7. R2 referred in email correspondence to C's "employment contract";

5.5.8. R2 required that C submit timesheets to secure payment for his work but not invoices;

5.5.9. R2 did not pay C sick pay, holiday pay or pension contributions;

5.5.10. C was expected to provide his personal service via R2 to R1 albeit in the written agreement with Matthaus Ltd there was an ostensible substitution clause. In practice substitution was impracticable; none of either respondents' witnesses who were asked knew of it having happened or believed it to be a practical option or anything more than theoretical (but a remote possibility in limited circumstances that no one could describe). C had to undergo the equivalent of pre-employment vetting, intense training and induction including in respect of complex financial dealings and the requirements of the FCA. Training and induction were not only generic for those engaged on R1's Chester site but were project specific where C was engaged initially for a PPI complaints handling project but was allocated to CRT's project, dealing with complex customer complaints and queries in the context of the business transfer from BoA to LBG. It was a time restricted and critical business transition and C was engaged on a time limited basis related to that project (subject to need, Notice and disciplinary sanction including dismissal);

5.5.11. When C's engagement was terminated R2 dismissed C first by formal written notice and then summarily, orally, and directly to C. No notice or confirmation of termination was served on Matthaus Ltd.

5.6. C's relationship with R1:

5.6.1. C was recruited by R2 to work at R1's site;

5.6.2. As stated above, R1 and R2 had a contract that governed such recruitment but neither respondent disclosed it to C or the Tribunal;

5.6.3. R1 provided general training on its policies and procedures and specific training in handling complaints in the CRT; C was obliged as a condition of work to comply with R1's rules and management requirements as to every aspect of his work and had no discretion as to his dealings with customer complaints and issues; C was bound by R1's disciplinary rules and procedures and could avail of its "whistleblowing" procedures (which he did not);

5.6.4. R1 was therefore overall responsible for managing and supervising C although it delegated day to day responsibility at a subordinate level to R2;

5.6.5. R1 dictated to C, via R2, its need for his service in overall terms and as to the requirement that he attend site Monday to Friday each week between 9 a.m. and 5 p.m. It also allocated work files to him; he was not permitted to carry out any other work than that allocated by R1 during his working day;

5.6.6. R1 exercised ultimate control over C's holidays, being able to override R2 who would, on occasions where there were potential shortages of required staff and "capacity" issues, refer requests to R1; this also applied in respect of late arrivals and early departures from work;

5.6.7. C's appointment (following pre-employment vetting/screening akin to permanent staff) and ultimate dismissal were decided upon by R1 and such decisions were communicated by R2 acting on R1's instruction and authorisation; R1 was the ultimate arbiter of how and whether C progressed through his training such that he could work throughout the project in question;

5.6.8. In all matters pertaining to and raised by C whether to R1 or R2 the respondents liaised and communicated openly and frequently; decisions taken in respect of C's engagement were influenced by both respondents albeit R1 had the last say;

5.6.9. C was given and used an R1 email identification, pass and email address as did permanent employees and others referred to as contractors (the status of any others not having been adjudged by this Tribunal);

5.6.10. R 1 provided C with all required equipment for his work at C's designated workstation within an open office at R1's Chester site; C was not permitted to use his own IT devices at work including his laptop;

5.6.11. C was in a subordinate position integrated into R2's cohort of operatives, integrated that is to the extent described above into R1's business; he had no say in agreeing his terms and conditions of engagement which were ultimately decided by R1, and otherwise by R1 in conjunction with R2.

5.6.12. C knew and accepted during the relationship that neither respondent was obliged to provide him with work, and he was not obliged to accept work but that he could opt out and work elsewhere on a day rate or otherwise as an independent contractor or otherwise. He had worked at R1's site before the time with which we are concerned. He had accepted projects under the auspices of R2 previously too. Although he hoped to see out this time-limited project, his way of working was as an independent contractor providing his personal services in this technical

field. He accepted that such engagement was subject to R1's capacity needs and that all parties wanted that flexibility.

6. **Summary chronology (subject to L.o.I-specific findings below):**

6.1. 5th June 2018 Matthaus Ltd entered a consultancy agreement with R2 (pages 77 – 96 of the updated final bundle to which all page references refer unless otherwise stated). Schedule 1 to the agreement sets out the period as 25th June 2018 – 31st August 2019 subject to one month's notice (and other early termination provisions) on "Project Name – PPI".

6.2. 25th June 2018 C commenced working in R1's CRT (complex banking complaints, and not PPI complaints). The intention was to undergo two weeks' training and then transition before being equipped to handle complaints subject to targets.

6.3. 27th & 29th June 2018: C raised issues with R1's trainers.

6.4. 17th July 2018 C asked Ms Chadwick to whom, other than Ms Turner, should he raise certain concerns including what he believes to be public interest disclosures; he was referred to Mr Hellens.

6.5. 19th July 2018 C met Mr Hellens with Mr Blything to discuss his concerns.

6.6. 25th July 2018 Ms Turner took C and Mr Blything aside to investigate an issue over disclosure of pay rates and a possibly falsified pay statement, while also enquiring as to the meeting held on 19th July 2018.

6.7. 30th July and 3rd August C asked to leave work early but without any response. C left work anyway.

6.8. 2nd August 2018 C asked to be moved to the Phone a Friend sub-team (PaF);

6.9. 6th August 2018 C received a chastening email from Mr Hellens, was told by Ms Dabbs that PaF placement was for "more tenured" operatives and he was ineligible, and C received Notice of Termination of placement effective 5th September 2018.

6.10. 13th August Ms Turner returned from holiday; this is the date C now says that she harassed him.

6.11. 15th August 2018 Staff meeting concerning R1's requirements and the need to hit targets; concerns raised were passed on to management and C was named as one who voiced concerns. C was under Notice and the meeting agenda in respect of targets was irrelevant to him.

6.12. 20th- 21st August 2018 C on holiday for Eid and Mr Denyer telephoned him at his home to confirm summary termination of his placement on 21st August.

6.13. 30th August Greg Hutchinson, another "consultant" in C's intake, was released having failed in his training.

6.14. 21st September 2018 Ms Turner released based on over-capacity.

7. **Alleged "whistleblowing":**

7.1. When C was recruited, he believed that he would be working on PPI customer complaints; he was comfortable with this idea and the work involved as he had prior experience in it. During training the recruited cohort was divided into those assigned to the PPI Team and those, including the claimant, who were assigned to CRT, dealing with complex banking complaints. He was uncomfortable with this assignment. C was disgruntled when he realised during training that there would be target pressure in respect of complaints where he, and others, felt they were out of their depth. He understood and believed from what he was told:

7.1.1. That the CRT team members would have to work long hours without breaks or with reduced breaks to reach Rs' expectations and difficult targets. Their expectations were at least in part because of the speed and pressure of work involved in transitioning from BoA to LBG; C considered that in all the circumstances the targets were unrealistic;

7.1.2. That they would be required to give customers incomplete information, or not to complete information already given to customers, in relation to the withdrawal of Affinity card benefits and the benefits attaching to the new Horizon Cards;

7.1.3. That he and his cohort of CRT colleagues lacked the knowledge, expertise and experience, training, and support to deal with the incoming complaints;

7.1.4. That as his colleague RB lived with dyslexia and his colleague GH lived with learning difficulties their performance would be impeded as judged by Rs' expectations; they would not be able to, and could not, perform the work as required without reasonable adjustments or redeployment.

7.1.5. That in consequence of the above, customers would not be receiving a service compliant with FCA regulations, he and his colleagues would not have their rights at work respected.

7.2. The claimant made the above concerns known to his trainers Lian Chadwick, Caroline Brunins and Colin 9all R1), and to Helen Foulkes (R2). He had similar conversations on 27th and 29th June 2018 with each or most of them on both days such that we accept he made these disclosures of information to each of those named, and he explained why he was concerned, disclosing the reasons and his understanding of each set of circumstances concerning him. We make this finding on the basis of the claimant's clear, credible and plausible oral evidence; his evidence was consistent with his persistent raising of issues (as evidenced later by his email of 13th July 2018 (a late un-numbered addition to the hearing bundle) to Lian Chadwick when requesting

a meeting concerning these matters; it is also consistent with some of the respondents' witnesses (notably Mr Hellens, reference his email to C dated 6th August 2018 at page 289) who said that they knew C raised complaints about working conditions. The Rs did not call Lian Chadwick, Caroline Brunins, Colin, or Helen Foulkes as witnesses at this hearing. In so far as the tribunal may draw any inference bearing in mind our finding of fact based on C's evidence to the tribunal, we infer by way of corroboration that C did more than raise complaints about his working hours and that references in the said email of 6th August 2018 by Mr Hellens to C being an outlier, being negative and confrontational, his name having been mentioned many times in a negative context, and that there were "issues" about which he was "constantly not happy" included reference to the above concerns at paragraph 7.1.

7.3. Having written to Lian Chadwick on 13th July 2018 as described above, C met with Mr Hellens (R2) on 19th July 2018. The meeting was an arranged one for C to raise his concerns. Mr Hellens had asked C to send him bullet points in advance of the meeting, as an agenda; C did not do this. C attended the meeting with Richard Blything. For all the reasons stated above we find that C raised the same issues with Mr Hellens, as set out in paragraph 7.1, as he had done previously to the trainers and Helen Foulkes. It was agreed that Mr Hellens would treat the information in confidence save in relation to the training and breaks issues which would be taken forward by Mr Hellens. In addition, Mr Hellens said that he had to act on what he had been told about Mr Blything because his dyslexia may have amounted to a disability and adjustments ought to be considered. C therefore only logged the Horizon/Affinity and targets matters with Mr Hellens, and confidentially. Mr Hellens was unsympathetic seeming to C to be more concerned with not raising complaints to R1 than issues of concern to FCA. Mr Hellens dismissed this meeting as C having "a bit of a whine" but the Tribunal finds, based on his experience and all surrounding facts that Mr Hellens was aware of the significance of the matters raised and was concerned that this would rock the boat in the relationship between R1 and R2. He said that he would not do more about the matters raised (other than as stated above) unless other colleagues also voiced them as just C and Mr Blything were not enough.

7.4. On 23rd July 2018 in a meeting called by Ms Turner involving C and his cohort of operatives targets were discussed and the suggestion was made that breaks be kept short but recorded on the trackers as being longer, to maximise working time and increase the likelihood of reaching targets. C took issue raising his health and safety concerns about this with Ms Turner (R2); he also asked for written confirmation (which he did not receive).

7.5. Mr Hellens stated that he had heard C's name mentioned in relation to complaints made by him. C made the complaints to those mentioned above, including Mr Hellens. It follows that Mr Hellens either heard from the trainers, Ms Foulkes, C's colleagues, Ms Turner (C's line manager), some or all of them. It is more likely than not that he heard from all of them, and he definitely heard from C about the concerns he was raising as detailed above.

Mr Hellens was described as Mr Denyer's "eyes and ears"; he was the senior R2 person at R1's Chester site and such was his obvious disquiet at C's stated concerns (as evidenced by his 6th August 2018 email to the claimant) that it is more likely than not that he discussed these matters and specifically C's "attitude" with Mr Denyer. It is more likely than not that Mr Hellens spoke to Ms Lloyd Davies about C before her decision to dismiss C with Notice; Ms Lloyd -Davies conceded that she may have met Mr Hellens before her decision; they both referred to C's "attitude" and to him as an "outlier"; in confidence when Mr Lynes communicated with Mr Denyer to confirm Ms Lloyd-Davies decision to dismiss C (p294) (in which the "UM" is the Unit Manger Ms Lloyd-Davies) he refers to C's "attitude/conduct" and challenges with C's "attitude" which made it easy for Ms Lloyd-Davies to identify C as being the chosen operative for dismissal as being surplus. The Tribunal notes that the "conduct" issues themselves are characterised as being "minor". The Tribunal finds as a fact that not only C's trainers and Ms Foulkes received disclosures of information as above from C but that so too did Mr Hellens and Ms Turner and that their concerns about C's "whining" and "attitude" to such matters were communicated to both Mr Denyer (R2) and to Ms Lloyd-Davies (R1).

8. **Alleged treatment of the claimant by the respondents:**

8.1. There is no evidence before the Tribunal that Ms Turner arranged or attended meetings for small groups of her team and excluded C. The claimant has not proved that there were such meetings at which he was positively excluded; we know of no times, dates, venues, or the identity of other supposed attendees; we accept Ms Turner's evidence that C was included in meetings of the team. C simultaneously claims in respect of a meeting on 15th August 2018 which he says he should not have been invited to attend. C was not excluded from relevant meetings.

8.2. Ms Turner would address the team together in an open plan office standing where she was visible to as many of the team as practicably possible. The Tribunal accepted her explanation and finds that she did not exclude C from addresses to her team by turning her back on C as he alleges.

8.3. We accept C's evidence that he achieved satisfactory pass marks on most of his files, that his performance was generally good and that he was not one of those struggling with the work. His case is just that; he says that despite his good performance his placement was terminated on the grounds of his whistleblowing and race, religion or belief. The Tribunal accepts his evidence that he was performing his duties adequately, albeit with room for improvement. The Rs were, until August 2018, generally satisfied with C's work although it was suggested by Ms Turner from any early stage that an eye need be kept on him because of his conduct and timekeeping. Not only therefore has the tribunal found no evidence that 1:1 coaching was positively withdrawn from him, the Tribunal is surprised C suggests that it was required. It was not required by the whole cohort. Any of them could ask for support including C. Those whom Rs considered to be struggling, such as Mr Hutchinson, were just given it as required. The Tribunal finds, in the words of

Mr Denyer (email 23rd August 2018 at p352A) that C was "on paper doing an ok job and there was nothing to suggest he wouldn't make it through transition", (a view which Mr Denyer supported by citing Ms Lloyd-Davies' comment in her email of 20th August 2018 that "in theory he could still pass transition").

8.4. The distribution of work was random and at least in part computer system generated and in part following Capacity Team consideration of who was available at any given time. The system operated as a queue across C's peer group with a view to equitable distribution and to provide operatives with a mix of low, medium, and difficult cases. C was given work that he did not like, that caused him concern, that was outside his experience and on which he was receiving what he considered inadequate training. Because of those matters we find that it may have been more appropriate to have allocated files such as the S Claim to a more senior and experienced operative but the allocation of that file to C was not a case of selection of that file for him because it was complex.

8.5. C asked to be moved from CRT handling written complaints to Phone a Friend (PAF) as there was a vacancy. PAF was in fact part of CRT. R wanted its longer term employees more used to written work, to become used to using telephones as this was to be LBG's preferred method. In general, therefore R1 wanted "more tenured" staff to work on PAF. An exception was made for Mr Blything who lived with dyslexia; PAF was seen as a reasonable adjustment for him. C's request was declined on 6th August, the day he was served with notice of dismissal. He was refused a move both because he was not "more tenured" and because he was about to be served notice.

8.6. C's placement was terminated, and he did not transition completely out of the training initial stages of engagement. As stated above C's performance was, objectively judged, adequate. Also as stated above, the Tribunal has made findings as to why C had difficulty with the work, being his lack of experience in complex complaints. Work was allocated as found above. The fact that C did not transition was not because his workload consisted of more complicated cases than colleagues.

8.7. C was the first of his cohort to be dismissed. Mr Hutchinson was later dismissed having been given additional time and further coaching before it was concluded that he could not transition successfully. The tables produced to the tribunal show that other colleagues who did transition performed as well as, or generally less well than, C. C was given Notice of termination on 6th August, by which date he had completed eight cases all of which scored pass marks including at 100%. The same is not so for others in his cohort as the disclosed tables show; some scored less well and all, bar Mr Hutchinson who was nevertheless given further time to prove himself, transitioned. After that date he failed three cases which were complex and at a time when he had escalated his concerns to FCA (albeit we had no evidence as to when either respondent became aware of this); as well as the complexity of the cases that he was randomly allocated, it seems that C, whilst under notice and seriously disgruntled, did not apply himself as assiduously to the case files as when he was training and believed he would have the prospect of an

extended engagement. Termination of the engagement was detrimental treatment; it was ostensibly Ms Lloyd-Davies' decision based on data that has been shown to be unreliable (and it is incomplete despite Orders for disclosure, relating to only 12 of the cohort of 18 engaged at the same time as C) such that an adverse inference can be drawn as to the real reason for termination.

8.8. On 25th July 2018 Ms Turner called C and Mr Blything into a meeting room for an investigation, without prior notice and on-the-spot. She was accompanied by her line manager, Mr McAvoy (who did not give evidence to the Tribunal). Ms Turner questioned them about an allegedly false/mocked-up invoice that had been left on a printer or somewhere easily visible to others, that suggested a higher pay rate was being received than was in fact the case; this had caused resentment amongst C's cohort. C denied involvement; Ms Turner then said the allegation was against Mr Blything, who became upset. It was not explained to C why he had been roped into this investigation. The Tribunal notes Mr Hellen's witness evidence that C and Mr Blything were seen by him as advocates for each other, both bringing up their concerns and speaking out in unison; the tribunal infers from his comments and Ms Turner joining C in this meeting that they were perceived as something of a trouble-some double-act. After excusing Mr Blything from the meeting Ms Turner then questioned and challenged C about his meeting on 19th July with Mr Hellens; she wanted to know what they had discussed and why. She was concerned that C had raised issues with Mr Hellens. C would not tell her any details stressing that the meeting had been confidential. Ms Turner was persistent and insistent. The fact that Ms Turner did not know the full extent of what C had raised with Mr Hellens, and felt the need to interrogate him, corroborates that some of C's disclosures and issues at that meeting had been treated in confidence by Mr Hellens; the Tribunal also infers that C was seen as a complainer and someone "rocking the boat" by not just Mr Hellens but also Ms Turner. Ms Turner said in evidence (paragraph 26 of her witness statement) that it is "now" apparent that C had little respect for her as a manager. The Tribunal infers from Ms Turner's conduct in and around the meeting of 25th July 2018 that she already had that perception and was irritated, wanting to know what C was doing (whether involved in the mocked-up invoice) and why he went above her head to Mr Hellens when she was his line manager. Ms Turner and Mr McAvoy also took the opportunity to discuss C's punctuality.

8.9. In the initial stages of C's training his daily commute was disrupted by fires on the moors adjacent to the motorway and rail networks. He was late on occasions and sometimes considerably late, as shown on the available tables. This was through no apparent fault of his own but due to traffic and rail disruption. Punctuality was important especially during training as lateness, and especially when extended, meant that operatives were missing out on valuable instruction. C was not alone in being unpunctual although it appears that of all the cohort in question, he was the one who lived most distantly from Chester and who was the most affected by the fires between his home (in Preston) and Chester. While the respondents gave out generalised messages to the cohort about timekeeping C was the only

individual singled out for criticism and correction. Whereas others arrived late and left early, C was held to account on several occasions, the matter was raised with him orally including by Ms Turner (25th July 2018 meeting) and in writing by Mr Hellens (6th August 2018 email at p289). Ultimately it was a contributory factor that R1 says it used to select C for termination of his engagement in the light of what it says was an over-capacity of one operative. Deficient timekeeping by others was tolerated although generalised reminders of the importance of good timekeeping were issued. The Tribunal accepts C's account that an operative Tom arrived several hours late for training on 12th July explaining that he was late because he had got drunk the evening before watching an England football match, and his late arrival was laughed off; no further action appears to have been taken, and no action was taken when he was late again on 24th July 2018 (C's written statement and oral evidence). Whereas others left early from work without any apparent comment, criticism or chastisement, C had to ask permission, and was not always allowed to leave early or was criticised for bad timekeeping when he did. On occasion, and it appears that this was particular to requests from C, Ms Turner said that she had to obtain permission for C from Ms Lloyd-Davies and that C could not go directly to Ms Lloyd-Davies; in that event Ms Lloyd-Davies does not recall the referral from Ms Turner and Ms Turner did not return to C who decided eventually to leave early anyway in the absence of any response). The tribunal finds as a fact that C was held to account more strictly than his colleagues for adherence to working times and practices and that this was due to the respondents' perception of him as someone rocking the boat, complaining and making "noise" by persistently raising the issues that he voiced to his trainers, Ms Foulkes, Ms Turner (including on 23rd July 2018 when he challenged her over the suggestion made to operatives that they fabricate long lunches for the tracker record but not take required breaks so as to better achieve targets), and Mr Hellens. In effect C was penalised over his timekeeping when it appears to the Tribunal that others were not. Having initially criticised C for the number of "lates" the respondents then at this hearing, specifically Mr Hellens, suggested that it was not the frequency or number of "lates" that mattered but their duration, that is the time absent through being late that cumulatively affected training.

8.10. While C was under notice of termination of placement dated 6th August 2018 the whole Team was called to a meeting to discuss issues and targets on 14th August 2018. Some operatives voiced complaints and disquiet at what was being communicated and C spoke supportively of them at the meeting, although not the main protagonist at this meeting. After the meeting Ms Foulkes summarised the matter in an email and listed the vocal participants, including C. These events were relayed to Mr Denyer who asked for the names of those involved so that he could "reach out to them" (email 14th August 2018 p319). In response Ms Foulkes (R2's Resource Manager) said that the "allegations" in question were made "by the group as a whole so I have provided all of their names below" and she named fourteen people including C. We did not hear evidence from Ms Foulkes as to why she named C. The Tribunal infers that she named C for the reason stated in her email and to reflect that C was present and did contribute his comments during the

meeting, being still part of the "group as a whole". There is a transcript of the meeting in the hearing bundle. The Tribunal notes that C spoke out and in her written statement Ms Turner refers to his contributions accurately. There is no evidence to support the assertion that C's name was included in that email to "vilify" him; the Tribunal finds it was not; C was named to identify him as a participant in a meeting where contractors raised issues over pay and targets when Mr Denyer asked for names to be named.

9. **Termination**

9.1. R1 used R2 to provide contractors for various reasons including to allow maximum flexibility of staffing levels, being able to increase and reduce the numbers of people engaged as the business need dictated. Capacity was planned for and the plan was regularly reviewed. The working environment at the material time was fast paced and fluid with the work related to transitioning from BoA to LBG ongoing. R1 says that on a Capacity Review in August 2018, albeit only two months after recruitment of C and his cohort, and despite the training resources expended, R1 had an over-capacity of one full-time equivalent. The Tribunal has no evidence to gainsay that assertion although it has concerns given the overall background and the way that C was chosen. That said the Tribunal does not draw an adverse inference in this regard and finds that R1 had cause to seek a candidate for dismissal.

9.2. There was confusion in the evidence of the respondents as to whether C was selected for poor timekeeping being the occasions when he was late or in terms of the duration of lateness or both, performance in terms of productivity or quality (when neither was accurately measured or relied upon for any of the others in the cohort during training) or attitude, conduct and the chance of disruption (see below). The Tribunal infers from all the circumstances that C was chosen because he was perceived as making noise, rocking the boat, whining, being disruptive when he complained about being assigned to CRT rather than PPI work, working conditions including breaks, threats of longer working hours without breaks, inadequate training for the complexity of matters facing him and others given their lack of expertise and experience, the impending imposition of targets that were seen as being unrealistic given all these circumstances, having to give incomplete or potentially misleading information to customers about Affinity and Horizon cards, the inability of the likes of Mr Blything and Mr Hutchinson to address complaints in written work given their disabilities, and the likelihood of breaches of FCA regulations given all this.

9.3. Ms Lloyd-Davies selected C as the FTE person to be dismissed acting on information received from those working for R1 and R2 about C's complaints, including what is described by Mr Hellens in his 6th August 2018 email as him "keep[ing] on persisting about hours", "negative things" where C is seen as an "outlier", "confrontation and constant negativity" and that "every time there is noise within that area you seem to be mentioned". Mr Hellens confirmed in his email that C has caused friction amongst the group regarding day rate…. The client [R1] is aware of unwanted noise in regard to rate and having spoken to various members of the area you and another name raised its

head". Mr Hellens also talks about C's timekeeping being problematic. Mr Hellens gave evidence that the meeting of 19th July 2018 was C whining, but the tribunal has found that the meeting included C making serious disclosures about Health & Safety and FCA compliance issues, which Mr Hellens has sought to playdown. The Tribunal finds that Mr Hellens said email displays the respondents' collective and respective views of C because of his complaints and disclosures throughout his placement including those matters at paragraphs 7.1 above.

9.4. Mr Lynes (R1) emailed Mr Denyer (R2) (294) asking that C's dismissal with notice be communicated to C, who was given 20 days' notice and told that there was sufficient work for him to continue throughout his notice period. Mr Lynes went on to explain C's selection in terms of having "a few challenges" with C's "performance and attitude/conduct" ("minor conduct issues"). Mr Lynes said that C left work having been refused permission on one occasion (although the Tribunal believes that this may have been the occasion that Ms Turner said she had to obtain Ms Lloyd-Davies approval and never returned to C with an answer). Mr Lynes indicated that C would be monitored and "if we see more serious conduct issues or disruption to the wider team, we may need to revisit him working his notice". The Tribunal finds that Mr Lynes' source of these opinions and decision was Ms Lloyd-Davies who was liaising with Ms Turner, and Mr Hellens of R2 at least. The information is not that gleaned from the tables exhibited to Mr Lynes' statement, not least as they do not show disruption to colleagues as apparently suspected by R1's management.

9.5. Mr Denyer instructed Joel Priest to communicate the above decision and his emailed 20 days' Notice of 6th August 2018 to C is at p295; the effective date of termination was to be 5th September 2018. The stated reason was over-resourcing by one FTE. C agreed to work his notice. Mr Priest duly informed Mr Denyer (R2) and Mr Lynes (R1).

9.6. Ms Turner was absent from work on leave during the period 6th – 8th August 2018.

9.7. Two matters of significance appear to the tribunal to have occurred during the notice period to give rise to the respondents' decision to summarily terminate C's placement during the notice period. C's performance dipped (he failed to reach pass marks on three files), and his involvement in the meeting of 14th August 2018 when a number of contractors raised issues over pay and targets (see paragraph 8.9 above). The matters discussed at the meeting on 14th August gave rise to email correspondence and conversations between management at R1 and at R2 internally, and between R1 and R2, for example Mr. Lynes emailed his response and comments on matters raised to Helen Foulkes (R2's Resource Manager at R1), Rebecca Minns (R1's Resource and Expenses Manager), Ms. Lloyd-Davies (R1's Operations Manager), and Mr. Denyer (R2's Client Services Director) (p352D); in essence he rebuffed the contractors concerns saying "pay is tied to productivity" and directed the matter to R2. That is why Mr. Denyer requested that the contractors be named so he could "reach out", which he did by email to all contractors except C (as he says in his email of 15th August 2018 at

p.352D). On 20th August 2018 Ms. Minns emailed all the above-named recipients of Mr. Lynes' email, and him, saying that in view of C's performance (failing cases) he was a risk to the business and was to be released early; early release was requested as "support" by R2 for R1.

9.8. The Tribunal finds that both the claimant's involvement at the 14th August 2018 meeting (in the context of C being perceived as creating "noise" when he raised the above mentioned issues repeatedly), and his dip in performance with file failures materially influenced the respondents' decision to terminate C's placement during the Notice period.

9.9. Also on 20th August, shortly after Ms Minns request for support in releasing C, Ms Lloyd-Davies asked Mr Denyer when he was going to dismiss C who was present in the office that day but was about to take two days' leave, a query that reads to the Tribunal as a prompt (p352C) in circumstances where R1 had acknowledged that there was work for C to do until expiry of his notice in September and where notice had been given without apparent urgency due to over-capacity; the Tribunal infers that C was perceived as a risk both in terms of his potential handling of files and in terms of the "noise"-factor.

9.10. C had booked two days for Eid celebrations, 21st – 22nd August 2018. Knowing only that C was still on site in the afternoon of 20th August but would be away the following two days Mr. Denyer said that he would telephone the next day, that is while C was away on holiday, so that "he won't cause you (Ms Lloyd-Davies) any issues" (email 20th August 2018 p352C). This was Mr Denyer's way; he preferred to dismiss contractors from projects when they were off site to minimise disruption and risk to work and work relations on site. Only after stating this preference did he become aware, from Ms Foulkes, that C was celebrating Eid, would be returning to site on 23rd and her suggestion that Mr Denyer "may feel it is better to leave it" until then. Despite Ms Foulkes' suggestion Mr Denyer telephoned C on the evening of 21st August 2018, telling him that he was being released early from the project and that he would not be permitted to work his notice, due to expire on 5th September 2018. Mr. Denyer acted as he did for the reason stated in his said email to Ms. Lloyd-Davies, to avoid the potential for "issues".

10. **Alleged victimisation:**

10.1. On 3rd August 2018 C emailed Mr Hellens (p. 290) complaining about Ms Turner's "unorthodox management style" in not confirming by email, as she said she would, his start and finish times, saying she would have to ask Ms Lloyd-Davies whether C could finish early on requested dates, and her saying that she was noting his file, while at the same time others were allowed to leave early as it had apparently been "ok'd". C added: "yet I seem to be treated differently". In that email C did not suggest any reason or motivation for the alleged difference in treatment; he merely stated what seemed to him to be a difference. Mr. Hellens did not understand that email to be a suggestion of anything other than inconsistency.

10.2. Mr Hellens came to conclude that C was a person who made noise and was an outlier, amongst other things as previously described in 6th August 2018 email to C. C complaining about Ms Turner formed part of the factual background that led Mr Hellens to his views on C. This complaint materially influenced Mr Hellens' opinion of C, which in turn eventually contributed to his dismissal.

10.3. As found above, C complained to Mr Hellens in a meeting on 19th July 2018 that his colleagues Richard Blything and Greg Hutchinson were unable to meet required standards in the CRT, given the working environment and level of training, because of their respective disabilities. Mr. Hellens understood this to be a case of C advocating for his colleagues, especially Mr Blything which he said in evidence he did not fully understand as they seemed to always talk for and in support of each other on many issues. Mr Hellens understood that in effect C was saying that consideration ought to be given to making reasonable adjustments as they were disadvantaged working as required; for that reason, he said that this matter could not be treated in confidence and that he had to take it further (which he said he would do regarding C's own training and hours issues too).

10.4. In consequence of the meeting on 19th July 2018 Mr Blything, who lives with dyslexia, was given the opportunity to move to working on the phone (Phone-a-Friend or PAF). C asked whether he too could move to PAF but was refused on 6th August 2018 for the ostensible reason that such posts were for "more tenured" workers as R1 wanted their employees to transition from paper complaint handling to telephony in line with LBG's practices. Mr Blything was an exception as a reasonable adjustment was required for him to remove the disadvantage of his working with written material.

10.5. C's raising the said matters on 19th July was seen by R2, and by extension when communicated to it by R1, as more "noise", albeit the respondents saw merit in moving Mr Blything to PAF. C was seen to be raising issues not only on his own behalf but also for others. This formed part of the factual background to Mr Hellens' views on C as stated in his 6th August 2018 email, which views and opinions were shared with and then by management at R1 and R2.

10.6. The Tribunal has already found that C was not excluded from meetings, Ms Turner did not exclude him by turning her back on him, support was not withdrawn from C, he was not allocated more complicated files than others, he was not named as a participant at the 14th August meeting to vilify him, and he did not fail to transition because of the allocation of file work.

10.7. The matters raised by C in his 3rd August email and 19th July meeting contributed to the respondents' overall impression of him as described above (in that they materially influenced the respondents); their impression being that he was confrontational, negative, an outlier with questionable commitment who needed to consider where his future lay, and someone creating "unwanted noise" when he raised maters of concern (pp289 – 290). In consequence of that C was held to higher account than others as regards timekeeping and working practices, and he was effectively penalised by

being dismissed, first with notice and then summarily during the notice period (albeit during the notice period C's performance dipped, and that too was seen as a risk to operations).

11. **Payment for work in the period 1st – 20th August 2018:**

11.1. The agreement between the parties, reflecting what happened in practice during C's placement by R2 with R1, was that contractors submitted timesheets (not invoices) for approval, and approved timesheets would then be processed so contractors were paid what is due. If a contractor did not submit timesheets they would not be paid for the period under consideration. If timesheets were rejected, they would not be processed, and no payment would be made. This arrangement was the implied contractual provision relating to pay.

11.2. C worked during the period 1st – 20th August 2018 and he completed timesheets which he submitted for approval and payment.

11.3. The respondents initially rejected the timesheets. They intended enforcing recoupment of monies they said they were entitled to withhold under the contract, in respect of training and deficiencies; they initially intended not paying C for this period (all other payments having been duly honoured). On reflection the respondents decided against seeking recovery of any money from C and invited him to submit his timesheets anew for payment if he sought to recover pay for the period 1st – 20th August 2018. The initial claim having been rejected by the system the respondents required a new submission and so notified C.

11.4. Despite being asked to submit timesheets again C did not. He has not been paid for the period in question. The reason he has not been paid id that the respondents have not received submitted timesheets for that period other than those that were rejected and do not fall for payment.

The Law (including brief reference to each parties written submissions, which were considered in depth in reaching our judgment as clarified by each Counsel orally):

12. **Jurisdiction – employment status:**

12.1. **Statute:**

12.1.1. S. 42 Employment Tribunals Act 1996 defines an employee as an individual who has entered into or works under a contract of employment where s3 of the same Act confers on this Tribunal jurisdiction for claims for damages for breach of such a contract.

12.1.2. ERA in general: save in respect of the "whistleblowing" provisions an employee for the purposes of this Act means an individual who has entered into or works under a contract of employment. A "worker" means an individual who has entered into or works under a

contract of employment or any other contract, whether express or implied whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual (S230 ERA).

12.1.3. "Whistleblowing" and the extended definition of Employee: s43K ERA sets out an extended definition of "worker" by including, amongst others, a person who works in circumstances in which they have been introduced or supplied to do that work by a third person and the terms of engagement are, or were in practice, substantially determined not by the worker but by the person for whom they work, or by the third person, or by both of them.

12.1.4. S.39 EqA prohibits an employer from discriminating against an employee including as to terms of employment, affording access and opportunities for promotion, transfer, training, or any other benefits, by dismissal or by subjecting an employee to any other detriment. For these purposes "employment" means amongst other things employment under a contract of employment, a contract of apprenticeship or a contract personally to do work (s.83 EqA).

12.1.5. S.41 EqA: apart even from employees and workers, a principal must not discriminate against a contract worker where a principal is a person who makes work available for an individual who is employed by another person and supplied by that other person in furtherance of a contract to which the principal is a party.

12.2. **Submissions:**

12.2.1. **C:** The purported right of substitution is a sham; it could not be, and never was, exercised by a worker in C's position working for R1 via R2. In fact, from the pre-appointment vetting to termination, and including how both were handled and all working arrangements such as training, equipment, management, time management and control generally, C was an Employee of R1; at very least a worker as he had to perform work personally and this is more obvious in line with the extended definition of "worker" for the purposes of "whistle blowing" protection. If C was a worker, he was supplied to R1 by R2 who between them substantially determined his terms of engagement, which he did not (and the Tribunal does not have to analyse which respondent had the greater say as an agency worker could have two "employers" (both respondents). A further alternative is that C was employed by his own company or R2 and supplied to R1 making him a contract worker on a contract personally to provide work. In any event the Tribunal has jurisdiction to hear the claims depending on who has subjected C to detriment.

12.2.2. **R1:** C was not employed by R1, C having no written contract with it but with R2. C was engaged for six weeks which is insufficient time for any inference as to status to be drawn. Regardless of the application

to C of R1's policies there were differences in the terms for those such as C and for "permanents" or employees. It is for C to prove his status.

12.2.3. **R2:** Labels are not determinative. C purports only to be an employee of R1 and not R2. The test in Ready Mixed Concrete (South Easy) Ltd v Minister of Pensions and National Insurance [1968] 1AER 433 applies namely there must be the provision of work in consideration of remuneration, an agreement to a sufficient degree of control by the employer, and the other provisions of the contract must not be inconsistent with employed status, but in fact a "multiple test" is also applied considering a number of factors discussed in the written submission provided. To acquire worker status there must be a contract for personal performance and there is no contract between C and R2 (only between Matthaus Ltd and R2). R2 relies on Halawi v WDFG Ltd t/a World Duty Free [2015] IRLR 50 (CA) as an analogous case where the purported employment relationship was considered in the light of criteria including a requirement to perform services personally and subordination to the employer's instructions; on this basis there was no contractual relationship between C and R2 and the relationship does not fit the criteria within s83EqA or S230 ERA. C also fails the extended definition of Employee in s43K ERA, again because there is no contract between C and R2. Furthermore, it was R1 and not R2 that substantially determined the working terms (Keppel Seghers UK Ltd v Hinds [21014] IRLR 754). Agreeing with C, R2 submits that it is possible for us to find that C was a worker for both respondents following McTigue v University Hospital NHS Foundation Trust [2016] IRLR 742. C was not a contract worker (s41EqA) following Halawi (above) and there was only a contract between C and Matthaus Ltd, and that company and R2 who supplied the company to R1, R1 being the principal.

13. **Breach of Contract:**

13.1. **Statute:** s3 Employment Tribunal Act 1996 provides that claims for breach of an employment contract can be brought before an Employment Tribunal; it follows that any breach of contract claim is dependent on a contractual relationship of employment.

13.2. **Submissions:** all parties agreed that for C to pursue such a claim he must establish that he was an employee of either or both respondents.

13.2.1. **C:** C was an employee of R1, having applied all statutory tests and case law indicated criteria. He was under R1's control, used its equipment and had to follow its direction.

13.2.2. **R1:** C was not an employee and there was n o claim at the end of his contract. R1 did not pay C nor have any authority/control over his pay.

13.2.3. **R2:** There was no contract at all between C and R2; C was paid all that due to him anyway.

14. **Unlawful deductions from wages (s.13 Employment Rights Act 1996 (ERA)):**

14.1. **Statute:** section 13 ERA provides a worker with the right not to suffer unauthorised deductions from wages. An employer shall not make a deduction from wages unless by virtue of a statutory provision or relevant provision of the workers contract or the worker has previously signified in writing agreement or consent to the making of the deduction.

14.2. **Submissions:**

14.2.1. **C:** as a worker C can bring this claim. He has not been paid for the period 1st – 21st August 20218 (£2,688). There was no valid consent to that sum being deducted.

14.2.2. **R1:** The burden is on C to prove that he is a worker; R1 makes no admissions. R1 was not his employer within the meaning of the applicable statutes; it do not pay C and was not liable for any outstanding payments, albeit R1 denies there were any.

14.2.3. **R2:** The Tribunal must establish what was properly payable and C failed to trigger entitlement by failing to submit timesheets when required for the period claimed; the original sheets had been rejected and C was obliged to submit unrejected timesheets for payment; he did not.

15. **Public Interest Disclosure ("whistleblowing") – detriment (S47B(1) ERA):**

15.1. **Statute:**

15.1.1. S.43A Employment Rights Act 1996 (ERA) defines protected disclosures, in the context of public interest disclosures generally referred to as "whistle blowing". S. 43B ERA lists the types of disclosures that qualify for protection at 43B (1) (a) – (f) ERA including disclosures that a person failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, and that the health and safety of any individual has been, is being or is likely to be endangered. Any such disclosure must be made appropriately as required by sections 43C – s. 43H ERA.

15.1.2. A worker has the right not to be subjected to any detriment by the employer done on the ground that the worker has made a protected disclosure (S. 47B ERA). S.103A provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason, (or if more than one, the principal reason), for the dismissal is that the employee made a protected disclosure, an automatically unfair dismissal (s. 1O3A).

15.1.3. There is a five-stage test to determine if there has been a protected disclosure

15.1.3.1. there must be a disclosure of information;

15.1.3.2. the worker must believe the disclosure is made in the public interest;

15.1.3.3. that belief must be reasonably held;

15.1.3.4. the worker must believe that the disclosure tends to show one of the matters in s.43B(1) (a) – (f) ERA, for example breach of legal obligation et cetera ;

15.1.3.5. that belief must be reasonably held.

15.1.4. It is good practice to decide why an employer acted as it did before becoming involved in lengthy esoteric debate about whether there has been a protected disclosure, so as to ensure the relevance of any such finding; if the tribunal were to find that the employer's actions were not influenced by any potential disclosure but have a clear and obvious innocent explanation for action or inaction then there is no need to over-deliberate to establish whether in fact the comment or observation made by the employee amounted to a qualifying or protected disclosure. The tribunal should establish the employer's motivation and rationale for action or deliberate inaction.

15.1.5. An "allegation" and "information" are not mutually exclusive; to qualify for protection a disclosure must have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in section 43B (1) ERA; if there is sufficient factual content and specificity, and the worker subjectively believes that the information tends to show one of those listed matters, then it is likely that the belief would be a reasonable belief, assessed in the light of the particular context in which it is made (Kilraine v Wandsworth LBC [2018] ICR 1850).

15.1.6. The tribunal ought to investigate the claimant's state of mind at the time of the disclosure to consider the reasonableness of the claimant's belief and whether this subjective belief was objectively reasonable.

15.1.7. What matters then is whether protected disclosure materially influenced (more than trivially) the employer's treatment of the person who made the disclosure (Fecitt & others v NHS Manchester [2012] ICR 372).

15.1.8. As stated above, in both discrimination and whistleblowing cases treatment will amount to detriment if a reasonable worker would, or might, take the view that the treatment accorded to them had in all the circumstances been to their detriment (Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73).

15.1.9. It is irrelevant that the respondent to a claim involving detriment would have or may have acted in the same way for any other number of reasons if the reason for action in the particular case is because of the protected action. If the treatment was because of a protected action, it is no defence to say that the same treatment could have followed other circumstances too (Balfour Kilpatrick Ltd v Mr S. Acheson & Others EAT/1412/01/TC).

15.1.10. The protection given to an employee carrying out health and safety activities (and by analogy, or who makes a protected disclosure) is broad. It would protect an employee (or worker, as appropriate), who caused "upset and friction" by the way in which they went about the said activity (or making a protected disclosure); an example of this would be where the person involved was perceived as being overzealous even to the point of allegedly demoralising colleagues. The protection seeks to guard against resistance or any manifestation of their conduct being unwelcome. It would undermine the statutory protection if an employer could rely upon the upset caused by legitimate health and safety activity, the way such activities are undertaken, as a reason to dismiss. The way such activities are undertaken will not easily justify removal of protection unless they are, for example, wholly unreasonable, malicious or irrelevant to the task in hand. [Sinclair v Trackwork Ltd UKEAT/0129/20/OO (V)]

15.2. **Submissions:**

15.2.1. **C:** C's evidence is clear that he made the claimed disclosures. R1 did not adduce evidence from its staff to whom C made his disclosures, although they were long-serving and not juniors. Disclosed emails (13th July 2018 at p420) "goes a long way to proving" that the disclosures were made. Neither R has even denied the claimed strategy in respect of Affinity and Horizon cards about which C complained, and which the documentary evidence discloses was an issue with customers. Mr Hellens has mis-characterised the 19th July 2018 meeting arranged in consultation between the respondents in response to C's said email (being more than a "whine about …hours"). C was seen as a troublemaker for raising his stated concerns. A disclosure must contain facts as opposed to mere allegations and this is a question of fact, albeit "allegation" and "information" are not mutually exclusive terms; the factual finding depends on consideration of all the facts of the case. The reasonableness of C's belief must be judged at the time he held it and is a partly subjective test. Once a subjective belief is established the tribunal must consider objectively whether the belief was reasonable in the light of all the facts. In relation to the data used against C to justify termination, neither R adduced evidence from the person who compiled and extracted the disclosed data which "did not stack up" and contained "glitches" said to possibly have been caused during updates; the witnesses were not able to make proper sense of the data relied upon while conceding it was incomplete and not contemporaneous. C was supposedly dismissed due to what the data showed as to C's performance, but the disclosed data did not in fact show C to be the most likely candidate for termination; others who were, were tolerated and allowed continue (and Mr Ahmed set out an analysis of C's comparators to show this). Source information for R's capacity report which is said to have indicated that R1 had one person over capacity, was not disclosed and this rationale was "false". R1 and R2 liaised over C's selection for termination through Mr Hellens and Ms Lloyd-Davies, the former telling her about C's attitude" issues.

15.2.2. **R1:** The Tribunal ought to focus on which alleged disclosures are likely to give rise to detriment(s), that is focusing on the principal disclosures that may have resulted in detriments. It is for a respondent to such a claim to show the grounds for doing what it did and if it fails to discharge the burden a Tribunal may, but need not and not by default, draw an adverse inference. Causation is established by applying "material influence" as the criterion, "the reason why" and this involves consideration of the motivation of the person alleged to have acted detrimentally to the claimant.

15.2.3. **R2:** C has claimed to make disclosures to some people for whom R1 would be vicariously liable and some that R2 would be. R2 denies that the disclosures were made as alleged, but he complained about his hours of work. There are no contemporaneous records and R2 would not have ignored such matters if raised. Even if C did make protected disclosures, they were not the cause of any detrimental treatment. In fact, C was not subjected to the alleged detriments. For C to succeed he must establish that he made protected disclosure(s) and any such disclosure was a material factor affecting the respondent's actions including dismissal of C.

16. **Public Interest Disclosure ("whistleblowing") – dismissal (S.103A ERA):**

16.1. **Statute:** I have already referred to the relevant statutory definition of public interest disclosure and the applicable five-stage test. S.103 ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure. This is called an automatically unfair dismissal. There is no qualifying period of employment for an employee to make such a claim.

16.2. **Submissions:** as above. R2, and to an extent R1, also referred to Kuzel v Roche Products Ltd [2008] IRLR 530 to the effect, without creating a rule, that where a respondent fails to establish the reason for a dismissal a Tribunal is entitled to find that the reason was whistleblowing (or it could find some other reason). The burden is on C to demonstrate that whistleblowing was the principal reason here because he was not employed for 2-years and there is no burden on R as to establish the real reason. The tribunal is entitled, Royal Mail Group v Jhuti [2020] IRLR 129 to take a broad approach to the reason for dismissal and consider the rationale of a person of authority giving bogus information to a decision maker, but here there is no evidence that Mr Hellens negatively impacted Ms Lloyd-Davies' decision making. C alleging a discriminatory dismissal at the time undermines his claim that it was because of whistleblowing now.

17. **Direct discrimination on the ground of religion or belief S.13 Equality Act 2010 (EqA)):**

17.1. **Statute:** direct discrimination is where one person treats another less favourably, because of a protected characteristic, than they treat or would treat a comparable person, that is someone who in all other respects is

comparable save that they do not share that protected characteristic. Religion or belief is a protected characteristic as listed in s.4 EqA. The burden of proof is set out in s.136 EqA as clarified in Efobi v Royal Mail Group. The Tribunal must make findings from all the circumstances that there may have been unlawful discrimination before a respondent is under a burden to prove to the contrary.

17.2. **Submissions:** The tribunal must find the "effective cause" of the treatment that the tribunal finds C received from the respondents. The Tribunal must consider a sole decision-makers knowledge and reasoning, motivation and intention. The protected characteristic must play no part in the reasoning for the treatment. The parties do not agree on what treatment C received with some outright denials from the respondents and some non-discriminatory explanations.

18. **Direct discrimination on the ground of race (s.13 EqA):**

18.1. **Statute:** race is also a protected characteristic and s.13 EqA applies as above. S.9 EqA states that race includes colour, nationality, ethnic or national origins. Direct discrimination is described above.

18.2. **Submissions:** As above.

19. **Harassment related to religion or belief and/or race (s.26 EqA):**

19.1. **Statute:** harassment is constituted by unwanted conduct related to a relevant protected characteristic where the conduct has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person (referred to as the harassing effect or the effect of harassment). The Tribunal must consider all C's perception, all the circumstances of the case and whether it was reasonable for the conduct to have the harassing effect.

19.2. **Submissions:** These were largely factual where there is no agreement as to either what happened, why, or the reasonableness of C's claimed effect.

20. **Victimisation (S.27 EqA):**

20.1. **Statute:** victimisation is subjecting someone to a detriment because they have done a protected act, is believed to have done so, or may do so in circumstances where a protected act includes the bringing of proceedings under EqA, giving evidence or information in connection with such proceedings, doing any other thing for the purposes of or in connection with EqA, or making an allegation (whether or not express), that a person has contravened EqA.

20.2. **Submissions:**

20.2.1. **C/R1/R2:** The submissions were largely in respect of factual disagreements.

20.2.2. **R2:** C's email of 3rd August 2018 merely cites differential treatment, which is not enough for a protected act. It does not assert facts capable of amounting in law to an act of discrimination (Waters v Metropolitan Police Commissioner [1997 IRLR 589); there must be something sufficient to show that it is a complaint to which EqA applies at least potentially, such as where detrimental treatment upon the basis of a protected characteristic is being alleged (Durrani v London Borough of Ealing UKEAT/0454/201). Mr Hellen's version of the 19th July 2018 meeting ought to be preferred namely C did not raise the matters he alleges, and Mr Hellens did not believe C had done a protected act. Further any detriment must be "because of" a protected act – "the reason why". In fact, C was not subjected to the alleged detriments.

Application of law to facts:

21. **Jurisdiction:**

21.1. C wanted to work for R1 as supplied by R2 and to affect that to his satisfaction, and knowing the pros and cons, he set up Matthaus Ltd as a vehicle to gain access to that work. The consultancy agreement between C and R2 was a device. It benefitted both parties on paper, and ultimately R2, but it had no bearing on the reality of the situation. Neither R1 nor R2 subsequently had any dealings with Matthaus Ltd but solely, directly, exclusively with C, from personal vetting (as opposed to corporate due diligence) through every aspect of the working arrangements and payment, to effecting C's dismissal. Matthaus Ltd was contracted to provide an operative for PPI work subject to the terms of the consultancy agreement and with a requirement to submit invoices for payment. That is not what happened. C's contract with R1 and R2 was implied and not written. Some of the provisions of the consultancy agreement, such as adherence to R1's policies and procedures, were common to C's implied terms; he accepted them and the respondent's expected them; those terms were worked to throughout the relationship but the contract that we had to consider in fact was with C and not Matthaus Ltd. The Tribunal does not accept that R2 can rely for total protection on the absence of a signed agreement with C, and Matthaus Ltd is a presence in this case in name only. There was no evidence before us that C was an employee of Matthaus Ltd; he was not.

21.2. C was engaged to personally perform work for R1's CRT team, submitting timesheets and being wholly subject to control by R1 as exercised either directly by R1 (such as via work allocation, the application of pre-appointment vetting, policies and procedures, Ms Lloyd-Davies having ultimate authority over requests to arrive late/leave early/for holidays) or as R1 delegated to R2 by way of direct line management by Ms Turner and on occasions by Mr Hellens. R1 and R2 always acted in the interests of both respondents' businesses, furthering and protecting their business

relationship; R1 specified what it required and R2 advised how best it could achieve its aims using staff recruited and line managed by R2. R2 fed back to R1 on matters pertaining to delivery and in relation to individual operatives and how the recruited cohort was performing. Emphasis was placed by R2 on maintaining a trouble-free environment to effect R1's plans without any perceived challenge, query or impediment. This model led to C being in a subordinate position to the respondents, sacrificing his independence to a very large degree including that in practice he had no alternatives than to perform the work himself or end his engagement. The respondents' witnesses conceded that substitution was at best theoretical; it was not practicably workable and was never a viable option for C; all parties were fully aware of this. The substitution clause in the agreement between Matthaus Ltd and R2 had no bearing on C's working relationship with R1 and R2; in the context of that relationship, it was a sham.

21.3. That said, C knew that he was not obliged to work for R1 and R2, that he was a contractor, that his placement was not permanent but for a fixed duration with maximum flexibility for all parties as to whether the duration was shortened or extended. He knew his position was different to that of "permanents". He benefitted from the tax arrangements of being an independent contractor. He was experienced with such relationships and freely entered a relationship that he knew was not one of employment. The Tribunal considers that in fact part of the reason C took exception to elements of the regime in practice was that he did not consider that he was subordinate as an employee would be, but that as an independent he had a status that allowed for a more flexible approach to hours and breaks and the acceptance of certain work.

21.4. Factors such as provision of equipment and a business address, having to have authorisation for holidays and timekeeping generally, being subject to certain policies and training might tend to show an employment relationship but the Tribunal takes note that the banking industry is highly regulated with, amongst other things, time constraints on complaint handling. In all the circumstances the relationship had to be fairly tightly controlled and neither respondent could afford operatives much latitude in how they went about their work.

21.5. In terms of the authorities cited, such as Halawi, and the various potential relationships and chains of relationships as submitted by the respondents, the Tribunal considers that the situation here was relatively straightforward, despite apparent dressing up. The facts speak for themselves, but the labels tend to obscure those facts; there is a much clearer path to understanding the reality than the labyrinth presented by the respondents. In fact, C provided his services personally to both R1 and R2 under an implied contract. That is it in essence. C did not work under a contract of employment for either respondent, for Matthaus Ltd or indeed anyone else.

21.6. Considering the tribunal's findings of fact, the respective parties' written and oral submissions and applying the applicable law the Tribunal finds that C was at all material times a worker. He was a worker for both R1 and R2.

He was not employed of either of them or his service company; he was not therefore a contract worker either.

22. **Breach of contract:** As C was not an employee his breach of contract claim fails and is dismissed, the Tribunal not having jurisdiction to consider it.

23. **Unlawful deduction from wages:** C is entitled to pursue this claim as a worker. In fact, he was required to submit claims for payment which fell to be paid if not rejected for error, a technical reason, or under the terms of the contract. C's initial claims were rejected to affect a recoupment which the respondents could arguably have affected. The respondents relented on further consideration. At that point the rejected claims could not be honoured, and C was invited to submit his timesheets which would then be approved for payment and payment would be affected. For his own reasons C did not comply with the contractual arrangements; he did not submit timesheets which he had been assured would be processed. In the absence of "unrejected" timesheets R was not obliged to make payment; C has failed to claim payment in line with the contractual arrangements. The respondents have not made a deduction form C's pay. C has to date waived entitlement to payment.

24. **"Whistleblowing", detriment, and dismissal:**

24.1. The tribunal has found that on 27th and 29th June and on 19th July 2018 C told R1 and R2 about being discouraged from taking breaks to which workers were statutorily entitled (a health and safety issue), that this and the complexity of cases with inadequate experience and training, especially where targets were to be introduced, would lead to breaches of legal obligations, that two colleagues were living with disabilities which, without adjustments, meant that they could not complete the work properly, affecting regulatory compliance and customer satisfaction, and that inaccurate or inadequate information was being given to customers about Affinity and the Horizon cards, again tending to show breaches of legal obligations. C told R1 and R2 directly or having been told, such as by Mr Hellens, that it would be shared between them. As regards the 19th July 2019 disclosures C notified Lian Chadwick (R1) by email as to what he wanted to raise with Mr Hellens (R2), and subsequently after he had raised those issues Mr Hellens said that he would take up the non-confidential matters such as the disability issues, hours, and training with R1. We know that Mr Blything was subsequently, consequently, redeployed by R1 to PAF as a reasonable adjustment. C therefore disclosed information tending to show endangerment to health and safety (denial of full and proper breaks) and breaches of legal obligation.

24.2. C believed these matters were issues because of what he was told in training by R1's trainers, sometimes in the presence of R2's managers or other officers and witnessed in practice. He had heard what R2's management were saying about breaks, productivity and targets, whether or not R2 intended to implement reduced breaks and longer working days. C did not make up that he heard directly that breaks were at risk and longer hours under potential threat. He knew from Mr Blything that Mr Blything lived with

dyslexia and was struggling with the written elements of the work. C was told how to handle complaints about the withdrawal of the Affinity cards and the introduction of Horizon cards; he was trained in R1's strategy which he alleged was misleading to customers; it is noted that neither respondent gave evidence denying the alleged strategy. C had such a belief from what he was told by R1 and R2 and Mr Blything while in the training and transition phases of his induction. We do not now how C became aware that Mr Hutchinson had learning disabilities but that was at very least a genuine understanding from his direct observation of Mr Hutchinson at work. C does not have to be right about the endangerment of health and safety or breach of obligations, but he must have a reasonable belief in them. C's belief in all these matters was reasonable based on first-hand knowledge. He disclosed no more than he had been told and witnessed. C believed that it was in the public interest to raise these matters because the breaches of legal obligations to customers potentially affected very many of R1's customers who were reliant on R1 to handle their complaints and deal with their accounts in accordance with FCA regulation and fiduciary duties. The heath and safety matters affected all his colleagues directly, but he also believed that those issues would impact the wider public , namely R1's customers who would receive a compromised service, and so again C believed that raising these issues was in the public interest. It must be in the public interest for the banking system to function ethically and effectively, in compliance with regulations. C was after all working in complex complaint handling; it must have been in the public interest to highlight any risk of working practices subverting its proper functioning.

24.3. The tribunal has made findings of fact in relation to alleged detrimental treatment; we consider that the claimant has either been overly sensitive and suspicious at times or has just lost some insight and focus. That said it is clear to us that C was marked out as a challenging, confrontational, negative outlier who was rocking the boat because of the matters he raised. He was subsequently held to higher account in terms of time-keeping and other elements of performance. He was seen as being disruptive by coming forward repeatedly making the above points. R2 wanted a quieter life and to present R1 with workers who were compliant and subordinate, getting on with what they were told to do and as they were told to do it without questioning fundamental matters such as C did. C's card was marked from an early stage, that is from when he first raised matters of concern at training. The respondents were in close liaison; they shared information about C's cohort of workers as can be seen in the email correspondence that was disclosed (noting those copied in and those to whom a "heads up" was given). The Tribunal infers that views about C such as those voiced by Mr Hellens in his 6th August 2018 email to C were at least known about if not shared by managers in R1 and R2, and because he raised matters of concern as in relation to health and safety and legal obligations to employees and customers. The view was shared that this conduct was rocking the boat and so disrupting the CRT Team. Neither R1 nor R2 considered C to be suitable for this reason.

24.4. It was detrimental to C to be held to higher account on timekeeping, productivity, and quality than his peers. This resulted in him not being excused early on occasions and/or having to wait for approval (when he did not always receive an answer), being chastised for being late, being criticised for failing certain files after 6th August, being considered to have made himself an easily identifiable candidate for dismissal by virtue of his conduct and attitude when R1 said it was over-resourced by 1FTE, and ultimately by his dismissal.

24.5. C was subjected to the detriments described above in paragraph 25.4 on the ground that C had made the said protected disclosures. R1's and R2's management of C as so described was materially influenced by those disclosures. Because C made the disclosures, maybe also his manner in making them but it was the persistence and content that bothered them, both respondents considered C to be a disruptive influence.

24.6. C was seen by the respondents as an outlier; he was not appreciated; he did not fit in because he spoke out, and for that he was not wanted by the respondents. R1 may have been over-resourced by 1 FTE but even if that was a reason for someone's dismissal, the principal reason for C's dismissal was that he made protected disclosures. His quality and output to 6th August 2018 was better than most of his peers; his was not the worst timekeeping record and at least his colleague Tom also had incidents where he was substantially late (several hours on at least two occasions according to C's evidence which the Tribunal accepts). What differentiated C from the others, why he was an outlier, was that he persisted in raising issues which were not being addressed and those issues comprised protected disclosures. When C's engagement was prematurely terminated during the notice period this was in part his involvement in the meeting of 14th August where issues of pay were raised and in part the threat he seemed to pose to the business because he had failed three cases, (but in particular according to Mr Denyer the last one that he failed). He was still being held to a higher account than his peers, some of whom were facilitated and allowed to continue beyond C's dismissal despite failing. That was because of his disclosure. C was seen as a threat to the business also in terms of being allegedly disruptive; his history of making protected disclosures materially influenced the decision to dismiss him without notice on 21st August 2018.

25. **Direct discrimination on the ground of race and religion or belief:**

25.1. C alleges that Ms Turner made discriminatory remarks and related gestures between 6-8th August 2018 relating to his imminent departure; he got the dates wrong as she was absent on leave on those dates. C repeats the allegations but times them upon her return to work. The alleged events took place in an open office in front of others; they were egregious if true; there is no independent witness evidence; Ms Turner denies them; there is no evidence that anyone ever mentioned these matters to C, Ms Turner any colleagues or management either formally or informally; they are startling accusations and we would have expected someone else to react or, even more likely, that C would have complained formally or informally at the time but he did not. It is notable that he cannot recall the date of such an alleged

act. There is no evidence to suggest Ms Turner was likely to behave in that way. The Tribunal rejects this claims as not proved on the balance of probabilities.

25.2. C was held to higher account as regards timekeeping, productivity and quality of case work including in that those factors were said to justify his selection for dismissal; that was on the ground of his protected disclosures. The Tribunal has considered all the evidence and concluded that there are no grounds for finding that the reason for this could have been race, religion or belief save the fact that the claimant is a Muslim and associates as being British of South Asian heritage or, as was frequently stated by Mr Ahmed, "BAME" (not my preferred nomenclature); that is correlation and not proof of causation. The Tribunal finds that the respondents' treatment of C was because he made protected disclosures and complaints such that he as seen as a disruptive element and an outlier. Oddly perhaps, Rs' presentation of their confusing rationale supposedly based on data that at least one of their witnesses conceded "did not stack up", against the background of the events and emails referred to above shows a non-discriminatory reason for C's treatment and dismissal but a reason on the grounds of and because of whistleblowing.

25.3. Mr Blything was moved to PAF as a reasonable adjustment in circumstances that did not apply to C. Mr Hutchinson was coached but was dismissed shortly after C for repeatedly failing on his case work. C was not offered PAF as he was not in post long and significantly was about to be dismissed (the same day); that was not unlawful discrimination in relation to race, religion or belief.

25.4. At the meeting on 14th August 2018 R2 referred its operatives to an expectation that pay would match productivity which was understood by the dozen or so present to mean that people who failed to achieve targets would not be paid for the work that they did. The meeting was for C's cohort, or most of them. The matters discussed were relevant to them all while working, and at least to C in that he saw fit to comment at the meeting although serving notice and not subject to targets. There is no evidence before the Tribunal from which it could find that any of this was related to C's protected characteristics.

25.5. Greg Hutchinson was struggling; the respondents could see this; C made representations on his behalf that he was struggling because of learning disabilities. In response to this the respondents provided Mr Hutchinson with coaching. Others too were coached according to their need for such, and their requests. C was not struggling with the work allocated to him before 6th August when he was given notice at least. He did not ask for specific coaching as he did not consider that he needed it. He does not live with a relevant disability that meant he was at a substantial disadvantage in doing his work (or at least if he does then he gave no such evidence to the Tribunal). It has not been established that the reason for differential treatment of C in this regard was due in any way to race, religion of belief. R has in any event established a non-discriminatory reason as set out in this paragraph.

26. **Harassment related to religion or belief and/or race:**

26.1. It is accepted that Mr Denyer dismissed C on the telephone when he was on leave celebrating Eid; that was insensitive and offended C, which the Tribunal acknowledges and appreciates. The reason for this however was that it was Mr Denyer's practice to dismiss operatives when they were off site such as at weekends or when on leave; he sought to avoid a scene or unpleasantness at work. He stated his plan to do so to his colleagues at R1 and R2 before knowing that the reason for C's absence was Eid. The Tribunal shared Mr Ahmed's surprise that at the time, according to Mr Denyer, he did not know that Eid was a religious festival let alone that it was an occasion revered by Muslims, but in view of the way he gave his evidence we do not disbelieve him, or at least we accept that he did not fully appreciate the significance of Eid, on which date(s) it fell and the duration or the form of celebration that is typical. Mr Denyer chose to dismiss C on a day when he was working but C was not; that is why that day suited him (and by extension the respondents) best. The reason is not related to C's protected characteristics, although we understand why C misunderstood that it was.

26.2. As regards Ms Turner's alleged reaction to C's dismissal, (be it alleged to have occurred on 6-8th August or later) I refer you to our findings at paragraph 25.1 above. The allegation is not made out.

26.3. The Tribunal has already found that C being held to account for his timekeeping and work to a standard not imposed on others and the events at the meeting of 14th August 2018 for reasons other than any protected characteristic; they were not related to C's race, religion or belief.

27. **Victimisation:**

27.1. The email of 3rd August 2018 relied on as a protected act does not satisfy the tests for such. There is no direct or indirect reference to matters within the ambit of EqA. It merely alleges different treatment. It is just too non-specific or vague, even in a situation where a claimant is not required to specifically state chapter and verse of EqA. It may have been offensive to C for either respondent to have read it as relating to C's protected characteristics when for all any reader could know C might have himself thought the reason was something different. C voiced several concerns about working conditions and does not relate them all to his protected characteristics. He was one of the better performers; he was the person most affected in commuting to work by the moor fires; he was also the most vocal in bringing concerns forward; any one of these, and probably any number of other reasons, could have been behind C's different treatment and, bearing in mind the wording of the email, the Rs would have been making a massive assumption if they had understood that when C complained it was because race, religion or belief were the root cause.

27.2. On 19th July 2018 C complained orally to Mr Hellens that effectively the respondents, amongst other things, had failed and were failing in a statutory duty to make reasonable adjustments for both Mr Blything and Mr

Hutchinson, that they were struggling with their work and to follow instructions and training given to them such that there was unlawful disability discrimination. He may not have used those words, but he did not have to. He was clear enough because we know that Mr Hellens said that he could not treat this information in confidence, and he had to take it further; we know that Mr Blything was redeployed to PAF as an adjustment and that Mr Hutchinson was given coaching before eventually being dismissed. C did a protected act on 19th July 2018

27.3. It was obvious to both Rs that C had done a protected act on 19th July 2018, and they reacted to it as described.

27.4. This protected act was held against C in that it was yet more evidence to Rs that C was a complainer who was rocking the boat; it does not matter that the Rs redeployed Mr Blything in response. Even though the Rs seem to have acknowledged that C had a valid point on this issue Mr Hellens still characterised the meeting as C having a whine primarily about hours. This, albeit appropriate and valid concern, was still seen by the Rs as part of a pattern of C's disruptive, negative, complaining behaviour that made him an outlier. It was added to his negative account; it was more fuel on the fire.

27.5. This protected act therefore re-enforced the Rs in holding C to higher account than his peers in respect of his general performance when they used that as the reason to select him as the one FTE over-capacity. It materially influenced the decision to dismiss C as a further example of the conduct that the Rs held against him. In effect the tribunal adds this protected act to the claimant's public interest disclosures, finding that the detriments we have found that C was subjected to were in part on the ground of the protected act and his dismissal was in part because of his protected act. The protected act was at the same time a protected disclosure.

28. **Conclusion in the light of resolution of the jurisdictional issues:**

28.1. **Successful claims:**

28.1.1. Whistleblowing detriment and dismissal
28.1.2. Victimisation.

28.2. **Unsuccessful claims:**

28.2.1. Breach of contract
28.2.2. Unauthorised deduction of wages
28.2.3. Unlawful discrimination including harassment in relation to the protected characteristics of race, religion or belief.

Employment Judge T V Ryan

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Date: 14 October 2021

REASONS SENT TO THE PARTIES ON 15 October 2021

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FOR THE TRIBUNAL OFFICE Mr N Roche

[TVR]