EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr G Cunningham **v** Formula One Autocentres Limited

Heard at: Cambridge Employment Tribunal (via CVP)

On: 7-10th December 2020 (CVP) and 12th January 2021 (parties not in attendance)

Before: Employment Judge King

Members: Mr S Holford
Miss V Pratley

Appearances

For the Claimant: Mr Mellis (counsel)
For the Respondent: Ms Ismail (counsel)

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal succeeds to the extent set out below.
2. The claimant's claim for detriments for having made a protected disclosure fails and is dismissed.

REASONS

Our reasons are as follows:

1. The claimant was represented by Mr Mellis (Counsel). The respondent was represented by Ms Ismail (Counsel). We heard evidence from the claimant and two witnesses on his behalf Mr Haddock and Mr Swain. The claimant was a credible and honest witness. We heard evidence from Mr Parkin, Mr Keeley, Mr Lee and Miss Mitchell on behalf of the respondent. The claimant and respondent exchanged witness statements in advance

and prepared an agreed bundle of documents which ran from pages to 1 to 234.

2. The matter was heard via CVP. This hearing was to deal with the issue of liability solely. The case was listed for five days but the available window to hear the case for this panel was four days. At the end of the fourth day we agreed a date to sit as a panel with the parties not in attendance to deliberate the matter which took place on 12th January 2021 and thereafter the panel prepared this judgment.

3. The case had had the benefit of a case management hearing on 14th February 2020 where the claims and the issues were identified. The claimant brought a claim for unfair dismissal firstly on an ordinary basis on the basis that he was dismissed expressly, secondly in the alternative as a constructive dismissal as he resigned in response to the breach and thirdly as an automatic unfair dismissal as a result of having made protected disclosures. The claimant also brought a claim for detriments for having made protected disclosures. The Respondent denied dismissal and asserted that demotion as a disciplinary sanction was a reasonable response to his misconduct and that as such, this did not amount to dismissal. Further the respondent's case was that the disclosures were not protected disclosures and that in any event the claimant was not subject to a detriment or dismissal as a result of having made a protected disclosure.

4. We started the first day of the hearing revisiting the list of issues and amending the list of issues to that below to better reflect the legal tests. We agreed these issues before the evidence commenced as follows:

The issues

Unfair Dismissal

5. Did the respondent terminate the claimant's employment at the disciplinary meeting on 1st April 2019? If so:

    a) Did the respondent have a fair reason for dismissal;

    b) Did the respondent act reasonably or unreasonably in treating this as a sufficient reason for dismissal, taking into account the size and administrative resources of the respondent. In particular:

        i) Did the respondent have a genuine belief in the claimant's guilt;

        ii) Was that belief formed on reasonable grounds;

        iii) Did the respondent carry out a reasonable investigation;

        iv) Did the respondent follow a fair procedure?

6. If the respondent did not terminate the claimant's employment at the disciplinary meeting on 1st April 2019, can the claimant establish that his resignation should be construed as a dismissal in that:

   a) The respondent committed a breach of the implied term of trust and confidence through one or more of the following matters, taken individually or cumulatively:

      i) The claimant being informed on 27th March 2019 that he allegedly committed misconduct by bringing his car into the branch on 25th March 2019 without prior authorisation;

      ii) The claimant's subsequent suspension that day;

      iii) The respondent's indication on 27th March 2019 that a disciplinary hearing would take place on 1st April 2019;

      iv) The respondent's failure to provide supporting documentation for the allegation of misconduct until requested by the claimant;

      v) The telephone call from Mark Brooks on 29th March 2019 at which Mr Brooks advised the claimant the respondent was trying to find a reason to push the claimant out of the company or demote him and if he apologised for his actions he would be demoted;

      vi) The disciplinary hearing on 1st April 2019 and in particular the outcome delivered by Mr Keeley in which he said "Me personally I don't want to dismiss you from the company but my outcome is to dismiss you to branch…demote you back to branch manager. If you want to stay working for us that's obviously your choice. It's completely down to you."

      vii) The respondent's decision to demote the claimant on 1st April 2019. The claimant will reply on BBC v Beckett [1983] IRLR 43.

   b) Did the claimant resign in response to that breach?

   c) Did the claimant do so promptly without affirming the breach?

Protected disclosure

7. Did the claimant make a protected disclosure? i.e

   a) Did the claimant disclose information which, in his reasonable belief tended to show either:

      i) That a criminal offence had been committed or was being committed or was likely to be committed; and/or
      ii) That the matter above had been or was likely to be deliberately concealed?

The claimant claims that he made such disclosures to Sophie Mitchell and Ian Keeley by email on 15th March 2019 and within a meeting with Mr Keeley on 20th March 2019.

b) Did the claimant reasonable believe that the disclosure was made in the public interest; *The respondent accepted that the claimant had a reasonable belief and that this tended to show (i)/ii) above but that there was no information that meets the definition.*

c) Did the claimant make his disclosure to the employer or another responsible person. *It is agreed that the claimant made his disclosure to his employer.*

8. Was the reason or the principal reason for the claimant's dismissal that he made a protected disclosure as above?

9. Did the respondent subject the claimant to detrimental treatment because he made a protected disclosure as above:

a) The disciplinary proceedings brought against the claimant on 27th March 2019;

b) The claimant's suspension on 27 March 2019;

c) Unrelated colleagues being made aware of the disciplinary proceedings;

d) The respondent advising the claimant his Range Rover must be removed by 12th April 2019 failing which he would incur a daily charge for storage; [*The claimant withdrew this allegation after the evidence was concluded in the interest of proportionality]*

e) The respondent's decision to dismiss, or demote the claimant on 1st April 2019;

f) The threats the claimant received from a colleague after his dismissal.

The Law

Unfair Dismissal

10. The claimant has the right not to be unfairly dismissed as follows:

s94 The right.

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

11. Dismissal under Section 95 of the Employment Rights Act 1996 is in dispute which states as follows:

s95 Circumstances in which an employee is dismissed.

(1)For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if)—

(a)the contract under which he is employed is terminated by the employer (whether with or without notice),

…..

(c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2)An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a)the employer gives notice to the employee to terminate his contract of employment, and

(b)at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

12. Section 98 ERA provides:

S98 General.

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

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

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

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

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

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

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

(3) In subsection (2)(a)—

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

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

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

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

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

(6) ……

Protected disclosures

13. The law as relevant to this case is set out in s43 ERA which states as follows:

s43A Meaning of "protected disclosure".

In this Act a " protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

s43B Disclosures qualifying for protection.

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

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

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

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

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

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

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

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

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

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

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

s43C Disclosure to employer or other responsible person.

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

(a)to his employer, or

(b)……

14. The right not to suffer a detriment is found in s47B as follows:

s47B Protected disclosures.

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

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

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

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

on the ground that W has made a protected disclosure.

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

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

(1D)……

(2) This section does not apply where—

(a) the worker is an employee, and

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

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

15. The right not to be dismissed is found in s103A Employment Rights Act 1996 as follows:

s103A Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

The parties have drawn our attention to a number of case law authorities to which we have had regard. On behalf of the Claimant in its written submissions as follows:

Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436
Hogg v Dover College [1990] ICR 39
Alcan Extrusions v Yates [1996] IRLR 327
BBC v Beckett [1983] IRLR 43
Governing Body of John Loughborough School v Alexis UKEAT/0583/10/JOJ
Kurzel v Roche Products Ltd [2008] ICR 799
NHS Manchester v Fecitt [2012] IRLR 64
Crawford & Ors v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402
Jhuti v Royal Mail Ltd [2020] ICR 731

On behalf of the Respondent in its written submissions as follows:

Sharkey v Lloyds Bank plc [2015] UKEAT/005/15
Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978
Waltham Forest v Omilaju [2004] EWCA Civ 1493
BBC v Beckett [1983] IRLR 43
Cavendish Munro Professional Risks Management Ltd v Geduld UKEAT/0195/09
Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436

Findings of Fact

16. The respondent provided additional disclosure after the hearing had commenced. We refused the admission of photographs of the workshop which the claimant objected to as they did not assist the Tribunal with the issues. A recording of a conversation came to light during witness evidence. This was obtained overnight by the respondent and a transcript prepared. The parties were able to agree an amended transcript for the Tribunal's use and we also heard the recording. The parties agreed that this was relevant to the issues in the case although the claimant thought it was indicative of the respondent's attitude to its employees more generally but we informed the parties that rather than generalities we were considered that the parts of the transcript about the claimant were the only relevant parts.

17. Ms Mitchell prepared an additional statement concerning the difference between the claimant's role and the demoted role. This was permitted in evidence despite its lateness and the claimant had the opportunity to cross examine Ms Mitchell on its contents. Given the allegations in this case we have adopted to not refer to third parties by their full names where they have not appeared before us and have not been given the opportunity to defend the allegations against them. We have therefore adopted a name for these individuals which the parties will know and be able to reference.

18. The claimant was employed from 23rd November 2016 initially as a branch manager. He moved into a more senior role in 2017 reporting to Mr Nick Green (Regional Manager for Region 1). In around March 2018 the claimant was promoted to Regional Manager for Region 7 which covered Birmingham to Bristol on the west side of the country. The Regional Manager was also known in the business as the role of Area Manager. The parties and the documents used these phrases interchangeably. There were a number of Regional Managers in the business. The Regional Managers had a number of branch managers reporting to them.

19. The region needed attention as it had had a series of regional managers in short succession. The claimant took over the role from Mr A who had moved back into the business in a different more junior role since stepping down. The claimant managed 9 branches across the area and spent time moving between branches dealing with his management responsibilities.

20. The claimant's line manager was Mr Keeley. Mr Keeley was Operations Manager who reported to Jon Butcher (Operations Director) at the relevant time. Mr Keeley has since been promoted to Operations Director. Mr Lee was Compliance and Training Manager reporting to Mr Keeley at the relevant time. Mr Lee has since been promoted to Commercial Director. The claimant had a clean disciplinary record prior to the issues which concerned this case.

21. Mr Parkin was Senior Auditor and also reported to Mr Keeley. His role was to ensure compliance with financial and operational matters in the

Northern Region across 32 centres across the country. Miss Mitchell is HR Manager for the respondent and oversees all personnel matters.

22. The respondent has 122 vehicle service centres across the UK. At the time of Ms Mitchell's statement the respondent had 781 employees. The respondent is therefore not a small employer.

23. When the claimant was promoted to Regional Manager he had a new contract of employment issued to him dated 19th March 2018. His salary was at that time £39,000.00. The claimant had a pay rise in November 2018 so his basic salary was £40,698.00 at the time of the matters that form the basis of this claim.

24. The claimant was given a company car and was eligible to join the management bonus structure. This was a contractual bonus as it was set out in writing and Ms Mitchell confirmed in her evidence that the regional manager's bonus scheme was contractual. This provided for a guaranteed bonus for the first two months. There was then a monthly bonus related to the management accounts which paid out monthly if the region was between 96% and 100% on target and a quarterly bonus of 6% as well.

25. At clause 15.4 of his contract the claimant could be suspended to allow for an investigation. At clause 15.5 the claimant had the following clause in his contract:

Following a disciplinary procedure, where you have been found guilty of misconduct or gross misconduct, we may at our discretion consider alternatives to dismissal. These may be authorised by a member of management and will usually be accompanied by a final written warning. These are:

(a) demotion
(b) transfer to another position or centre;
(c) a period of suspension without pay;
(d) loss of seniority;
(e) reduction in pay;
(f) loss of future increment or bonus; or
(g) loss of overtime.

26. Before his promotion the claimant was branch manager which gave him a basic salary of £29,000. He would be paid a bonus if the branch was profitable but this was discretionary. Ms Mitchell confirmed that this scheme was different to the regional manager's bonus as it was not contractual in the same way. The branch manager's role required weekend working and did not attract a company car or a car allowance.

27. The respondent's disciplinary policy is said to not form part of the claimant's contract of employment. This is relevant to matters in this case as a whole but in particular provides the following relevant clauses:

Investigations:

1.9 The purpose of an investigation is for the Company to establish a fair and balanced view of the facts before deciding whether to proceed with a disciplinary hearing. This may involve reviewing any relevant documents, interviewing you and any witnesses, and taking witness statements. A member of management will usually carry out the investigation.

1.10 Investigative interviews are solely for the purpose of fact-finding and no decision on disciplinary action will be taken until after a disciplinary hearing has taken place. You do not normally have the right to bring a companion to an investigative interview. However, The Company may (at its discretion) allow you to bring a companion if it helps you overcome a difficulty caused by a disability, or for example, any difficulty in understanding written/spoken English.

Suspension:

1.15 An employee may be suspended in any circumstances where the Company considers it necessary, in order to conduct an investigation, or where the Company considers it appropriate pending the outcome of disciplinary proceedings. The suspension will be for no longer than is necessary and the Company will confirm the arrangements to you in writing. You are required to co-operate in our investigations and may be required to attend the workplace for investigative interviews or disciplinary hearings. However, you are not otherwise required to carry out any of your duties and you should not attend the workplace unless authorised by your Line Manager or the HR Manager to do so. You must not communicate with any of our employees, contractors or customers unless authorised by your Line Manager or the HR Manager. However, you are required to be available to answer any work-related queries

1.16 Suspension of this kind is not a disciplinary sanction and does not imply that any decision has been made about your case. You will normally receive you full basic salary and benefits during any period of suspension.

2.0 Formal Disciplinary Procedure

Written Information:

2.1 Following any investigation, if the Company considers there are grounds for disciplinary action, it will inform you in writing of the allegations against you and the basis for those allegations. This will normally include:

(a) A summary of relevant information gathered during the investigation;

(b) A copy of any documents which will be used at the disciplinary hearing.

The evidence of any witnesses will be considered at the disciplinary hearing and will be either appropriately summarised in an investigation report or will be provided to you in the form of witness statements (which may be anonymised as appropriate).

Disciplinary Hearing:

2.3 The Company will give you written notice of the date, time and venue of your disciplinary hearing, which will take place within a reasonable period after you receive written notice. The hearing will be conducted by an appropriate member of management. If an Investigating Officer was appointed they may also be present. There should also be a note taker present to take a record of the meeting. You are entitled to bring a companion with you to the hearing (please see below), who will be allowed reasonable paid time off to act as your companion.

2.8 As soon as practicable after the disciplinary hearing (or the conclusion of any further investigations), the Company will inform you, in writing, of its decision (including details of any misconduct that it considers you have committed, and the disciplinary sanction to be applied) together with the reasons for its decision. The Company will also inform you of your right to appeal. Wherever possible, the Company will also explain this information to you in person.

Appeals:

2.11 Where practicable, the appeal hearing will be conducted by a member of management who is more senior to the person who conducted the disciplinary hearing. You may bring a companion with you to the appeal hearing.

2.13 The appeal hearing may be a complete re-hearing of the matter or it may be a review of the original decision, taking account of any new information. This will be at the Company's discretion depending on your grounds of appeal and the circumstances of your case.

3.0 Dismissals and Disciplinary Action
Disciplinary Sanctions:

Stage 4: Dismissal

3.8 By way of example, the Company may decide to dismiss you in the following circumstances;

(a) Misconduct or poor performance or attendance during your probationary period or extended probationary period; or
(b) Misconduct or poor performance or attendance where there is an active final written warning on your record; or
(c) Gross misconduct (including gross negligence) regardless of whether you have active warnings or not

3.9 The dismissal will be confirmed in writing. In cases not involving gross misconduct, you will normally be given your full contractual notice period, or offered payment in lieu of notice.

4.0 Gross Misconduct

4.1 The following list, whilst not exhaustive, details some serious breaches of discipline, conduct or performance (gross misconduct) that are likely to result in disciplinary action including summary dismissal (dismissal without notice or pay in lieu of notice);

(a) Committing (or conviction for) a criminal act (whether or not in connection with your employment) or any conduct liable to lead to criminal proceedings, other than an offence under the Road Traffic Acts for which imprisonment is not a sanction.
(b) Deception, forgery, fraud or theft.
(c) Gross negligence or deliberate breach of any of the Health and Safety Regulations.
(d) Assault, insulting behaviour or violence of any kind.
(e) Indecent/immoral acts including sexual harassment of colleagues or others.
(f) Harassment, bullying or victimisation of another individual.
(g) Unwarranted allegations of harassment made in bad faith.
(h) Any act which constitutes unlawful discrimination of any kind.
(i) Alcohol, drug or substance abuse, including the possession of alcohol or illegal drugs on Company premises.
(j) Malicious or wilful damage to misuse of Company property.
(k) Disregard or breach of an obligation of confidentiality owed to the Company.
(l) Bringing the Company into disrepute.
(m) Refusal to follow reasonable and lawful instructions or to carry out work lawfully assigned from your management.
(n) Failure to efficiently and diligently carry out your duties to the reasonable satisfaction of the Company.
(a) Falsification of attendance, sickness or other work records or documents.
(o) Unauthorised possession or use of Company goods and property or other employees' property.
(p) Breach of the Company's Electronic Information and Communication Systems Policy.
(q) Serious breaches of Company rules, policies or procedures.

(r) Material or persistent breach or non-observance of any of the provisions of your contract of employment.
(s) Gross insubordination.
(t) A serious breach of health and safety rules.
(u) A serious breach of confidence.

You may also be dismissed without notice or payment in lieu of notice if you cease to be eligible, and are unable to provide proof of your eligibility, to work in the United Kingdom.

Alternative Sanctions Short of Dismissal:
4.2 In appropriate cases, the Company may consider a sanction short of dismissal, such as:
(a) Demotion;
(b) Transfer to another department or job function;
(c) Period of suspension without pay;
(d) Loss of seniority
(e) Reduction in pay;
(f) Loss of future pay increment or bonus;
(g) Loss of overtime.

28. The respondent did not have written policy dealing expressly with work carried out on staff and family vehicles along the lines of the disciplinary policy. The respondent would from time to time issues memos concerning staff purchases. The respondent produced five such memos but only one post dated the start of the claimant's employment. This was dated 9th July 2018 which stated:

Payment Assist- Staff Purchases

ALL staff members wanting to use Payment Assist MUST follow the correct procedures below;

- *Authorisation MUST be obtained from your Regional manager prior to the work being carried out.*
- *The cost of the parts MUST include a 10% increase to counter act the chargers from Payment Assist.*
- *All details on the invoice MUST match that of the Payment Assist application*

If any of the above criteria isn't met then disciplinary action may be taken.

Regards

Ian Keeley
Operations Manager

29. The respondent asserted that the other memos were on the system and that the claimant ought to have been aware of them. The respondent did

not assert that the claimant had been expressly told to read them or that he had been shown the historic memos. The highest it was put was that Mr Lee believed that during management training all staff are shown where the memos are and that the claimant would have read them.

30. The historic memos do make reference to work on your own vehicle but that this must be authorised by your area manager. There is no reference to what area managers must do and no reference to line manager save for one reference to labour not needing to be charged in 2016. The July 2018 memo is not directly applicable as there were no staff purchases referred to in this incident and Payment Assist was not being used. Again it referenced regional managers giving permission and not what those regional managers should do when requiring work to be completed on their own vehicles.

31. The respondent's position was that everybody knew this was the policy. We do not accept that. Mr Green confirmed in the disciplinary hearing that he had placed a car on the ramp without Mr Keeley's permission. In the transcript from the call on 20th March 2019 Mr Keeley raised concerns that if "he did him for not asking permission and got rid of him, if Mel does it I gotta do the same with Mel" and "if Nick Green ever does it I gotta do the same with Nick". We do not accept that this was a common policy within the respondent. Branch managers do have to ask permission as they have less freedom than regional managers who have more responsibilities and authorities within the respondent. Further the respondent accepted that it was a 50/50 chance other areas managers were taking in a car and doing something without asking permission. This is therefore clear that there is no express policy and that even if there was such a policy the respondent accepts it is not followed.

32. In early March 2019 the claimant was carrying out his role and was visiting the Gloucester branch when he had a conversation with the branch manager Mr H who mentioned that Mr A (the ex-regional manager) used to give him additional wages disguised as bonus, overtime and fuel which was not owed to him to supplement his wages. It was alleged that Mr A would then take a "cut of" the supplementary sums in cash.

33. The claimant discussed the matter with Mr Green as he was concerned and Mr Green's advice was that he should look into the matter. As a result the claimant called Mr H on 14th March 2019 recording the call covertly to get further information. Mr H confirmed that he wanted the matter to stay between them but confirmed he would get around £1500 extra a month and give Mr A £300 of that. He mentioned two other employees Mr Z and Mr G also had this arrangement with Mr A.

34. The claimant called Mr Z on 15th March 2019 recording the call covertly to verify the information given by Mr H. Mr Z did not accept expressly he had participated in such matters but confirmed he was interested in doing so. When reading the transcript of the call the impression given is that this is something that did occur and he was aware of it, if not compliant in it.

There is then a second call that day when Mr Z calls the claimant again and confirms that he used to get a £400 bonus and £100 fuel extra and give Mr A £120 per month back. The claimant also recorded this call and had a transcript made. By this point the claimant had call recordings that confirmed both Mr Z and Mr H had participated in this arrangement with Mr A.

35. The claimant in evidence was adamant that he had emailed Ms Mitchell asking for historic documentation before 15th March 2019 at 10.13 am when he emailed to say:

Good morning Sophie,

Please is it also possible to forward me the branches P&L's this will also include Coventry and Erdington

36. Ms Mitchell replied to the 15th March 2019 to say:

Hi Gavin

You are on holiday!

Why do you need these & have you spoke to Ian about your concerns? You really should get authorisation from him first.

37. When this matter came to light during the evidence, the respondent carried out an additional search overnight during an adjournment for the email but could not locate it. The respondent's letter of 18th April 2019 also refers to an earlier email *" By way of summary, you first contacted us on the 14th March and request a copy of the Company's bonus payment records for the last 12 months. This is because something had been brought to your attention that you wanted to look into."* We accept that there was an earlier communication in line with the summary in the April 2019 letter. This should have formed part of disclosure and whilst we accept it cannot now be located it is a relevant document that the tribunal would have liked to have seen for itself particularly when the issue of information is not agreed and we have to determine whether there was a protected disclosure.

38. On 15th March 2019 there was an audit where the respondent discovered that the claimant had his Range Rover on site to be worked on at the Gloucester branch. The claimant was on annual leave and so the respondent decided to discuss the matter with him when he returned from annual leave.

39. On 15th March 2019 there were a series of emails between the claimant and Ms Mitchell about the claimant investigating the matter first. This culminated in an email from the claimant to Mr Keeley as follows:

Good Morning Ian,

It has been brought to my attention recently that an ex area manager has allegedly been paying staff more money in the form of bonus and fuel than he should of and was collecting a cut each month from the staff involved. If this information is correct it would more than likely work out to quite a substantial amount of money which has been fraudulently obtained. I was hoping to carry out the investigation before bringing it to your attention in case the accusations turn out to incorrect and false and for this reason I require a copy of all managers P & L sheets and the bonus payments made for at least 12 months prior to me taking over the region. please can you authorise Sophie to release this information to me.

40. By the 15th March 2019, the respondent knew the claimant was looking into bonuses during the last 12 months in his region and that an ex area manager was paying staff more than they were entitled to in respect of bonus an fuel and then taking a cut of the money. He asked for documentation.

41. On 18th March 2019 there are a series of emails between Ms Mitchell and the claimant about the matter. He wished to investigate it and she wanted him to give her the information he had.

42. On 19th March 2019 the claimant emailed Ms Mitchell to ask whether she had found any irregularities. She told him she would get back to him later that day and she confirmed that there was no irregularities on the bonus, fuel and other payments in the area 7 region in 2017. She had compared Area 7 to two other areas and there didn't seem to be anything untoward.

43. On 19th March 2019 there was a surprise audit at Redditch in the claimant's region. The investigator was asking staff questions about the claimant and there was an invoice on the system for one of the claimant's family for parts that had not been paid for but were actually under Mr H branch manager's desk and Mr H has since been dismissed for issues within the branch. No action was taken against the claimant in this regard.

44. On 19th March 2019 the claimant called Mr Haddock. The call was covertly recorded by the claimant. Mr Haddock did not confirm that he was a party to what went on but eluded that he was aware something was going on and that money was changing hands but not the specifics of this.

45. On 19th March 2019 the claimant tried to ring Mr Keeley to discuss these matters but was told that it would be discussed tomorrow. On the 20th March 2019 Mr Keeley emailed the claimant asking for his plan to improve centres as he had been reviewing performance for the region.

46. Later that day there was a meeting between the claimant and Mr Keeley. This was the meeting to discuss the Range Rover and Mr Keeley informed the claimant he was aware of it being in the Gloucester branch. The

claimant explained he had selected the Gloucester branch due to its size to be able to carry out work on a ramp and be the least disruptive with the business. This was because it would only occupy one ramp at a site with multiple ramps. It was agreed to complete this as soon as possible and get it out of the branch.

47. The claimant and Mr Keeley discussed the work that was needed to the Range Rover and the claimant made reference to a donor engine being transplanted into the vehicle. There was no specific reference to a Jaguar being the donor vehicle. There had previously been a team Whats App conversation which Mr Keeley and the Claimant were members of the group where a colleague suggested a Jaguar would make a good donor vehicle. We accept there was reference to a donor vehicle and that Mr Keeley understood given his knowledge of the trade and its industry that in order to fit a donor engine it had to come from a donor vehicle. It was not expressly stated and thus clear whether the engine would be delivered or a second vehicle used (the donor vehicle).

48. Mr Keeley told the claimant in that meeting that if in the future he wanted to work on his own vehicle he needed Mr Keeley's permission to do so. Mr Keeley said that he told the claimant that if he failed to do so he would face a disciplinary. The claimant said that Mr Keeley told him "if he did not then they would be having a different sort of conversation". We prefer the evidence of the claimant and Mr Keeley confirmed in his oral evidence that he may have used those words.

49. The claimant's position was that he thought he had permission to finish the Range Rover and the respondent's position was that Mr Keeley had made it clear that any further vehicles needed permission whether or not linked to the Range Rover and that it was clear that disciplinary action would follow.

50. At the end of the meeting the claimant raised the matter of Mr A and the payments he had been receiving. He told Mr Keeley he had recordings of employees confirming that this had taken place but Mr Keeley declined to hear that evidence. Mr Keeley was concerned about the implications of the recordings being obtained without consent.

51. At the end of the day Mr Keeley called Ms Mitchell from the car. That call was recorded in line with the respondent's head office call recording procedure and a transcript provided which was agreed during the course of the proceedings. This is the late transcript referred to at the outset of our findings of fact.

52. In this call Mr Keeley relayed to Ms Mitchell the meeting with the claimant and that he had told the claimant "you're on your last legs Gavin. I said time is running out to change things. So what I am going to do is have him in on 31st March and say right if you aren't at 98% at the end of April you will get a demotion." Mr Keeley then added "And if at two weeks after if you're at 80% I'll do it sooner." Other comments by Mr Keeley of note

included “told him he needs to start taking to people and telling the fucking truth and stop trying to hide things because you’re not as clever as you think you are” and “gotta play the long ball game with it”.

53. The two also discussed the recordings and Mr Keeley confirmed that he knew the claimant had been recording people without their knowledge and that the conversations were about the ex manager. Mr Keeley was able to name this manager. Ms Mitchell did not seem surprised by the name but the nature of the recordings. Further they went onto discuss that the manager in question could take a grievance out against the claimant and Mr Keeley could also identify the worker who had “opened his mouth by mistake”. Mr Keeley finished the discussions with Ms Mitchell about the claimant with the comment that “I will call him to Head Office on the 31st March sit down and do a meeting with him and give him until the end of April to get where I want him to be if he ain’t there then he takes branch or leaves.” There was reference to additional resource being given to support the claimant more recently

54. A file note was made by Ms Mitchell of this call which merely recorded that Mr Keely had spoken to the claimant in regards his conduct and performance. That the claimant must obtain authorisation if he had any work untaken on any more personal vehicles. If he does not then disciplinary action may be taken. She recorded that Mr Keeley declined to take any information regarding 2017 bonus payments due to the claimant recording phone conversations without people’s prior knowledge.

55. It was clear that Mr Keeley had concerns about the claimant’s performance by this time and that this had been ongoing for some time and not since the emails on 15th March 2019 and the conversation on 20th March 2019.

56. On 25th March 2019 the claimant stayed behind with two members of staff to work on the Range Rover in order to get the vehicle off the ramp. Mr Swain and Mr Haddock assisted. A Jaguar was brought to site earlier to use the engine as a donor engine. The engine was removed within a few hours and the branch tidied. The workers in question having not taken a lunch break took it at the end of the day and in another case worked after hours without the Company paying them to undertake this work. We do not accept that the claimant either admitted that they left early with his permission as asserted later or that factually they did so. These allegations did not form part of the original disciplinary case as set out below.

57. The claimant had made arrangements for the Jaguar to be collected on 26/27 March and removed from site. As set out below, however, this did not happen.

58. On the evening of the 26th March 2019 the claimant received a text message from Mr Keeley asking where he was going to be the next day. On 27th March 2019, the Claimant received a text message from Mr S at

the Gloucester branch telling him that Mr Parkin had turned up at the branch for a surprise audit and was taking photos of the Jaguar. The claimant then became aware that the Jaguar was still on site and had not been collected as scheduled. He was on his way to Bristol so diverted to the Gloucester branch.

59. Mr Parkin's evidence was that he found the Range Rover and Jaguar on the 27th March for the first time. Mr Keeley confirmed that it was the Jaguar as Mr Parkin had told him about the Range Rover on the 15th March 2019. Mr Parkin called Mr Keeley to inform him and see whether the claimant had permission. Mr Keeley confirmed he knew about the Range Rover but not the Jaguar. Mr Keeley was a little confused about dates in this regard.

60. The claimant attended site having been told by Mr S that Mr Parkin was onsite. The claimant explained about the donor engine and that the Jaguar was the donor vehicle. Mr Keeley and Mr Parkin then had another conversation. Mr Keeley had discussed the matter with Mr Butcher (Director) and decided the claimant should be suspended for allegations of gross misconduct.

61. Mr Parkin spoke to the claimant again in the back room and told him that he was being suspended and asked for his mobile and laptop. The claimant was told that there would be a disciplinary meeting on the 1st April 2019. Mr Parkin told the claimant that the meeting was not an investigation meeting but fact finding. Mr Parkin made a note of the meeting but this only covered the last conversation but he accepted in evidence the claimant had given him a full explanation that was not recorded in that note. The note was made around the time of the meeting but we do not accept that it was written in the meeting as Mr Parkin's evidence was that he prepared a note at Mr Keeley's request. The claimant has no recollection of it being made whilst they talked. It is a mere summary and we therefore find that it was prepared after the discussions with the claimant not during the meeting but roughly around that time.

62. The claimant left site having handed his laptop in but did not hand in his mobile phone as requested. The respondent confirmed the claimant's suspension by letter dated 27th March 2019. The suspension letter confirmed that the reason for suspension was:

Not following instructions from your Line Manager and lack of trust due to having unauthorised cars in the Centre without prior permission from your line manager or Director. We reserve the right to change or add to these allegations as appropriate in light of our investigation.

63. In fact, there was no investigation. By letter dated the same day the claimant was invited to a disciplinary meeting on 1st April 2019 with Mr Keeley. He was told it could amount to gross misconduct and that the allegation was:

Gross misconduct namely not following instructions from your Line Manager and lack of trust due to having unauthorised cars in the Centre without prior permission from your line manager or Director.

64. On 29th March 2019The claimant received a call from Mr Brooks another regional manager within the respondent. The claimant took the call and his sister in law was present helping him prepare for the disciplinary hearing when the call was received. Mr Brooks asked the claimant "*what are your intentions for Monday*". This was a reference to the disciplinary hearing. Mr Brooks added "*Listen, I have been speaking to Ian this morning and I can guarantee that you'll have a job. You just need to go in there and hold your hands up.*" Mr Brooks is also credited with adding "*They can't get you out on your figures, so they're looking for every little loophole to get you out or demoted." "If you go in and hold your hands up you'll still have a job but if you don't want to be demoted there's not many options for you." " My advice is that you go in hold your hands up and apologise, take the demotion and look for a job somewhere else."* This information was read to the respondent at the end of the disciplinary and they did not produce Mr Brooks as a witness to refute the statements attributed to him. On the balance of probabilities we accept this conversation happened and the statements were made to the claimant given the contents and the relevance to what later transpired as the outcome of the disciplinary meeting.

65. Mr Keeley denied having spoken to Mr Brooks but we find that the conversation did take place as it was odd that Mr Brooks would call the claimant as they were not friendly and odd that he would know this level of detail. In addition Mr Brooks reported that he had spoken to Mr Keeley.

66. There was a disciplinary hearing on 1st April 2019. The claimant attended with Mr Green his companion. Mr Keeley was the disciplinary chair and Ms Mitchell the HR representative. The respondent's notes of the meeting run to 1.5 sides for the 45 minute meeting. The claimant covertly recorded the disciplinary meeting and produced a transcript which ran to 11 ½ pages. The claimant suffers from anxiety and recorded the meeting to ensure that he had an accurate record himself. He felt that the matter was predetermined and had concerns. The respondent's notes do not accurately record the contents of that meeting. Without the transcript the tribunal would not have had the full picture.

67. The claimant confirmed in the meeting (as has been his point consistently) it that he did not ask, not because it was not a separate car but because they were linked together. The Whats App conversation was discussed and Mr Keeley recalled this and the claimant confirmed it was during that conversation that a colleague told him to get a Jaguar donor engine. Mr Keeley said that "*It just feels to be clear after the conversation we had about being whiter than white why wouldn't you have just said Ian I'm going to bring the Jag in just to make you aware we are staying late tonight.*" The claimant confirmed that no one had told him the Jaguar

was still there. As far as he was concerned it was gone. The claimant mentioned throughout that he felt he had authority to finish the Range Rover asap doing whatever it took but further vehicles beyond this required permission. This was not an unreasonable or unarguable conclusion given the meeting on the 20th March 2019.

68. The respondent took an adjournment. After the adjournment Mr Keeley confirmed the following:

"Right well we've had a good chat. This is not something we want to do as we think you're the future of the company but Gavin to be honest, that's why we set you up and tried to get you to the next level. Me personally I don't want to dismiss you from the company but my outcome is to dismiss you and demote you back to branch manager if you want to stay working for us that's your choice. "

69. The claimant asked for time to think about that and Mr Keeley confirmed that "*Help yourself, the reason for that is the lack of trust. I employed you to make sure everything is done properly and at the moment I don't feel that is happening and you're looking for something that has not quite been done properly. I've lost some trust that things will get back to a stage of trust as this point.* " Later Mr Keely confirmed that:

"That's the outcome of my disciplinary meeting, demote you back down to branch manager, if you want to appeal my decision, you have 7 days to do that to the directors and either John or Steve will hear it as Lee's away on holiday but with that as ever they might take a stronger outcome
So we'' put that in writing and you have 48 hours to think about it and let either me or Nick know."

70. The claimant then raised about his anxiety and he felt that he was being victimised for whistleblowing against Mr A because after he mentioned it everything has gone a bit crazy. He tried to hand in an appeal letter as he had anticipated the outcome but was told that he could not do so until he had read the letter and the notes of the meeting. Mr Green confirmed in the meeting that he had put a car on the ramp without Mr Keeley's permission. When the claimant asked about his suspension and that he was told it was Mr Keeley's decision to suspend Mr Keeley confirmed that he ran the business and that he has spoken to the board of directors about suspending him. It would later transpire this was one director John. Mr Keeley's comment was telling as he very much felt it was his business and that he ran it.

71. The outcome was confirmed in writing dated 2nd April 2019 that the same allegation from the invite letter was proven and that it "had further been decided that the appropriate disciplinary action is demotion to a Centre Manager due to lack of trust in the role of area manager." The claimant was given the right to appeal within 5 working days.

72. The claimant appealed by email dated 4th April 2019 setting out his full grounds of appeal.

73. The claimant raised by email on 7th April 2019 that Jon Butcher was on the board who made the decision to suspend so it was inappropriate for him to hold the appeal hearing. The claimant asked for an external person with him to support him during the appeal given his anxiety which was subsequently permitted. The respondent as a result decided to appoint Mr Lee to hear the appeal who reported to Mr Keeley but worked in a different area of the business to the claimant.

74. The claimant attended the appeal hearing with his sister in law on 9th April 2019 and provided the same consistent explanation for why the Jaguar was on site and why he has not asked permission of Mr Keeley namely that the vehicles were linked and this was the donor vehicle. Basically, that he had permission to finish the Range Rover.

75. Mr Lee took a short adjournment before confirming to the claimant that *"I have looked at everything; the disciplinary, the demotion and the trust issues. You were going to record me today and not tell me, you recording IK and without telling him. You had the Jag in the Centre without telling him on that basis I am going to uphold the decision and offer the role as centre manager."* Mr Lee had formed the view that the claimant knew about the policy and chose to breach the policy and said in evidence he felt that Mr Keeley had given a clear instruction notwithstanding the confusion over what was agreed, that he was not present when the instruction was given and he had no statement from Mr Keeley as to what was actually said. The claimant confirmed he did not want that as he saw himself as dismissed from the Company. Mr Lee confirmed in evidence that the conduct in question did not justify dismissal at all and that it was no so serious as to justify dismissal.

76. On 18th April 2019 the respondent issued an outcome of the appeal which also dealt with the whistleblowing allegations in a six page letter by Ms Mitchell. Miss Mitchell confirmed in evidence that this letter had input from external advisers. This made a number of statements which the respondent accepted in evidence were contrary to what actually happened. The letter confirmed that the chairperson at the disciplinary considered the following allegations of gross misconduct namely;

- *"Deliberately refusing to adhere to your Line Manager's reasonable instructions.*
- *Bringing personal vehicles into the Centre and using the Company's tools and equipment without permission.*
- *Without authority or permission, you informed members of staff that they could leave work early so that they could assist you with the work that needed to be carried out on your personal vehicle.*

The chairperson was satisfied that there was sufficient evidence to find you guilty of gross misconduct which compromised of witness

statements, photographs of your vehicle which still remains on the ramp at the Centre as well as your admissions. "

In actual fact the only witness statement was the fact finding document which Mr Parkin accepted was incomplete. The respondent did take statements but not until 23rd April 2019 after the appeal process had been completed. The respondent accepted in evidence that the points above differ from the actual allegations put to the claimant and that were actually dealt with at the disciplinary hearing. The last two bullet points were never put to the claimant.

77. The letter also stated that suspension was kept under review to ensure it was no longer than necessary and that the decision to suspend the claimant had not been taken lightly. It stated that alternatives were considered including a temporary move, temporary transfer to another role or being on restricted duties but that they were rejected and not suitable and to allow for the investigation. There was no witness evidence advanced in respect of such matters and no documentary evidence to support this. It was only when questioned that Ms Mitchell confirmed such matters had taken place. We do not accept that. Mr Keeley had made the decision to suspend and spoke to Mr Butcher about that we do not accept that any further consideration was given to alternatives.

78. In respect to the disciplinary process the letter confirmed that they conceded that the claimant had not been invited to an investigation meeting and Mr Keeley was both a witness and a chairperson at the disciplinary hearing. The letter started that this was rectified on appeal. We do not accept this assertion. Mr Lee did no investigation of his own, he took the disciplinary outcome and reviewed it during a short meeting and adjournment having already formed a view that his line manager was right. He started from the basis that the claimant has chosen to ignore a request from his manager.

79. Finally, the letter confirmed that the outcome of the appeal was to uphold the original decision that the claimant:

- *"Deliberately refused to adhere to your Line Manager's reasonable instructions.*
- *Brought personal vehicles into the Centre and used the Company's tools and equipment without permission.*
- *Without authority or permission, you informed members of staff that they could leave work early so that they could assist you with the work that needed to be carried out on your personal vehicle.*

The Company have made it very clear that if staff wanted to work on their own vehicles then this must be authorised by their Line Manager first. There have been regular memorandums sent to all staff reminding them of this. It was also made clear that any breach of the Company's rules would be considered an act of gross misconduct and dealt with under the disciplinary procedure.

You had been verbally reminded of this rule by Ian Keeley just prior to the conduct. You accept bringing in the vehicle and placing it on the ramps and that you had instructed a number of staff to leave work early and assist you with your vehicle.

Taking into account all of the evidence, we are satisfied that the conduct took place and that this amounts to gross misconduct. We have considered the mitigation put forward as well as your length of service and previous clean disciplinary record and consider a demotion to Centre Manager is the appropriate sanction. "

80. On the 23rd April 2019 the claimant emailed the CEO with the recordings outlining what he saw was a fraud on the Company. He received no response to that email.

81. By letter dated 25th April 2019 the claimant refuted the matters and the contents of the letter. He outlined the timeline in respect of his "whistleblowing". The claimant reiterated he felt that he had been dismissed at the disciplinary and appeal hearings but if he was to be demoted this would be a significant reduction in pay and he would have to return his company car. The claimant said that he cannot be forced to accept the variation in terms and conditions and asserted he had been summarily dismissed. The claimant relies on this letter as a letter of resignation in the alternative to the primary assertion of dismissal.

82. After the appeal was concluded Mr Parkin conducted an investigation into the whistleblowing matter raised by the claimant. As part of that investigation the respondent used the recordings sent to the CEO and played them to the staff concerned. It was therefore at this stage that the staff became aware that the claimant had covertly recorded them and the nature of the allegations against them. The respondent did not accept that any fraud had actually occurred in its investigation after the event and no action was taken as a result against the individuals concerned.

83. The claimant set out in his witness statement, which was not challenged, that as a result of playing those members of staff the recordings he received a call from Mr H asking where he would be later that day. The claimant asked Mr H why he wanted to know and he replied that he would know exactly why and that he was coming to get him. The claimant reported the matter to Ms Mitchell who responded that it was nothing to do with the respondent and what the staff do in their own time is their business. We do not accept that this is the correct approach for the respondent to take given that it was the respondent that put the matter before the employees.

84. The claimant outlined other instances of threats by those involved in his witness statement and attempts by the employees involved to secure his address from Mr Swain and that they wanted to "send his boys to come and get" the claimant. These are all matters which were unchallenged and

we accept the claimant's evidence about such matters. The respondent does not appear to have considered whether such matters may have influenced its decision on the whistleblowing complaint the claimant raised and whether this led some credibility to the allegations. One of the claimant's witnesses also gave unchallenged evidence about the threats and that he had to be moved to another branch to keep him away from the employees concerned to his detriment.

85. The claimant raised with Mr Glencross by email on 29th May 2019 that the recordings had been played to staff and his home address asked for. Mr Parkin's investigation concluded that there was not sufficient evidence to support the allegation of theft or fraud and that no further action was taken against those employees in question. No formal report was prepared and no formal outcome sent to the claimant.

86. The claimant commenced ACAS Early Conciliation on 9th April 2019 and the certificate was issued on 30th April 2019. The claimant presented his claims to the Tribunal on 10th July 2019 for unfair dismissal (ordinary and automatic) and detriments for having made a protected disclosure.

Conclusions

87. Turning now to the issues in this case the first and substantial point between the parties is whether the claimant was dismissed or resigned amounting to a constructive dismissal. Taking the issues agreed in turn:

    Did the respondent terminate the claimant's employment at the disciplinary meeting on 1st April 2019?

88. The outcome of the disciplinary hearing was that the claimant was told he was demoted. The question is whether in the circumstances of this case this amounts to a dismissal. The starting point is whether demotion is open to the respondent. The contract provides that this is discretionary as an alternative to dismissal and following a finding of misconduct or gross misconduct following a disciplinary procedure. The disciplinary policy frames this more widely but this is said not to form part of the contract of employment in any event.

89. In this case the claimant was said to have committed an act of gross misconduct but the reason given for the demotion was lack of trust in him as branch manager. The respondent via Mr Keeley clearly communicated with the claimant that "*I don't want to dismiss you from the company but* ***my outcome is to dismiss you*** *and demote you back to branch manager if you want to stay working for us that's your choice."* ***[our emphasis]*** This was not recorded in the minutes in this way but is in the agreed transcript of the meeting. It is clear from the words Mr Keeley used, that the respondent expressly dismissed the claimant and offered him the alternative role which was a demotion. This was the respondent's intention and something the claimant focused on thereafter. Despite the clear words used the respondent denied dismissal and these words did not

appear in the meeting notes or written outcome. Thereafter it maintained there was no such dismissal.

90. The claimant was given time to consider it and it was clear the respondent felt that the claimant needed to consent to this. At no point was the claimant told we have a contractual right to do this or that the respondent was minded to dismiss but instead would offer demotion. The words used by Mr Keeley confirmed that he was dismissed and demoted. After the meeting the respondent did attempt to gloss over dismissal and focus on demotion in its outcome and minutes.

91. The conclusion of dismissal is further supported by the intention in the recording between Mr Keeley and Miss Mitchell that shortly the claimant would be demoted and he either accepted it or he leaves. Having heard the evidence we are satisfied that the outcome letter was not framed in the same way but gave the claimant until Thursday 4th April 2019 to accept the "decision" being the demotion. The claimant in his letter of appeal confirmed he was told he was dismissed and that unless he accepted it he would have to leave and he would not accept the demotion.

92. The Tribunal finds therefore having heard all the evidence that the claimant was expressly dismissed on the 1st April 2019. However, had Mr Keeley not expressly dismissed the claimant in his own words then we would have found that decision unilaterally to demote him and the significant reduction in his salary would amount to a dismissal in accordance with *Hogg v Dover College [1990].* The contractual provision was only an alternative to dismissal when in this case the respondent confirmed the misconduct was not so serious as to justify dismissal.

93. Demotion was said in the policy to be usually accompanied by a final written warning which was not the case here as would be expected if a finding of gross misconduct had been made. The policy is also non-contractual. The letter confirming the decision was dated 2nd April 2019 merely referred to a lack of trust as to the reason for the demotion and not because of the other findings. Taking into account the words used, the letters and minutes and the material facts of the demotion, we consider the claimant was dismissed on 1st April 2019.

94. The respondent cannot simply rely on such a clause to justify its actions in the same way it cannot simply rely on a clause purporting to allow for any variations of contract. In accordance with *Alcan Extrusions v Yates and others [1996]* both as a matter of common sense and law he was told on the 1st April 2019 that his former contract was gone. We consider the variation to be so fundamental as to amount to a termination and the offer of a demotion was in effect an offer of reengagement on much lesser terms.

95. Here the contractual change was a drop in salary of over £11,000 (over 27%), he would lose his company car and a contractual bonus scheme and in addition have to work weekends at a detriment to him and his young family. There is also the loss of status back to his old role. In

essence, we find that these new terms were so radically different from the old terms that they could properly be termed as withdrawal of the old contract on the facts of this case and as such the claimant was in effect dismissed on 1st April 2019. We do not consider that it was unreasonable for the claimant to reject the demotion in the circumstances of the contractual changes.

96. We have gone on to consider the alternative position as to whether the variation was sufficient to constitute a constructive dismissal had we not found an express dismissal in the issues identified below. Given the above it would have equally impacted on the employment relationship and the implied term of trust and confidence as dealt with below.

97. Having found that dismissal took place on 1st April 2019 this was the effective date of termination.

<u>If so did the respondent have a fair reason for dismissal?</u>

98. The respondent advances that it dismissed the claimant for conduct reasons. The claimant asserts an alternative reason for dismissal and that this was that he made a protected disclosure and the dismissal is automatically unfair. Conduct is a fair reason for dismissal in accordance with s98(2)(b) Employment Rights Act 1996. If the claimant was dismissed for having made a protected disclosure this would have been automatically unfair in accordance with s103A Employment Rights Act 1996.

99. When considering the reason for dismissal, the Tribunal must identify the facts known to the employer or the beliefs held by the employer which caused them to dismiss the employee.

100. It is not in dispute that there was a discussion between the Claimant and Mr Keeley on 20th March 2019 after the respondent discovered the Range Rover in Gloucester on 15th March 2019. We have found that Mr Keeley told the claimant that if in the future he wanted to work on his own vehicle that he needed Mr Keeley's permission to do so or they would be having a different sort of conversation. The claimant and Mr Keeley discussed the work that needed doing and there was a reference to a donor engine being transported into the Range Rover.

101. It is not in dispute that on 27th March Mr Parkin carried out an inspection and discovered a Jaguar also at the Gloucester branch and that the claimant was suspended. The respondent said that the claimant had committed an act of gross misconduct by not following instructions and lack of trust for having an unauthorised car in the centre.

102. The respondent had facts that it felt the claimant had committed an act of misconduct. We have considered here that performance was an underlying concern which the respondent intended to demote the claimant for but finding the Jaguar on site was an intervening event that gave the respondent a reason to discipline. The claimant's conduct in having the

Jaguar on site was the reason he found himself demoted/dismissed sooner.

103. We therefore find that the claimant was dismissed for a "reason related to the conduct of the employee". We have considered further below whether this dismissal was influenced by any protected disclosure as alleged so do not deal with s103A Employment Rights Act here but below under the protected disclosure. Conduct is a fair reason within the meaning of s98 Employment Rights Act 1996.

Did the respondent act reasonably or unreasonably in treating this as a sufficient reason for dismissal, taking into account the size and administrative resources of the respondent. In particular:

(i) Did the respondent have a genuine belief in the claimant's guilt;
(ii) Was that belief formed on reasonable grounds;
(iii) Did the respondent carry out a reasonable investigation;
(iv) Did the respondent follow a fair procedure?

104. There was no written policy that prevented area managers working on their own vehicles and the memos were of little assistance to the Tribunal despite the respondent's focus and reliance on them. Most pre-dated the claimant's employment and were not to area managers or concerning the right topic. Even if there was such a policy the respondent accepted it was not followed. The respondent proceeded on the basis that there was such a policy and that the claimant chose to breach it which a fatal blow to fairness.

105. The respondent appears to have been motivated by concerns that the claimant was not being honest although this was not expressly put to the claimant and discussed with him for him to respond to. Mr Keeley made comments about the claimant not being as clever as he thought he was, but where it is most stark is at the conclusion of the appeal hearing. Mr Lee draws conclusions about the claimant recording meetings and it is this preconception of the claimant which tainted the disciplinary process right from the start.

106. The respondent accepts that it carried out very little investigation in this case. Mr Parkin was the person who suspended the claimant and he merely carried out what he determined was a fact finding. In reality this was that he saw the Jaguar at Gloucester, he asked Mr Keeley if he knew about it, took some photos of the car, suspended the claimant on request and made a note of some but not all of what the claimant had told him only when Mr Keeley asked him to do so.

107. The respondent did not follow its own procedure or the ACAS COP1 despite being a large employer and having HR and (as we heard in evidence) external advisers. Mr Keeley was a key witness in his discussions on 20th March 2019 and he made the decision to suspend. He was the disciplinary officer and decision maker despite being a key

witness into what was agreed. The decision maker was not independent and there was no independent investigation.

108. Contrary to the respondent's own policy the claimant was not provided with a summary of the relevant information gathered during the investigation and copy documents to be used at the disciplinary hearing. No statements were obtained and no evidence provided to the claimant in advance. There was no investigation report provided either. The respondent only took statements after the appeal had concluded which is contrary to its own policy and the ACAS COP1. There was very little that could be said to be any form of investigation into this matter. The claimant's fact finding note (even though it was incomplete) was relevant but also was a statement from Mr Keeley of the 20th March 2019 conversation and what was agreed about the Range Rover.

109. The appeal officer reported to the decision maker and was not independent of or more senior to the decision maker. Even at this stage the respondent did not correct its errors and no further investigation was undertaken by the respondent before reaching its decision to uphold demotion. The appeal officer Mr Lee used the notes of the disciplinary hearing and accepted in cross examination that the evidence was not sufficient to dismiss. The appeal hearing outcome was not written by Mr Lee and was factually inaccurate. It referred to disciplinary allegations not put to the claimant and that it was clear company policy that the claimant had breached. The appeal officer heard the case with one outcome in mind and in his decision he relied on matters not before either the disciplinary hearing or the appeal hearing in that the claimant was going to record the hearing and not tell him and that he recorded the disciplinary hearing without permission and it is clear that he focused on trust and that he thought the claimant had chosen to breach the policy. Mr Lee was not objective and had at the forefront of his mind that he would uphold what Mr Keeley had decided. He accepted on cross examination that the conduct did not warrant dismissal and therefore he upheld a decision to demote as an alternative to dismissal which he did not consider was even justified.

110. In addition to the above procedural issues with this case, the respondent as a large organisation, had poor note taking and the difference between its own notes of the disciplinary hearing and the recording are stark and not minimal. The respondent is a large employer with a HR manager involved in the process and as such should not only have more robust procedures but follow them. It must act reasonably and the standards against which it is judged are higher given its size and administrative resources.

111. The Tribunal has in mind that it must not substitute its decision for that of the respondent. The respondent should be judged as to whether it acted in the range of reasonable responses in accordance with BHS v Burchell.

112. The claimant was consistent throughout that he thought he had authority to finish the Range Rover following the discussion with Mr Keeley on 20th March 2019. Mr Keeley knew from that discussion that this required the

claimant to fit a donor engine. The claimant agreed with him that he would get the Range Rover finished as quickly as possible and out of the workshop. This was not a case where the claimant was working on a second vehicle, the sole purpose of the Jaguar being on site was to donate its engine to the existing Range Rover which the claimant thought was agreed to be finished asap.

113. There was no policy or memo to assist the respondent so it only had the record of the conversation on 20th March 2019 to rely on here. There were two different versions of this conversation and what was agreed, yet the decision maker held one version so this was never tested. It was his view so it must be correct. There were no notes of the 20th March 2019 meeting, nothing put in writing afterwards and no statements produced.

114. From the outset Mr Keeley formed the view that he had been clear in the 20th March 2019 meeting and that this was not what was agreed. Mr Keeley was right and there was no possible way anything else could be entertained by the respondent. Nothing the claimant said would have changed that pre-determined approach to the disciplinary matter in hand. The claimant had consistently provided an alternative explanation and a plausible one as to what had happened. He was upfront and set out that he thought it had been authorised. Mr Keeley was the witness, the judge and the executioner and there was no way he could accept anything other than his own interpretation. This pre-determined the whole outcome to the process. To him it was black and white.

115. In addition, there are two other matters which concern this Tribunal as to the respondent's approach to this dismissal. It is clear from the discussion on the 20th March 2019 that the respondent already had concerns about performance of the claimant in his role. He was on borrowed time "you are on your last legs Gavin", he only had until 31st March (day before the disciplinary anyway) before he was due to be told if you are not at 98% at the end of April he would get demoted and by mid April if he was not at 80% Mr Keeley would do it sooner. This concerns us that the outcome was always going to be demotion but that instead of following a proper performance management process (which we do not accept would have fairly lasted until the end of the next month) the discovery of the Jaguar gave the respondent an excuse to expedite those plans under the mask of gross misconduct.

116. Mr Keeley as decision maker had also formed the view that the claimant should "start taking to people and telling the fucking truth and stop trying to hide things because you're not as clever as you think you are" and "gotta play the long ball game with it". The respondent had formed a view on trust as far back as the incident on 15th March 2019 with the Range Rover which was discussed on the 20th March 2019 if not before. Trust was a theme in the dismissal and appeal but the full particulars of this were never put the claimant.

117. Secondly there is the call from Mr Brooks and that he (before the disciplinary hearing has been held) was able to recall a conversation that

Mr Keeley denies, yet it predicts the outcome of those proceedings accurately. Specifically that "*They can't get you out on your figures, so they're looking for every little loophole to get you out or demoted." "If you go in and hold your hands up you'll still have a job but if you don't want to be demoted there's not many options for you." " My advice is that you go in hold your hands up and apologise, take the demotion and look for a job somewhere else."*

118. The Tribunal has concluded on hearing the evidence that the decision in this case was predetermined. Whilst the respondent may have formed the belief in the claimant's guilt, this was not on reasonable grounds or following a reasonable investigation and they did not follow a fair process in this case. The respondent did not act within the range of reasonable responses of a reasonable employer.

119. The appeal did not correct any of these things and actually added to the unfairness overall as it was not independent and was further pre-determined. Further, the conclusions reached were on matters not discussed or put to the claimant in advance such as recordings, letting others leave early and use of company property. This was not a genuine appeal, a re-hearing or an independent review of such matters. The respondent merely went through the motions.

120. The respondent relies on the admission that the Jaguar was on site to justify the lack of investigation. This is of course not in dispute but the content of what was agreed in the meeting on 20th March 2019 was very much disputed. In our view, the claimant's credible explanation stood no chance in this matter as the whole process was adopted on the basis that he has been dishonest and Mr Keeley was clear, unambiguous and of course right. This cannot be correct and goes against the very principles of natural justice as Mr Keeley would be judging the matter and would not (and in this case could not even accept it in cross examination with the benefit of hindsight) accept that there was any room for misinterpretation or ambiguity. This starting point meant that the respondent acted outside the range of reasonable responses and could not meet the requirements of Burchell. Its beliefs were formed at the outset before any investigation or process.

121. We have considered the procedural flaws in the light of the whole facts and circumstances and the prejudice to the claimant. Taking into account *Sharkey v Lloyds Bank Plc [2015]* all the circumstances are that the respondent did not act reasonable in treating the reason as sufficient reason for dismissal. In the circumstances, dismissal cannot be within the range of reasonable responses.

<u>If the respondent did not terminate the claimant's employment at the disciplinary meeting on 1st April 2019, can the claimant establish that his resignation should be construed as a dismissal in that:</u>

(i) <u>The respondent committed a breach of the implied term of trust and confidence through one or more of the following matters, taken individually or cumulatively:</u>

a. The claimant being informed on 27th March 2019 that he allegedly committed misconduct by bringing his car into the branch on 25th March 2019 without prior authorisation;
b. The claimant's subsequent suspension that day;
c. The respondent's indication on 27th March 2019 that a disciplinary hearing would take place on 1st April 2019;
d. The respondent's failure to provide supporting documentation for the allegation of misconduct until requested by the claimant;
e. The telephone call from Mark Brooks on 29th March 2019 at which Mr Brooks advised the claimant the respondent was trying to find a reason to push the claimant out of the company or demote him and if he apologised for his actions he would be demoted;
f. The disciplinary hearing on 1st April 2019 and in particular the outcome delivered by Mr Keeley in which he said "Me personally I don't want to dismiss you from the company but my outcome is to dismiss you to branch…demote you back to branch manager. If you want to stay working for us that's obviously your choice. It's completely down to you."
g. The respondent's decision to demote the claimant on 1st April 2019. The claimant will rely on BBC v Beckett [1983] IRLR 43.

122. Given our findings on dismissal it is not necessary for us to explore this issue in detail in respect of each of the points the claimant relies on to support the undermining of trust and confidence but we did want to draw a few conclusions that would have been drawn if this was not an express dismissal case having heard all the evidence.

123. The decision to demote in circumstances where this was not a gross misconduct case and where the appeal officer accepted that dismissal was not justified would have fundamentally undermined the relationship of trust and confidence. We accept that an employer can investigate and suspend an employee when allegations arise and that this would not normally amount to a fundamental breach of trust and confidence. Here however, given the pre-determination and the way the respondent conducted the investigation and disciplinary would have contributed to the claimant's trust and confidence in the respondent.

124. A change in terms and conditions of this magnitude by way of demotion can undermine the relationship of trust and confidence particularly where dismissal is not justified. The claimant reasonably thought he had authority to proceed with the car and the respondent had pre-determined the outcome of any process and Mr Keeley as the person who has the authority could not be wrong and could not see any other conclusion than his conclusion was possible. This undermined the relationship of trust and confidence. The fact Mr Brooks knew of the outcome before the meeting and that there were disciplinary proceedings further undermined that trust and confidence.

125. In accordance with *BBC v Beckett [1983]* we would have found (had we not found a dismissal) that the demotion even if this was provided in the contract, the nature of which meant that the claimant was entitled to refuse it and this amounted to a constructive dismissal.

Did the claimant resign in response to that breach?

126. The claimant set out a detailed letter on 25th April 2019 why he considered that the treatment was unfair and that he could not accept the demotion as the terms were too great in terms of pay reduction and return of the company car. The claimant clearly resigned in response to the breach if we had not accepted he had been expressly dismissed.

Did the claimant do so promptly without affirming the breach?

127. The claimant appealed the decision in the hope that the respondent would reinstate him on appeal. It would not have been unreasonable for the clamant to do this and delay any resignation in the circumstances where he made it clear even from the moment that the outcome was given in the disciplinary hearing that he would not accept the demotion. He had been quite vocal on these matters.

128. We do not accept that there was a significant delay in this case and the fact that the claimant had engaged in the appeal process did not mean that the contract had been affirmed. As per *Kaur v Leeds Teaching Hospitals NHS Trust [2018]* "exercising a right of appeal against what is said to be a seriously unfair disciplinary decision is not likely to be treated as unequivocal affirmation of the contract". The claimant was quite clear throughout about the unfairness and that he would not accept demotion.

129. Whilst the claimant does not expressly rely on the appeal process as grounds for resignation (which is surprising given the way this was conducted particularly given the contents of the outcome letter) he clearly expressed concerns about this and that it undermined the relationship of trust and confidence when one reads he claimant's letter of 25th April 2019. There is about a week between getting that long letter giving the outcome of the appeal which was full of inconsistencies and errors and his equally long response said to be a letter of resignation. At no point did he work as branch manager in that period having accepted the demotion and we would have found that the did not affirm the breaches as the passage of time is small against this factual matrix.

Would the claimant have dismissed if a fair procedure had been adopted and if so when/what was the percentage chance?

130. Given our findings and the significant procedural issues in this case we cannot say that the claimant would have been dismissed even if a fair process had been followed. The respondent clearly had an outcome in mind but any dismissal in these circumstances would have also been unfair as no performance management process was followed which would have taken months to follow. There is no evidence that the claimant would

not have turned matters around if properly performance managed. The respondent led no evidence as to how far behind the claimant was and the passage of time before it could fairly dismiss him.

131. We therefore do not consider that this case would be an appropriate case for a Polkey deduction in terms of a % chance that the claimant would have been fairly dismissed if a fair procedure had been followed or that this would have fairly taken place within a further period. The issues are simply too great to speculate as to what a proper process would have concluded faced with a proper investigation, an independent decision maker and a proper appeal process. Other issues as to remedy will be dealt with at the remedy hearing.

Protected disclosure

Did the claimant make a protected disclosure? i.e

Did the claimant disclose information which, in his reasonable belief tended to show either:

iii) That a criminal offence had been committed or was being committed or was likely to be committed; and/or

iv) That the matter above had been or was likely to be deliberately concealed?

132. The claimant claims that he made such disclosures to Sophie Mitchell and Ian Keeley by email on 15th March 2019 and within a meeting with Mr Keeley on 20th March 2019. The sole issue in dispute between the parties in this case is whether there was a disclosure of information. As set out below the respondent conceded that this was made in the public interest and that it was made to the employer. The respondent conceded that the claimant had a reasonable belief that the email/conversation tended to show the matters relied on.

133. The claimant sent the email on 15th March 2019 informing the respondent that an allegation had recently been brought to his attention and that he wanted to investigate it. The claimant argues that he provided information to the respondent. The statute does not provide for a distinction between allegations and information. We have in mind the test in *Kilraine v Wandsworth LBC [2018]* that "it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)". The email is part of a chain and further discussions took place on 20th March 2019.

134. The email relied upon identifies the pool of culprits as it identifies an ex-area manager and the region they are in and the time frame being the last 12 months. There is reference to fraud which is a criminal offence and even more specifically the method of the fraud by paying staff more money in the form of a bonus and fuel than he should have and then taking a cut each month.

135. In the meeting on 20th March 2019 the claimant named Mr A and offered the recordings of more evidence to Mr Keeley. Mr Keeley relays this to

Miss Mitchell in the recorded call and both talk about Mr A and indeed one of the other employees involved in the fraud who was recorded. There is no doubt or surprise in his name being mentioned and it is quite clear from hearing the recording that the only surprise is that the claimant had covertly recorded colleagues talking about it. Miss Mitchell and Mr Keeley are both aware of the details, the employees involved and what the claimant reasonably believed. It is not clear what more the claimant needed to provide for the respondent to say that this was the provision of information.

136. We consider that the statements made by the claimant cumulatively are more akin to the *Cavendish Munro Professional Risks Management Ltd v Gedulo [2009]* example of sharps being left lying around than a general allegation of breach of health and safety or fraud in this case. Not every statement involving an allegation would be a disclosure of information. It would depend on whether it had sufficient factual content and was sufficiently specific and we find here that the information the claimant gave fell within this category to make it a qualifying disclosure. In this case the email and the conversation do not simply convey a concern or raise an allegation they give specific details and facts to be a disclosure of information.

137. The respondent's position comes from the use of the word "allegation" and that the claimant wanted to carry out an investigation in case the "allegation" turned out to be incorrect or false. The employee does not need to prove the information is correct to make a protected disclosure he has to disclose information which in his reasonable belief tends to show the malpractice occurred or may occur. The reasonableness of the belief will depend on the quality and volume of information available to the claimant at the time the decision to disclose is made. Caution must be exercised about the use of hindsight.

138. At the time the claimant sent the email he had the matter raised by Mr H and the subsequent call where Mr H confirmed it had happened and he was in possession of this recording. He also had the recording of Mr Z and his confirmation. By the time he meets Mr Keeley on 20th March 2019 he has this and the enquiries made by Ms Mitchell and the recording of Mr Haddock. By the time of the 20th March 2019 they were more than unsubstantiated rumours. The claimant had a reasonable belief that the information tended to show one of these matters but naturally was concerned about the seriousness of the matter if he was wrong.

139. We find that the email taken in context of the chain and the information the claimant had on the 15th March 2019 disclosed information and therefore amounted to a protected disclosure and that if this was not the case then certainly by 20th March 2019 there was a disclosure of information and that conversation on 20th March 2019 further or in the alternative consisted of a protected disclosure.

140. There was sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) as per *Kilraine v Wandsworth LBC [2018].*

141. The claimant does not need to prove the matter is a criminal offence and had done all he could at the point of 20th March 2019 to establish the facts. He had to hand this over to the respondent to investigate at that point and there was nothing further he could do, he had all the information he needed to make this a protected disclosure there was nothing missing. In any event the respondent conceded that the claimant had such a reasonable belief and it is clear to us that he had disclosed information which was the issue in this case. There was nothing further the respondent needed to know in this regard by 20th March 2019.

142. We consider that there was a disclosure of information for the reasons given and the claimant believed that the information tended to show one of the prescribed matters and we consider that that belief was reasonable. He had three different parties confirming the arrangement and he had audio recordings of these. The audio recordings being offered to Mr Keeley (even if he refused them as in this case) would amount to (or at least form part of the rationale) that a form of disclosure had occurred as the claimant was additionally telling the respondent that he had communications from employees of the fraud. The making of the audio recordings themselves did not amount to a protected disclosure.

Did the claimant reasonable believe that the disclosure was made in the public interest?

143. The respondent accepted that the claimant had a reasonable belief and that this tended to show (i)(ii) above but that there was no information that meets the definition. We agree with this acceptance but have found that there was disclosure of information.

144. Further, that given the evidence the claimant had and that there was nothing further he could do this “tended” to show that a criminal offence had been committed. The claimant did not need to prove that it had in fact taken place. The fact that he had recordings from employees confirming that it had taken place was enough for him to hold that reasonable belief.

145. The nature of the information was such that it was not personal to the claimant. It did not concern him personally but fraud being actioned on the respondent by other employees of it (plural) and possibly on multiple occasions. This was clearly as the respondent rightly conceded in the public interest.

Did the claimant make his disclosure to the employer or another responsible person.

146. It is agreed that the claimant made is his disclosure to his employer. This was conceded by the respondent and that is clearly right in the circumstances of this case.

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

147. We have found that the claimant made a protected disclosure on the 15th March 2019 and certainly by 20th March 2019. Given the timing of this and the incident on the 27th March 2019 when the claimant was suspended it is only right that the matter is subject to scrutiny and we can understand the claimant's concerns here but the timing alone is not sufficient.

148. The claimant raised that Mr Keeley and Miss Mitchell were involved and so this would have reflected badly on them having signed off on the fraudulent payments. The timing is certainly coincidental but we have considered the background in this case and that the respondent felt that the region was failing. It had been a problem region for some time (including before the claimant's appointment) and the reality is that Mr Keeley and Miss Mitchell did have an agenda here but it was not because of any protected disclosure but because they felt that the claimant was on "his last legs".

149. We have considered the recording and the transcript that came to light part way through the evidence and consider this important evidence in this case. This was a recording where Mr Keeley had a frank exchange with his HR manager in the business about the claimant's future. It is contemporaneous evidence at the time when the protected disclosures were made. Whilst the protected disclosure was discussed this was more in line with the fact that the claimant had covertly recorded his colleagues and the trouble that this could cause. Given the frank conversation they had there were no comments in there about the protected disclosures that would show any concerns to make the link between these and the subsequent disciplinary action. There were no comments to assist the claimant's case on protected disclosure even though it was a frank conversation the respondent did not anticipate at the time the conversation was had that this would make its way into these proceedings.

150. We have found above that the Jaguar was used to shortcut the plans to demotion but we do not consider that this was because of or mainly because of the protected disclosures. Even before the protected disclosure was made the claimant was being subject to audits and additional scrutiny. The claimant had an audit on 15th March and then again on the 19th March 2019. The first was around the time of the emails and not in response to the email (the audit was already underway when the protected disclosure email was sent on 15th March 2019) and the second was before the conversation on the 20th March 2019. Third time round the respondent was able to locate something it could identify as an issue the Jaguar. The claimant was being put under pressure before the protected disclosures were made because of the performance concerns as he was being audited regularly. The respondent was applying pressure as it considered the claimant was on his "last legs"

151. We therefore do not find that the reason for the dismissal was the protected disclosure but for the reasons identified above in the unfair dismissal claim. We have found that the claimant was dismissed and therefore the test is whether the reason or principal reason for that dismissal was the disclosure. We do not find this.

152. As set out above we do not find that the protected disclosures in fact influenced this decision in any way, the respondent acted in the way it did as it had pre-determined dismissal on performance concerns. It had in its mind demotion before the protected disclosures were made and the claimant was on "his last legs". The protected disclosures were not the reason or principal reason for the dismissal but rather that was already in mind when the protected disclosures were made.

Did the respondent subject the claimant to detrimental treatment because he made a protected disclosure as above:

153. We have considered whether for the other detriments short of dismissal the making of the protected disclosure played more than a trivial part in the treatment the claimant received in accordance with the test in *NHS Manchester v Fecitt [2012]*.

The disciplinary proceedings brought against the claimant on 27th March 2019;

154. The Jaguar being on site was picked up on the third audit of the claimant's sites within two weeks. The first of those happened around the time of the email chain but was not after or in response to these emails. It is clear that the claimant was under close scrutiny as Mr Keeley thought he was on his "last legs" and planned to demote him before the end of April in any event and the discovery of the Jaguar gave him a reason to expedite those plans.

155. For all the reasons set out above under the unfair dismissal claim Mr Keeley was witness, Judge and executioner and as far as he was concerned he was right and there was no room for misinterpretation or error on the claimant's part. He was "not as clever as you think you are" and that he needed to start "telling the fucking truth and stop trying to hide things". As far as Mr Keeley was concerned the claimant was doing this again and he was right and the claimant was wrong.

156. We accept that the claimant thought he had authority to finish the Range Rover and that included having the Jaguar on site to donate the engine and that he did not need additional permission. Had a proper and fair process been followed we consider that this could have been accepted by the respondent as it was evidence before them and on the balance of probabilities this legitimate explanation could have been accepted but judgment was clouded by Mr Keeley's own thoughts that the claimant was not right for the role and on his last legs. We do not consider that the claimant making a protected disclosure in anyway influenced the respondent in bringing those disciplinary proceedings as the claimant was

on a set track on a one way train to demotion. The protected disclosures were a fact on the track but had no influence on the direction of travel i.e. that disciplinary process.

157. We consider that had the claimant not sent the emails on the 15th March 2019 and had the conversation on the 20th March 2019 about the protected disclosures then the claimant would still have been subject to the disciplinary proceedings and demoted so the protected disclosure did not influence in any way that decision to subject the claimant to disciplinary and ultimately demote him. The only element of the 20th March 2019 conversation that influenced the respondent and the process it followed was Mr Keeley's instructions on other vehicles which later formed the basis of the disciplinary action.

The claimant's suspension on 27 March 2019;

158. We accept the claimant's submissions that there are contradictory reasons for the suspension. Suspension contractually under clause 15.4 was to allow for an investigation but there was no investigation. The letter confirming suspension is said to be because of the allegation and the outcome of appeal letter which we have found to be inaccurate already, gives multiple reasons and suggests this was reviewed when the evidence does not support this.

159. The claimant was suspended after the Jaguar was located and Mr Keeley asked him to be suspended by Mr Parkin. We accept Mr Parkin was simply following orders as Mr Keeley was pulling the strings here. We again do not accept that the protected disclosure in any way influenced the decision to suspend and consider that even if the claimant had not made it, he would still have been suspended as Mr Keeley had already decided that the claimant had not done as he was asked and sought authority and suspension was a knee jerk reaction to that. That this was in his mind was another example of the trust issues which Mr Keeley had picked up on 15th March 2019 and then discussed on 20th March 2019. Had the claimant not been dismissed this could have formed part of the breach of trust and confidence in the respondent but we do not find that the protected disclosure in any way influenced the decision to suspend.

Unrelated colleagues being made aware of the disciplinary proceedings;

160. We have found that the conversation with Mr Brooks did take place. Again we do not accept that the claimant having made a protected disclosure in anyway influenced the fact that Mr Brooks was made aware of the disciplinary proceedings. When you look at the contents of the conversation it is to sound the claimant out about the forthcoming disciplinary hearing and to get him to accept the pre-determined outcome of demotion. Mr Keeley denied having discussed the matter with Mr Brooks but it is clear that Mr Brooks got this information either direct from Mr Keeley or a third party and given what Mr Brooks said we prefer the former. The conversation is attempting to get the claimant to accept the forthcoming demotion and that is more likely to be the reason why Mr

Brooks called and why he was told. The claimant has not advanced other evidence as to any other unrelated colleagues that were made aware of the disciplinary proceedings.

161. Again, even if the claimant had not made a protected disclosure we find that Mr Brooks would still have known about the matter and called the claimant to "sound him out" and to get him to accept the pre-determined outcome. This was not related to the protected disclosure in any way but to get the claimant to stick to the respondent's predetermined plan and agree to the demotion.

<u>The respondent advising the claimant his Range Rover must be removed by 12th April 2019 failing which he would incur a daily charge for storage</u>

162. The claimant withdrew this allegation after the evidence was concluded.

<u>The respondent's decision to dismiss or demote the claimant on 1st April 2019</u>

163. The respondent's decision to dismiss or demote the claimant on 1st April 2019 was for the reasons already stated not in any way influenced by the protected disclosure. Dismissal has been dealt with above under the test for automatic unfair dismissal.

164. We have found that the claimant was dismissed either expressly or as a matter of law so the claimant's resignation as a dismissal is not relevant but had we had to look at this in line with the test in *NHS Manchester v Fecitt [2012]* we would have concluded the same as the other detriments. This is that this was unconnected to the protected disclosure but because the claimant was already on his last legs and the discovery of the Jaguar expedited Mr Keeley's plans to demote the claimant sooner.

<u>The threats the claimant received from a colleague after his dismissal.</u>

165. The tribunal found the threats to have occurred as a matter of fact. This detriment occupied more of the Tribunal's time as clearly the reason the threats were made was because colleagues knew about the claimant's recordings. However, it was entirely possible for the respondent to have investigated the matter without the recordings having been played to the claimant's colleagues. This happened after dismissal but former workers are protected under s203(3) of the Employment Rights Act 1996.

166. This then raises the question of whether it was the protected disclosure itself that led to the threats or the manner and way the claimant obtained the evidence. If the claimant had not relayed information and simply handed over the recordings themselves without comment and they were passed on to those involved then this still could have resulted in the same outcome.

167. This is another example of how the respondent conducted matters that led to issues. This itself is not enough to make the respondent vicariously liable for actions of its staff. A person who subjects a whistleblower to a detriment must personally be motivated by the protected disclosure in order for a detriment claim to succeed. There was no evidence that the colleague knew of the emails and the conversation of 15/20th March 2019 which have been found to be protected disclosures but they were aware of the recordings themselves.

168. Further, the law changed as a result of *NHS Manchester v Fecitt [2012] so* this case is not good authority in connection with vicarious liability as it found that an employer could not be liable under whistleblowing legislation where an employee victimizes a whistleblower colleague which was then amended in law. Under s47B(1A)(a) Employment Rights Act 1996 protection against detriment from a co-worker would include a worker of the claimant's employer in the course of that other worker's employment. The latter part of the definition is the key here.

169. It is clear that the threats the claimant received cannot be made in the course of that other worker's employment. There have been recent developments in the law of whether there is a sufficiently close connection with the wrongdoing that it can be regarded as in the course of employment.

170. We have considered this matter and the nature of the colleagues duties and responsibilities and there is little connection with the wrongdoing even taking into account the broad nature of employment. The matters that arose had a degree of closeness to employment but it was not an unauthorised way of carrying out and authorised act, there is no evidence the employer authorised such actions. The incident occurred after the claimant's employment had ended so cannot be said to be of a close proximity to work-related matters and these matters occurred outside of work albeit there is a connection with work. The wrongdoing by the colleague did not entail a failing in the responsibility for the safekeeping of someone or something. The colleague was not seeking to pursue the respondent's ends but his actions were for personal reasons. The wrongdoing did not involve the exercise of authority derived from the employment and did not use work equipment or equipment derived from employment. The employment did not materially increase the risk of harm and considering the risk of employees abusing their position is one of life's unavoidable facts.

171. Having considered the matter carefully we conclude that the threats the claimant received from a colleague after his dismissal were not materially influenced by the protected disclosure by email on the 15th March 2019 and the conversation on 20th March 2019 but by the nature of him covertly recording his colleagues.

172. On balance we do not consider this to be a detriment that the respondent can be vicariously liable for as the threats were not made in the course of the worker's that made the threats' employment but for personal reasons.

173. Therefore, for the reasons set out above, the claimant's claims for unfair dismissal (ordinary contrary to s98 Employment Rights Act 1996 is well founded and succeeds but the claimant's claim for automatic unfair dismissal contrary to s103A Employment Rights Act 1996 fails and is dismissed. The claimant's claim for detriments for having made a protected disclosure also fails.

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Employment Judge King

Date: 22 March 2021

Sent to the parties on: ...24 March 2021.
THY
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For the Tribunal Office