EMPLOYMENT TRIBUNALS

Claimant: **Mr W. Sigismund**

Respondent: **Financial Conduct Authority**

Heard at: **East London Hearing Centre**

On: **1-4, 8, 10-11, 15-18, 22-25, 29-31 March and 1 April 2022; and in chambers on 4, 7, 11 April, 11-13 and 18 May and 25 July 2022**

Before: **Employment Judge Massarella**
Miss S. Harwood
Mr S. Woodhouse

Representation
Claimant: Mr E. Kemp (Counsel)
Respondent: Ms J. Shepherd and Ms C. Clubb (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimant made the protected disclosures identified by the Tribunal in our reasons below by reference to the following issues: PID 5 (the 2013 and 2014 documents only); PID 6a (the 2010 graphic only); PID 7; PID 8; PID 9 (the June 2011 email and interview only); PID 12 (the October 2013 email only); PID 17; PID 18 (the January and April 2017 documents only); PID 20; PID 22; PID 23; and PID 26;**

2. **the other matters relied on by the Claimant were not protected disclosures;**

3. **the Claimant's claims of detriment on the ground that he made public interest disclosures (s.47B Employment Rights Act 1996 ('ERA')) fail because they are not well-founded and/or because the Tribunal lacks jurisdiction in respect of them (in circumstances where they were presented out of time, when it was reasonably practicable to present them in time) and they are dismissed;**

4. the Claimant was not automatically unfairly dismissal (s.103A ERA) by reason of having made protected disclosures, and that claim is dismissed; he was dismissed for redundancy, alternatively some other substantial reason (restructuring);

5. the Claimant's claim of ordinary unfair dismissal (s.94 ERA) succeeds: the dismissal was unfair, having regard solely to the Respondent's failure properly to consider the main ground in his appeal against dismissal;

6. unless remedy can be resolved by agreement, or addressed by written submissions, there will be a remedy hearing to determine the compensation to which the Claimant is entitled, including consideration of the extent to which it should be reduced by reason of *Polkey* and/or contribution.

REASONS

Introduction

1. This is a whistleblowing case concerning the Claimant's employment by the Financial Services Authority ('the FSA') and its successor, the Financial Conduct Authority ('the FCA').

2. The Claimant was employed by the FSA from 2 October 2006. His employment transferred to the FCA in 2013, when the FSA was abolished and the FCA assumed some of its functions. He was employed as a Manager within the Risk department. His employment ended on 25 October 2018, the Respondent says by reason of redundancy, the Claimant says by reason of his whistleblowing.

3. The events occurred between 2007 and 2020. During that period the Claimant says that he made many public interest disclosures. Although around twenty-five are listed in the schedule of issues, some of them consist of multiple disclosures of a similar type: for example, the pleaded public interest disclosure 5 ('*PID 5*')[1] consists of eight alleged disclosures.

4. The Claimant says that he was subjected to detriments because he made public interest disclosures throughout his employment by both employers, up to and beyond his dismissal.

Procedural history

5. By a claim form presented on 22 January 2019, the Claimant brought claims for whistleblowing detriment (s.47B ERA), automatically unfair dismissal for making a protected disclosure (s.103A ERA), ordinary unfair dismissal (ss.94 and 98 ERA) and a redundancy payment; the Claimant withdrew this last claim at the end of the hearing. There were also discrimination and freestanding wages

[1] the abbreviation adopted by the parties in the final schedule of issues and used throughout this judgment; the alleged detriments are abbreviated to 'D2, D3' etc.

claims, which were dismissed on withdrawal at the May 2019 Preliminary Hearing ('PH') referred to below.

6. Originally, there were 56 other individuals and organisations named as Respondents in the claim form. EJ Russell rejected the claims against all of them, apart from the present Respondent, the Bank of England and HM Treasury.

7. At a PH before EJ Tobin on 23 May 2019, the Judge struck out the claims against the Bank of England and HM Treasury for lack of jurisdiction and/or because the claims had no reasonable prospects of success. He ordered the Claimant to provide detailed further particulars of the protected disclosures and detriments by 20 June 2019. The Respondent was given permission to serve an amended response by 18 July 2019.

8. By the next PH, on 16 September 2019 before EJ Russell, the Claimant had provided a 77-page schedule. The Judge described it as being closer to a witness statement than the focused analysis ordered by EJ Tobin. She reminded the Claimant that the authorities (such as *Blackbay Ventures Ltd v Gahir* [2014] IRLR 416) required the Tribunal to consider each disclosure by date and content, and to identify the relevant breach and the detriment caused thereby. She ordered the Claimant to provide the schedule by 14 October 2019 by way of 'a succinct, focused response to the questions listed'. At that stage a final hearing was listed for September/October 2020.

9. On 13 December 2019, a PH took place before EJ Gardiner. The issues still had not been clarified and the Judge ordered the Claimant to send a schedule by 24 January 2020, based on his earlier schedule and the discussion at the hearing.

10. At a further PH on 4 June 2020, EJ Gardiner observed that there had been several attempts to clarify the protected disclosures and considered there was an agreed list of issues and a schedule containing a revised list of protected disclosures and detriments. The Judge spent some time with leading Counsel for the Claimant, seeking to clarify each of the alleged detriments. The Judge was invited to make deposit orders but declined to do so. He also considered an application to amend the claim to add additional disclosures and detriments. He permitted the Claimant to add one additional protected disclosure (*PID X-a*) and to make some amendments to two of the detriments.

11. The Respondent filed its amended grounds of resistance on 3 July 2020.

12. A further PH took place on 10 August 2020 before EJ Crosfill to deal with disclosure issues. That led to the vacation and relisting of the September 2020 final hearing. The parties were again ordered to agree and lodge a final list of disclosures and detriments within 14 days.

13. Another PH took place on 5 March 2021 before EJ Gardiner. At that hearing an agreed list of issues and schedule of protected disclosures/detriments was submitted. Disclosure issues arose and were dealt with by the Judge. Ms Shepherd (Counsel for the Respondent) submitted that further clarification was required, both as to the specific information disclosed and the legal obligations relied on. The Judge declined to make an order but observed that it may be in the Claimant's interest to provide the clarity the Respondent was seeking, given

that the onus was on him to show that protected disclosures were made. Similarly, if the Respondent thought there was a lack of clarity, it was open to it to make an application, which could be considered at the PH listed for 7 January 2022.

14. In September 2021, the Respondent prepared a schedule, breaking down each alleged protected disclosure by reference to the elements of s.43B ERA. It asked the Claimant to provide further information in an attempt to seek to narrow the issues. The Claimant declined to engage with that process voluntarily, and the Respondent did not apply for an order.

The hearing

15. At the final hearing (which was reduced from 20 to 19 days owing to lack of judicial resources), there was an agreed bundle of documents of 15,710 pages, and an unagreed supplementary bundle (also referred to as 'the deleted bundle') of 12,777 pages. The bundle was so big that the Respondent had to provide laptops for the lay members and the witness table, with the bundles pre-loaded onto them; a single hard copy, for members of the public to consult, stretched from one side of the tribunal room to the other. We were referred to a tiny fraction of the documents during the hearing. It is unclear how such a manifestly disproportionate bundle came to be created.

16. We were provided with the following documents on the first day of the hearing: opening notes from Ms Shepherd and Mr Kemp (Counsel for the Claimant), together with essential reading lists; an agreed list of issues and a schedule of disclosures and detriments; an agreed cast list and chronology; and an agreed note on limitation.

17. After reviewing these we concluded that the protected disclosures still had not been properly particularised. The Tribunal gave the Claimant and Mr Kemp an additional day to revise the schedule and complete the process of identifying the documents which the Claimant relied on as containing the protected disclosures; the passages containing the information disclosed were highlighted in the bundle; a new column was added, identifying the relevant breaches of legal obligations; brief further particulars were also provided of some of the detriments.

18. Ms Shepherd did not object in principle to that process, but she did object to one of the proposed clarifications (in relation to *PID 13*), which she submitted was a substantial alteration, requiring amendment. Mr Kemp made an application, Ms Shepherd responded and, for the reasons given orally at the hearing, the Tribunal refused it.

19. Given the exceptional volume of documentation we were presented with, the Tribunal was clear with the parties at the outset that we would not be determining matters which were (a) not particularised in the list of issues, (b) not put to the relevant witnesses in cross-examination and (c) not covered in closing submissions. Nor would we read documents unless they were on the essential reading list or we were taken to them in oral evidence. No other course would have been practical and fair to both parties.

20. We read into the case over four days. The Claimant's statement was 417 pages long; he also submitted a short supplementary statement in response to some additional disclosure provided by the Respondent. The Respondent's initial statements ran in total to 114 pages. One of the Respondent's witnesses, Mr Nelson, submitted two short supplementary statements in response to the Claimant revised schedule and supplementary statement, dealing in particular with the question of legal obligations.

21. From the fifth day onwards, we heard evidence from:

    21.1. the Claimant;

    21.2. Mr Lyndon Nelson (Chief Risk Officer and Managing Director of the Risk Business Unit in the FSA until 1 April 2013, when he transferred to the Prudential Regulation Authority ('the PRA');

    21.3. Ms Rosemary Hilary (Director of Internal Audit at the FSA from 2006);

    21.4. Mr Christopher Woolard (Executive Director for Policy, Risk and Research at the FCA from January 2013; Executive Director for Strategy and Competition from 2014; Interim Chief Executive Officer between March and October 2020);

    21.5. Mr Peter Andrews (Head of Economics and Financial Regulation at the FSA; Chief Economist at the FCA until March 2017);

    21.6. Mr Peter Lukacs (Senior Manager within the Chief Economist's Department, FCA, May 2014 to November 2017);

    21.7. Ms Natasha Oakley (Senior HR Business Partner, FCA, in 2014);

    21.8. Ms Barbara Frohn (Director of the Risk and Compliance Oversight Division, FCA, from the end of 2015);

    21.9. Mr Jose Morago (Head of Department for Enterprise Risk & Advisory Services, FCA, from October 2016 to December 2019);

    21.10. Ms Vivien Jarvis (HR Business Partner, FCA);

    21.11. Mr Charles Randell (non-executive Chair of the FCA since 1 April 2018);

    21.12. Ms Julia Hoggett (Head of the Wholesale Banking Supervision Department, FCA, from May 2014; Director of Market Oversight from April 2017 to April 2020);

    21.13. Mr Martin Wheatley (Managing Director of the FSA in late 2012/early 2013, then CEO of the FCA until September 2015).

22. When it came to closing, both Counsel provided detailed written submissions; appended to Ms Shepherd's submissions was a table analysing the protected disclosures. There was an agreed bundle of authorities. We do not attempt to summarise their written submissions in what is already a very long judgement, they are a matter of record; we cannot refer to each point made; we had regard to all of them and we refer to specific points in context.

23. Counsel also provided an agreed statement of the relevant legal/regulatory framework, which the Tribunal reviewed and adopted (para 37 onwards) and an

agreed statement of the law to be applied to these claims, which was reviewed and approved by the Tribunal and is incorporated below (paras 428, 724, 910, 934 and 946 onwards).

24. The Tribunal is grateful to both Counsel for the thoroughness of their preparation, the excellence of their advocacy and the constructive and courteous spirit in which they approached the hearing.

The structure of this judgment

Paras 30 to 427

25. We first set out our findings of fact as to the events which occurred during the material period. In order to avoid obscuring the overall narrative, at certain points in the chronology we simply identify where disclosures and detriments are said to have occurred, making more detailed findings of fact about them later in the conclusions section.

Paras 428 to 723

26. We then turn to the alleged disclosures, setting out the law to be applied, making any further findings of fact specific to each disclosure, including whether information was disclosed; if it was, we state our conclusion as to whether it was a qualifying, protected disclosure.

Paras 724 to 909

27. We then turn to the alleged detriments, setting out the law to be applied, any further findings of fact specific to individual detriments, followed by our conclusions as to whether any of the detriments we find did occur were materially influenced by one or more of the protected disclosures we have found the Claimant made.

Paras 910-933

28. We then deal with the question of time limits.

Paras 934-967

29. Finally, we deal with the claims relating to dismissal, setting out the law to be applied and our conclusions as to whether the dismissal was automatically unfair on the ground that the Claimant had made protected disclosures; if not, whether it was unfair on ordinary principles.

FINDINGS OF FACT

The major institutions

30. The Basel committee on banking supervision is the primary global standard-setter for the prudential regulation of banks. It comprises members from central banks and bank supervisors from twenty-eight jurisdictions. It agrees standards (accords) for bank capital liquidity and funding. The Basel accords do not themselves have legal/regulatory status; they are agreements made between the jurisdictions via the committee. The individual jurisdictions then enact them, sometimes in different ways.

31. Between 2001 and 2013, the FSA was the body accountable for the regulation of the financial services industry in the UK; it was responsible for prudential and conduct regulation of both large and small firms. The Financial Services and Markets Act 2000 ('FSMA') set down the FSA's powers and statutory objectives.

32. After the financial crisis in 2007/2008, the government abolished the FSA and split its functions between two new bodies: the PRA and the FCA. The new structure was introduced through the Financial Services Act 2012 ('the FS 2012 Act') and came into existence on 1 April 2013.

33. The PRA is now responsible for the prudential regulation and supervision of banks, building societies, credit unions, insurers and major investment firms. It supervises around 1,500 large financial institutions.

34. The FCA is now responsible for the conduct regulation of more than 50,000 retail and wholesale financial services firms. It is also responsible for the prudential supervision of smaller firms (those firms not regulated by the PRA). It authorises firms and individuals to carry out relevant activities.

35. The FCA and the PRA sit alongside the Financial Policy Committee ('the FPC'). The FPC is a committee of the Bank of England ('BoE'); it is responsible for monitoring the UK economy at a macro-economic level.

Agreed summary of the legal/regulatory framework

36. The following summary of the legal/regulatory framework, relevant to the legal obligations relied on by the Claimant in his alleged protected disclosures, was agreed between the parties.

The Basel regime

37. The Basel Accords are a series of three sequential banking regulation agreements (Basel I, II and III), set by the Basel Committee on Bank Supervisions ('BCBS'). In themselves, they have no legal status.

38. The EU enacted the Basel Accords by legislation, initially by way of directives (specifically the various iterations of the Capital Requirements Directives (CRDs)) and latterly by way of regulations. The Directives were implemented in the UK through the FSA rules.

39. Basel and the CRDs have three pillars:

    39.1. Pillar 1 relates to minimum capital requirements and sets out an approach to calculate capital adequacy. Basel and the CRD state that banks must hold a ratio of at least 8%;

    39.2. Pillar 2 sets out a supervisory review for banks to ensure they use better risk management techniques to monitor risk;

    39.3. Pillar 3 relates to market discipline and sets out disclosure requirements to enable market participants to gauge the capital adequacy of an institution.

40. Financial firms were required to hold capital at least equivalent to 8% of risk weighted assets, as determined by the rules and the directives. This is complex,

as the rules needed to take into account many different circumstances, including the type of asset and currency denomination and whether the bank has a hedge or collateral against that asset.

FSA statutory objectives

41. Pursuant to s.2(1) FSMA, the FSA was obliged in discharging its general functions, as far as reasonably possible, to act in a way that was compatible with its regulatory objectives and which the Authority considered most appropriate for the purpose of meeting those objectives. The FSA had four statutory objectives in accordance with provisions under FSMA, which are no longer in force:

    41.1. maintaining confidence in the financial system (section 3 FSMA) ('Market Confidence');

    41.2. promoting public understanding of the financial system (section 4 FSMA) ('Public Awareness');

    41.3. securing the appropriate degree of protection for consumers (section 5 FSMA) ('Protection of Consumers'); and

    41.4. reducing financial crime (s.6 FSMA) ('Reduction of Financial Crime').

42. Prior to 8 April 2010, Public Awareness was one of the FSA's regulatory objectives. However, this was removed by s.2 Financial Services Act 2012.

FCA statutory objectives

43. Pursuant to s.1B FSMA, the FCA is obliged, in discharging its general functions, so far as is reasonably possible, to act in a way which is compatible with its strategic objective and to advance one or more of its operational objectives. The FCA's strategic objective is to ensure that the relevant markets function well (s.1B(2)). Its operational objectives are as follows:

    43.1. to secure an appropriate degree of protection for consumers (the consumer protection objective: s.1C(1) FSMA).

    43.2. to protect and enhance the integrity of the UK financial system (the integrity objective: s.1D(1) FSMA).

    43.3. to promote effective competition in the interests of consumers in the markets for regulated financial services and services provided by recognised investment exchanges (the competition objective, s.1E(1) FSMA).

44. Pursuant to ss.41(2) and 44 FSMA, as originally enacted, in giving or varying permission, or imposing or varying any requirement, the FSA must ensure that the person concerned will satisfy, and continue to satisfy, the threshold conditions in relation to all the regulatory activities for which he has or will have permission, but the duty imposed by subsection (2) does not prevent the Authority, having due regard to that duty, from taking such steps as it considers are necessary in order to secure its regulatory objective of the protection of consumers. Paragraph 4 (1) of Schedule 6 of FSMA provided that 'Adequate Resources' was one of the threshold conditions that a firm's resources must, in

the opinion of the FSA, be adequate in relation to the regulated activities that the firm seeks to carry on or carries on. These provisions were substituted for s.55B FSMA by the Financial Services Act 2012.

Threshold conditions

45. Pursuant to s.55B FSMA, in giving or varying permission, imposing or varying a requirement, or giving consent, the FCA (and the PRA) must ensure that the firm will satisfy and continue to satisfy, in relation to all the regulated activities for which the firm has or will have permission, the threshold conditions for which that regulator is responsible (s.55B(3)). But the duty imposed by subsection (3) does not prevent a regulator, having due regard to that duty, from taking such steps as it considers are necessary, in relation to a particular person, in order to advance in the case of the FCA, any of its operational objectives. Paragraph 2D of Schedule 6 of FSMA provides that 'Appropriate Resources' is one of the threshold conditions that a firm's resources (both financial and non-financial) must be appropriate to the regulated activities a firm carries on or seeks to carry on. This includes whether a firm has adequate financial resources i.e. the ability to meet its debts when they fall due.

Duty to investigate and report on possible regulatory failures

46. S.73 FS 2012 Act imposes a duty on the FCA to investigate and report on possible regulatory failures. S.77 FS 2012 Act empowers the Treasury to require the FCA (or the PRA) to undertake an investigation into specified 'relevant events'. The FS 2012 Act was implemented on 1 April 2013.

<u>Ss.73 and 77 FS 2012 Act</u>

47. One matter on which the parties could not agree was the interpretation of ss.73 and 77 FS 2012 Act, specifically whether it has retrospective effect. Our conclusions as to that, and the question of what the Claimant understood the position to be at the material time, are set out below (para 466).

<u>The capitalisation of banks</u>

48. Firms were required to hold capital at least equivalent to 8% of risk weighted assets, as determined by the rules and directives. The Claimant accepted that this is a complex calculation. It was the role of supervisors within the FSA to judge whether the capital calculation fairly reflected the risks. The process in relation to each firm was unique to it.

49. There was a tension between the need to recapitalise the banks, the difficulty of doing so, and the impact on the wider economy. In the period after the financial crash, the FSA (and later the PRA) were continually in discussion with banks about rebuilding their balance sheets. The FSA took a lead in international negotiations to increase capital held in banks. However, raising capital in those circumstances was not straightforward. As Mr Andrews explained in his witness statement:

> 'there was not capital around and there would have been significant suppression in GDP if you put too much capital into the banks. You cannot demand that banks have enough capital to cover all foreseeable losses, as there will be enormous economic loss as a result, and the economic

> recovery would have been even slower. This was therefore a process that took place over a number of years and the process of recapitalising remains ongoing. Banks were therefore undercapitalised for a long time, however there was no other alternative'.

50. It was a consistent theme of the Respondent's witnesses that, when the Claimant continued to warn after the financial crash in 2008 that banks were undercapitalised, he was telling the Respondent something it already knew, but he was not suggesting solutions which took into account the challenging circumstances. For example, Mr Nelson, in his first supplementary witness statement (paragraph 23) described the risks of the Claimant's proposed approach:

> 'If the FSA were to declare, as the Claimant has suggested, that the majority of banks were undercapitalised, this would have destroyed market confidence and led to the huge economic costs of bank runs. This would also have been pointless, given the practical inability of banks to refinance immediately. What happened in practice was that the FSA successfully kept confidence at a high enough level to avoid the downward spiral and huge impact on GDP seen in a number of countries that, like the UK, had relatively large banking sectors, for example Ireland and Iceland. The FSA were therefore pursuing the statutory objectives of maintaining market confidence, which ensured consumers were protected from a more severe fallout from the global financial crisis. The FSA's target was to maintain confidence in the financial system, rather than the avoidance of failure of firms *per se*.'

51. This passage also illustrates how one statutory objective of the FSA/FCA might be in conflict with another. As Mr Nelson wrote in his second supplementary witness statement (paragraph 8): 'telling consumers that banks are undercapitalised would be very positive for Public Awareness, but it would cause market turmoil and the loss of Market Confidence, and in the subsequent period consumers could lose quite a lot of money' (i.e. Protection of Consumers).

52. Mr Nelson's unchallenged evidence was that Basel II and the CRD do contemplate banks being below capital requirements for a (non-determined) period. During those periods, supervisors would be considering how capital could be restored, taking into account the overall circumstances of the bank and the prospect for restitution. The Claimant accepted that supervisors had access to private information, to which the markets did not necessarily have access; nor did he have access to it, in order to feed it into his own financial model, which we will describe below.

<u>The Claimant's previous whistleblowing</u>

53. Before joining the FSA, the Claimant had worked in financial firms for 19 years. His role with the FSA was his first in a regulatory organisation. In his witness statement (paragraph 10), he referred to the fact that, in his previous employment, he had:

> 'spoke[n] up about and tr[ied] to correct malpractice, blew the whistle on hidden losses; trained risk managers to do the same […]'

54. The Claimant explained in oral evidence that he had blown the whistle on wrongdoing in the early 1990s, while working at NatWest. He also brought a whistleblowing case in the Employment Tribunal in 2002, arising out of his employment at HSBC. The Claimant's evidence before this Tribunal was that part of the reason why he did not engage with the formal whistleblowing procedure within the FSA or FCA was because of these earlier experiences. We had no detailed evidence as to his earlier case, of a kind which would enable us to assess its merits, and therefore whether it is likely that he would have harboured such fears. What is clear is that the Claimant was familiar with the whistleblowing legislation and the availability of a remedy in Tribunal before his employment with the FSA began.

The Respondent's whistleblowing policy

55. The Whistleblowing Policy in the FCA Employee Handbook, dated August 2018, describes a whistleblower as 'any person that has disclosed, or intends to disclose, a concern relating to [a] reportable concern [which] can relate to suspected danger, risk, malpractice or wrongdoing at work which affects others'.

56. In the section 'Which procedure should I use?' the policy states:

> 'If you have a Reportable Concern, you should report it under this policy. Please note that for concerns regarding your own employment, or how you have been treated by your manager, you should use the FCA Grievance Procedure or the Equality Complaints Procedure (depending on the nature of your concern). If you are not satisfied with an outcome arising from the Grievance and Equality Complaints procedures, or with an outcome of a disciplinary or performance management process, then you should raise an appeal under the relevant procedure. It will generally only be appropriate to blow the whistle about an internal policy or procedure if you have genuine concerns about the overall effectiveness or efficiency of the procedure, rather than in relation to the outcome of specific proceedings.'

The Claimant's employment with the Respondent

57. The case covers events between 2007 and 2019. It falls into five periods:

    57.1. the FSA period (2007 to 31 March 2013), during which he worked in the Risk Business Unit, under the line management of Mr Nelson;

    57.2. the FCA period 1: 1 April 2013 to March 2014, when he worked in the Risk department, under the line management of Mr Gavin Stewart;

    57.3. the FCA period 2: April 2014 to March 2015, when he was seconded to the Chief Economist Department ('CED'), under the line management of Mr Peter Lukacs;

    57.4. the FCA period 3: April 2015 to October 2018, when he returned to what, by then, was called the Risk and Compliance Oversight Division, initially under the line management of Mr Azhar Rizvi, subsequently Ms Tennant and others;

    57.5. there is then the post-termination period between October 2018 and July 2020.

THE FSA PERIOD (2007 TO 31 MARCH 2013)

58. The Claimant was recruited (via head-hunters) by Mr Nelson. He joined from Chase Bank, where he had been a Quantitative Specialist. He commenced his employment with the FSA on 2 October 2006 as a Manager in the Risk Department. His contract of employment, at paragraph 3, stated:

> 'Your job title will be Manager. The precise description the nature of your job may need to be varied from time to time.'[2]

59. The Claimant had a graduate reporting to him, who changed from time to time; the Claimant referred to this as the Market Analysis Policy team.

The Harm metrics

60. Mr Nelson thought that the Risk department needed a more objective, analytical measure of the risks being taken by regulated firms, to complement the FSA's existing capabilities. He gave the Claimant a brief to consider approaches which would improve the FSA's approach to risk management.

61. The principal risk management system used by supervisors in the Risk Department to assess the level of risk in relation to firms was called Arrow. This was a database of factors to be taken into consideration, approved by the FSA Board.

62. Mr Nelson encouraged the Claimant to work on what would, in time, become the Harm metrics (also referred to in the documents as the Harm metric, the Harm model or just Harm).

63. The Harm metrics were essentially an analytical model, which built on an existing, commercially available database, produced by KMV, a subsidiary of the ratings agency Moody's, which provides data to creditors on the likelihood that loans and debt will be repaid. KMV built on another existing model: the Black Scholes/Merton model.

64. The Claimant described the Harm metrics in his 'Harm User Guide', which he circulated with his monthly blog (see below at para 89):

> 'Harm was developed by the Risk Policy team, in order to have an objective way of identifying firms which are not financially sound, whether due to market, credit, operational or liquidity risk. The Harm metric does this by estimating the mark-to-market losses suffered by non-shareholders.
>
> This is a very powerful measure of Financial Soundness for many reasons. Firstly, it ignores losses suffered by shareholders except when they become so large that it becomes likely that the firm might not have enough to pay off its obligations. In other words, a firm with lots of equity will cause no Harm, but as a firm starts to run out of equity it gets into distress and

[2] Quoted text has not been altered for grammatical or spelling errors; minor amendments for sense are shown in square brackets.

> starts to cause significant Harm. In this way, Harm measures the degree to which a firm is 'undercapitalised'.
>
> Secondly, by measuring the inability of firms to pay its obligations, Harm is a direct and very powerful indicator of the liquidity difficulties faced by a firm, sector or economy. Thirdly, when applied to retail banks, as deposits are unsecured, the Harm metric is a direct measure of the losses depositors are likely to incur, and thus an indication of the amount of support required from the central authorities […] Fourthly, one can think of Harm as the value of an insurance contract that covers such losses, i.e. Harm measures how much an insurance contract that covers the losses of non-shareholders over the next year would cost. Finally, we can aggregate the Harm metric by sector and market to determine the overall soundness of the economy.
>
> This metric can be used by supervisors in assessing their firms' Prudential position; for peer/market comparisons; and lastly to identify which are the most risky firms and sectors. The risk policy has a wide range of tools for analysing Harm firm by firm as well as by sector and major market. It is also possible to highlight which underlying variable is the [*sic*] causing the Harm.'

65. Thus, one of the key features of the Harm metrics was that it took inputs from market data to determine the probability of failure of a firm. The Claimant agreed in cross-examination that his view was that, when judging a firm's solvency, what mattered was market capital (the measure used by investors), rather than accounting or regulatory capital (the measure used by regulators), because it is the market which provides funding to the firms.

66. The Claimant described the Harm metrics as a 'black box', that is to say:

> 'a system which only a few people understand… Many people have seen the equation, but it would still be a mystery to most people… It is not something readily understood by members of the public.'

67. He said that, for these purposes, he regarded a typical employee of FSA/FCA as a member of the public, albeit sometimes with special skills (legal, economic etc.). Some of the Respondent's witnesses did not disagree: the skillset of a financial modeller is highly specialised; when the Respondent later sought to validate the Harm metrics, it looked to external specialists for advice.

68. One of the questions which was asked time and again, over a period of years, by colleagues within the FSA and FCA, and continued to be explored at the hearing before us, was what precisely the Claimant had added to the commercial models in devising the Harm metrics.

69. The Claimant explained that what he did was simply to 'apply the correct interpretation of the Merton model to the KMV database': that it was the distress point, rather than the distance-to-default point, which he regarded as the key early indicator of the failure of a firm.

70. He wrote: 'so in some ways Harm is quite trivial'. He developed this surprising observation in his witness statement (at paragraph 327).

> 'Unique Contribution of the Harm Metrics made by Walker Sigismund
>
> I have always described how the Harm metrics maintain all essential features in the Merton Model and Moodys-KMV database and distribution of outcomes when decoded it [*sic*] into the Harm metrics. I have never claimed that I needed some additional feature apart from one. Rather than measure the 'distance-to-default' within the distribution of outcomes used by KMV, the Harm metrics stay faithful to the Merton model and measure the likelihood of asset values falling below the face value of debt. It was clear to me as an academic and trader that that was the value any rational person would want to track. That is it! However simple, I believe it is potentially worth a Nobel Prize.'

71. Other witnesses expressed different views as to the originality of the Claimant's approach. Mr Nelson, in cross-examination, said that he thought the potentially groundbreaking aspect of the Harm metrics was its application to financial services firms (the KMV model had previously been used for industrial companies). He agreed that the switch of focus from the default point to the distress point was also novel. However, while broadly supportive of the Claimant's work, he identified in his witness statement (at paragraph 62) an underlying difficulty which mitigated against its adoption during his time at the FSA:

> 'the difficulty, which I keep returning to, is that the Harm Metric did not have the explanatory power needed to rely on it. The Harm Metric is essentially a holistic measure. The Harm Metric shows for example a bank being high risk, or that it had fallen four places but it does not say *why* it is high risk and whether it is poor management, poor asset quality, its business model is flawed or countless other reasons. Supervision requires the detail so that it can then intervene to try and correct the problem – change management, greater provisions etc. Large banks are complex organisms and it was just not feasible for supervisors to start to use powers on the basis of the measure.'

72. Mr Randell went further and dismissed the idea that there was anything genuinely new in the Harm metrics, or particularly useful to the FCA.[3] In his statement (at paragraph 40), he wrote:

> 'Financial regulators have been attempting to develop more reliable methods of predicting the failure of firms for many years, including through refinements to the Merton model. However, this approach has a number of limitations in general, and certain specific limitations in terms of its use by the Respondent. The first general limitation is that it relies on market price inputs and, as we know from the global financial crisis, even with high quality information about a business, markets are not always efficient in predicting the failure of that business until the point of failure is so close that the range of available regulatory responses at that stage is quite limited. A second general limitation is that certain of the inputs to the Merton model are unobservable.

[3] Mr Randell's involvement postdates the abolition of the FSA

> […]
>
> Turning to limitations which are specific to the Respondent [i.e. the FCA], [although] the Respondent does prudentially regulate many firms, the overwhelming majority of the firms which the Respondent regulates are unquoted companies, which makes it very challenging to use a variant of the Merton model to assess their risk of default. A second limitation of the Merton model approach for the Respondent is the fact that neither the financial statements nor the prices of traded securities (if any) of the firms which the Respondent regulates tend to capture effectively the off-balance sheet risks that are central to much of financial conduct regulation: namely, the risks that the products or advice that have been sold by a firm are unsuitable for the firm's customers and will in due course lead to redress or penalties, resulting in the firm's failure. Since the global financial crisis it has been these redress costs and penalties, rather than the decline of asset values, which have often brought Respondent-regulated firms close to failure or cause them to fail.'

The Claimant's work in the Risk Department

73. On 25 May 2007, the FSA began to fund the Moody's/KMV data for the Harm metrics. By 2009, the Risk department was purchasing data from Moody's at a cost of around $100,000 per annum; by 2013, the cost had grown to some $200,000.

74. When the Claimant first joined the Respondent, he was actively involved in the work of the wider team. However, as he became more absorbed in work on the Harm metrics, he gradually became disengaged. In these proceedings he described this as isolation; Mr Nelson, who knew him well, believed that that the distance from the wider team suited the Claimant's temperament, and he allowed him that distance. We accept that evidence. It is consistent with the Claimant's later resistance to being required to work more closely within a team.

Exchange of views with Mr Huertas [*PID X-a*]

75. In May 2007, Mr Thomas Huertas (FSA Director of Banking Sector 2007- 2011) produced a paper, in which he described the Basel 2 Framework as 'the most comprehensive review of international prudential regulation ever attempted'.

76. On 4 June 2007, the Claimant responded to Mr Huertas's paper in a paper called 'Further Considerations for Wrapping up "Some Unfinished Business?"' The Claimant now relies on parts of his paper as the first of his protected disclosures (*PID X-a*).

The beginnings of the financial crash

77. On 9 August 2007, the short-term money markets froze, and the financial crisis began. According to the report, which was subsequently produced by Lord Adair Turner, the signs of the crash had already started to show earlier, between 2006 and summer 2007.

Codenamed teams within the FSA [*PID 2*]

78. By August 2007 teams had been set up within the FSA to focus on specific types of financial institutions, which got into difficulty during the financial crisis. They were given codenames to maintain confidentiality: the Planet team focused on building societies; the Asteroid team focused on subsidiaries of building societies.

79. The Claimant says that in August/September 2007 he made disclosures to Mr Nelson and the Planet and Asteroid teams about the undercapitalisation of firms (*PID 2*).

Northern Rock and RBS

80. In September 2007 depositors withdrew £1b of deposits from Northern Rock. It was the largest run on a British bank in over a century. On 14 September 2007 Northern Rock received liquidity support from the Bank of England.

81. On 17 October 2007, the Royal Bank of Scotland ('RBS') completed a takeover of ABN-AMRO.

82. In November 2007 the Bank of England injected liquidity into the markets through a special auction.

Development of the Claimant's work in the second half of 2007

83. The Claimant accepted that Mr Nelson was supportive of his work at almost all times. In a memo of 16 July 2007, Mr Nelson signalled to Mr Huertas that the Risk department was working on ways of assisting supervisors to complete their risk assessments by making greater use of market data; this was a reference to the Harm metrics. By this point, the Claimant had not yet started circulating details of the Harm metrics to supervisors. Nor is there any mention of it in either the Claimant's paper of 13 August 2007, 'Arrow Scores, KMV and Credit Ratings'.

Back testing using Harm data [*PID 3*]

84. The Harm metrics did not go online until August 2007. The Claimant later produced data which he claimed, retrospectively, showed that the Harm metrics might have predicted the crisis, had it been in operation earlier. That is, of course, very different from the suggestion (which the Claimant later made) that the model had, in fact, predicted the crisis.

85. For example, in an email of 13 November 2007, the Claimant sent an email to Mr Nelson, pointing out that, using retrospective testing ('back testing') historical Harm data appeared to reveal problems with banks up to a year earlier than the problems manifested themselves (*PID 3*).

Distribution of information about the Harm metrics [*PID 4*]

86. On 4 December 2007 the Claimant circulated a spreadsheet to the Planet and Asteroid teams, purporting to show the extent of undercapitalisation for around 150 regulated firms. Before then, the Claimant was not ready to distribute his work widely within the organisation; the work was still embryonic. We note the Claimant's email of 21 December 2007, which ends: 'we hope to have a user-friendly version of our data available in the next few days'.

87. In an email of 3 January 2008, the Claimant was still acknowledging the challenges of rolling out his model and asked for input from colleagues:

> 'I would be grateful if you could give me feedback on this guidance, today if at all possible, as tomorrow is my last day until 23 January. The most significant problem is the use–apparently for the first time in the FSA–of a model akin to those used by industry under advanced Pillar 2 methods. Indeed, this is the sort of model that might be used for Basle 3. So the challenge has been to explain it within a supervisory context. Your comments most appreciated. What is unclear? What works for you? What needs more development?'

The daily, monthly and 'Executive Harm Update' newsletters [*PIDs 5, 6a, 6b and 7*]

88. From December 2007, the Claimant began sending out a daily newsletter (also referred to as the daily email, the daily blog, or the 'Regatta news feed'), with an attachment containing a workbook of the output generated that day by the Harm metrics. There was a highlights section with key results (*PID 5*).

89. He also sent out a monthly newsletter/blog, with a workbook containing the entire database produced up to that point (*PID 6a*). The Claimant accepted that the workbooks were 'quite big and complex'. The Claimant found it challenging to explain them to supervisors.

90. The Claimant also sent out bespoke reports for each firm between 2008 and 2013 (*PID 6b*).

91. The Claimant sent the first of three 'Executive Harm Updates' on 31 May 2008 to senior executives and all daily/monthly email recipients. It set out the Claimant's views as to undercapitalisation and loss of market-based funding. Further Updates were sent in August and September 2008 (*PID 7*).

92. In March 2008, the Claimant began to deliver presentations in an attempt to explain the Harm metrics. At the same time, he circulated a guide for supervisors as to how to use the information generated by them (*PID 6a*).

93. The distribution list for his daily and monthly newsletters grew from an 80 people to around 300. The initial list consisted of Major Retail Group Division (MRGD) and members of the Planet and Asteroid teams; by early 2009 recipients included individuals at every level of the organisation, including ExCo (the FSA's executive committee) and the Board. By 2014, the Claimant was in daily, personal email communication with the CEO of the FCA, sending him tailored versions of the daily newsletter, to which he occasionally replied.

94. The bespoke reports on individual firms stopped in 2013, when the Claimant no longer had a graduate working for him. The daily and monthly newsletters were distributed until 2015.

95. The volume of information the Claimant sent out daily, weekly and monthly reflected his apparently unshakeable belief that the greater the quantity of information, the more persuasive the argument.

Discussions about the Harm metrics in late 2007/early 2008

96. On 20 December 2007, Mr Nelson sent an email to Mr Julian Adams, commending the Claimant's work on the Harm metrics:

> 'As I said I suspect Walker has […] been working on bringing together a number of different data sources in determining what messages we can extract from that. You might find his views on KMV interesting. In short the raw model is not good for financial services firms. He has made some adaptations that essentially seek to reflect a stress point rather than the default point – the analysis is quite compelling and would have put Northern Rock as our highest risk firm in December 2006. As such it can't really be ignored. It has also made some interesting forecasts and comparisons on [*redacted firm*] and [*redacted firm*].'

97. On 21 December 2007, Ms Verena Ross (then Director of Strategy & Risk) circulated an email on the question of whether there was sufficient capital in the system. It is clear from this that the Claimant's work was being noticed.

98. On 3 January 2008, Mr Joe Traynor (Manager, Risk Management Team, Strategy & Risk Division) sent an email, copying in Ms Ross, suggesting that they might wish to include 'the work that Walker's team (mainly) are doing on provision of liquidity guidance to supervisors'. Ms Ross replied: 'good idea'.

99. On 1 February 2008, Mr David Alexander circulated a paper (Risk Profiling for Financial Soundness/Liquidity Risk) which, the Claimant agreed, suggested that the Harm metrics (and others) should be factored into the supervisory process and a pilot project undertaken. The objective of the pilot project was for supervisors to gain familiarity with Harm, to test it and assess how it could be deployed as a regulatory tool.

100. Mr Alexander wrote:

> 'Supervisory judgement will remain a key component of a firm's liquidity risk assessment, requiring understanding of the business model, and market risk. The proposed frameworks augment the tools available to supervisors.'

101. He then went on to explain that the Harm metrics focused on the losses which occurred before default (financial distress) and operated as an early warning system. Mr Alexander described the Harm metric as 'a radical departure, [which] has generated debate'.

102. A Supervision Directors Meeting took place on 18 March 2008. The purpose of the meeting was 'to respond to ExCo's wish for more forward-looking financial soundness indicators'. One of the proposals was the 'inclusion of "harm" style metrics to complement existing metrics and determine the suitability of the proposed harm risk appetite.' There was specific reference to the Harm metrics.

103. So far as Mr Nelson was aware, the pilot project was not followed through, but he did not know why. It was put to the Claimant in cross-examination that not everyone agreed with him about the usefulness to the FSA of the Harm metrics; his reply was that it was 'clear that recipients did not fully understand the data and the analysis'. Asked to address the specific question, the Claimant accepted that 'very few people agreed with it'.

The 2008 appraisal [*D5*]

104. Annual appraisals were usually conducted in February of each year, reflecting on the previous calendar year. The line manager initiated the process; the employee then provided comments; the line manager then signed it off and gave a score; comments were then sought from the second appraiser (the grandfather/mother manager); the employee then signed off the appraisal.

105. Such evidence as is available suggests that, with the possible exception of the first year, the Claimant's appraisals were never completed and signed off both by him and his line manager. The Claimant relies on this as giving rise to a detriment.

106. Mr Nelson conducted the first appraisal for the first full year of the Claimant's employment on 24 January 2008. He gave him a 2 rating, which equates to 'meets FSA expectations'.

107. Ms Verena Ross also provided some second-line reviewer comments in an email of 8 February 2008. She observed that he had made:

> 'a significant contribution to the FSA's thinking on risk over the last year. He has provided valuable insights and has worked with business areas to consider their specific needs his enthusiasm for the issue is infectious.'

She went on to say that he needed to work closely with colleagues to translate some of his thinking into practical solutions that could work within the FSA; he needed to devise practical and business-based solutions that would help others 'to translate (at least some of) his ideas into reality'.

108. It is unclear whether this appraisal was signed off by the Claimant. On 18 April 2008, Mr Nelson set the Claimant's objectives for the year ahead.

Resistance to the Harm metrics from supervisors in 2008 [*D2*]

109. In March 2008 the FSA Internal Audit Division published 'the Supervision of Northern Rock' report, which was a 'lessons learned' review. Recommendation 2.5 in the report was that:

> 'In addition to the automated production of Watchlist entries from IRM, the presumption should be that firms identified as having outlier business models, whether through the work of the subsector resource or that of supervisors, should be added to the Watchlist.'

110. In an email of 19 June 2008, supervisors were told that data from the Harm metrics should be used in implementing this recommendation. The Claimant by this stage had been giving presentations to the supervisors to explain his model.

111. However, there was considerable disagreement among supervisors as to the suitability of using the Harm metrics. Some expressed concerns about their accuracy. In an email dated 20 June 2008, for example, Mr Tim Ross took issue with the fact that one of the firms he supervised had been identified by the Harm metrics as a firm with an outlier business model. He wrote:

> 'The figures shown for the firm in the analysis are incorrect though and exactly duplicate those of its much larger parent, [*firm redacted*] is a run-

> off insurer with gross liabilities of just £288m, and is a stand-alone entity. I thought I should notify you of this and let you know that we have therefore come to the conclusion that this is not a firm with an outlier business model.'

112. On 26 June 2008, the Claimant sent out a newsletter, explaining that he was in the process of supplying Supervisors with information for their individual firms for potential inclusion in the watchlist (part of *PID 7*).

113. On the same day, Mr Alex Patient (Risk Business Partner, Wholesale) emailed the Claimant, saying that he thought that he thought the root of the problem for supervisors was 'a mixture of lack of understanding due to it being rushed in and them being very busy'. Later on Mr Patient also wrote to Mr Nelson, saying that 'there seem to have been high-level meetings in Wholesale that have led to a rejection of the outlier business model approach.' He wrote that supervisors were saying that they needed to understand how the Harm metrics worked; they were unhappy about being asked to use it when they did not fully understand it.

114. Mr Nelson continued to support the Claimant, saying that supervisors should engage with the model. He did not believe that they needed to have a deep understanding of its workings: 'all it is saying is that the market has a downer on the firm and asking the supervisor why that might be.'

115. On 27 June 2008 Mr Stephen Bland wrote to Ms Ross:

> 'But the continuing emphasis on the Harm index as 'the' tool to provide such challenges is really unhelpful. I am not disputing at all its potential usefulness, not least in terms of potential challenges to the traditional watchlist. I and others, however, still fail to see its relevance, let alone proportionality, to the outliers question. Indeed, one could make a case for excess profitability being more closely correlated with outlier business models than financial weakness!'

116. Mr Nelson replied the same day, acknowledging that 'Walker, whose primary job is research and development of our risk process, may not have the implementation skills we would ideally like'. He went on:

> 'I may have made the wrong call in putting HARM in the mix of the business model outliers work – I take full responsibility for that error and we will therefore tone down the emphasis. However let's not ignore approaches like this. They were built to help and in particular to help senior supervisors gain insight into firms.'

<u>Different views as to the role of the Harm metrics</u>

117. Mr Nelson disagreed with the Claimant in one respect: he regarded the Harm metrics as merely one weapon in the supervisory armoury; the Claimant regarded it as a complete answer to the supervisory process, which could effectively replace supervisory judgment and existing rules on capital requirements.

118. The Claimant confirmed in oral evidence this was not an exaggeration: he believed that the Harm metrics was 'the answer…the best available answer…95/97% of the answer' and that is how he had pitched it to the FSA at

the time. He disagreed that it should be treated as merely one in an arsenal of tools. Asked if he thought that anyone who ignored it was wrong, he said he did. Asked if he accepted that there might be a respectable range of opinion as to the value of the model, he replied that he thought it was:

> 'a very small respectable range of opinion. The likelihood of there being other objective data which shifted the Harm metric is pretty small and I am not aware of it. I have looked through from beginning of introducing Harm… On a theoretical level it is almost impossible to disprove it.'

119. It appeared to the Tribunal that anything less than total commitment to the model was intolerable to the Claimant. That absolutist approach did not help him to win supporters for his work.

120. We have already recorded (para 71) Mr Nelson's misgivings about what he called the lack of 'explanatory power' in the Harm metrics. Despite this, he continued to support the Claimant's work on the Harm metrics, and to fund the underlying data, in the hope that the Claimant could make a breakthrough in communicating his ideas.

121. Mr Nelson later said (in the context of his interview on 21 July 2011 as part of the RBS review) that the Harm metrics were never incorporated into Arrow and that the decision to exclude it been taken by him. He noted that the decision had frustrated the Claimant. He went on to say:

> '… the HARM metric continues to be circulated from Risk and therefore may be seen as a 'product offering' from the Division and one which it 'sponsored'. LN acknowledged that it would be difficult to 'walk away' from the HARM metric since the Department was paying for the data budget. However, he made the point that an independent risk function supports independent thinking. As such, he would not try to censor what WS might say. LN did make the point, however, that WS had recently become more 'argumentative' in his efforts to get his point across. He also noted that, at the same time, WS had recently been receiving more positive feedback on the HARM metric. Elaborating on this issue of independent thinking, LN said that the purpose of the independent research was to avoid the instances of 'group think' that the FSA is very quick to criticise its firms for.'

<u>The Claimant's own explanations for the pushback against the Harm metrics</u>

122. The Claimant was also interviewed in connection with the RBS review. He gave the following explanation of why there was pushback against the Harm metrics:

> '[…] he attributed this to individuals being 'flummoxed' by a divergent approach to prevailing supervisory standards, as well as persons not understanding the constituent parts within the 'black box'.'

123. Elsewhere in the same interview he said that:

> 'the organisation did not like HARM since it was based on techniques which were not understood within the FSA.'

124. In a 2014 document, in which the Claimant set out his private thoughts, with a view to seeking legal advice (see below at para 190), he wrote:

> 'In January 2008 these findings well discussed at a meeting of Major Retail Group Heads of Department (MRGD HoDs). They denied there was a problem but failed to produce any data, analysis or explanation. As far as I could tell they were relying on their gut instinct having talked to their firms in person, not realising that what the firms reports and what the market perceives upon careful forensic analysis can be very different.'

We note that he did not say in this document that he believed that his work was not used because it contained inconvenient truths and so had to be buried.

125. In a 2015 email (below at para 274) the Claimant ascribed the underuse of the Harm metrics to 'lack of sufficient confidence and understanding of such sophisticated mathematical techniques.'

126. In his letter of January 2019 to the Chancellor of the Exchequer and others (para 410 below) he wrote:

> 'The core regulatory failure is due to lack of competence, experience and trust. In order to take apart the black boxes, distil such metrics, create the frameworks and recommend risk management solutions more or less takes a doctorate in math (or physics) and another in finance followed by lots of product development, trading and advanced model risk management experience across Wall Street and the City, like I have. The FSA has always struggled to understand me when I speak up. Which mean [*sic*] they struggle to understand the engine room of the City and Wall Street and verify that it minimises harm to objectives.'

<u>The uses of the term 'undercapitalisation'</u>

127. A distinction may be made between undercapitalisation, which was a general feature of the financial crisis, and the question of whether firms were in breach of the minimum capital requirements (i.e. in breach of the prevailing legal requirements).

128. In an email dated 27 June 2008, Mr Heurtas wrote in response to the Claimant's newsletter, sent out the previous day:

> 'I think we should be cautious in using the word "undercapitalised" in connection with this, lest it create the impression that the HARM metric conforms in any way to threshold conditions or to a standard that we would require banks to meet […] Although the statistical work is of interest and although I look forward to reading the paper, the HARM metric should NOT as yet in my view be a regulatory standard.'

129. The Claimant replied:

> 'We have purposefully used the term "undercapitalised" from the inception of the model about 10 months ago, because Harm is designed to measure the degree to which firms are 'undercapitalised' in a marked-to-market sense. We try to always stress this "marked-to market" meaning, as well as make clear that this can differ from the accounting or regulatory meaning […] Now that you have kindly pointed this out, I hope that everyone will understand that Harm measures 'undercapitalisation' in the sense that the market thinks the firm is undercapitalised - irrespective of

> what the accounts or regulatory returns say - and that the firm should raise that much capital or a bit more.'

130. The distinction was neatly illustrated by the RBS review (para 155 below), which found that, although RBS was undercapitalised, it was not in breach of the 8% minimum capital requirement.

The Turner report [*PID 8* and *D4*]

131. On 15 September 2008 Lehman Brothers filed for bankruptcy.

132. On 20 September 2008, Lord Adair Turner took up the post of Chairman of the FSA for a five-year term.

133. By 26 September 2008, the Claimant had added Lord Turner to his daily email circulation. He wrote in his witness statement (paragraph 591):

> 'About this time I was told to stop sending out the Executive Harm update. I'm sure those who complained to Verena [Ross] and Verena herself were trying to conceal the catalogue of errors on their watch, so needed to isolate and silence me.'

134. The Claimant continued to send out the daily and monthly newsletters for several years. Insofar as he relies on this as being an attempt to 'gag' him, we regard that as an exaggeration.

135. On 6 October 2008, Alistair Darling, then Chancellor of the Exchequer, asked Lord Turner to review the causes of the financial crisis and to make recommendations on the changes in regulation and supervisory approach needed to create a robust banking system for the future. Mr Nelson was the principal executive on the review, working alongside Lord Turner. The Claimant was asked to provide some information, derived from Harm metrics data, which he did (*PID 8*).

136. On 24 October 2008, the global stock-market crash occurred.

137. On 18 March 2009, the FSA published the Turner Review. It concluded that the quality and quantity of overall capital in the global banking system should be increased. This led to minimum regulatory requirements being set significantly above the previous Basel levels.

138. The Claimant alleges that, in the final report, Lord Turner 'deliberately changed my data and analysis'. He accused Lord Turner of being 'unprofessional' for leaving out Harm metrics data (*D4*).

The 2009 appraisal [*D5*]

139. The performance review arising out of the previous year's objectives is dated 29 January 2009. The progress/actions identified by Mr Nelson were as follows:

> 'The HARM metric continues to gather supporters. There has been a lot of work for example to "win round" insurance supervisors. This was done successfully. There still remains a significant scepticism about Harm, which needs to be overcome. For the coming year Walker may need to

> take more care in communicating his analysis, which can present a much more definite picture than may have been justified […].'

140. Mr Nelson gave the Claimant a performance rating of 2. In response, the Claimant wrote that he ought to have been given the highest rating of 4. In his comments he wrote:

> 'In general, at least in regards risks, my role is to provide a series of lighthouses & beacons pointing out the location and nature of the rocks upon which the financial industry and Western economy has foundered and where safer passages lie. I believe that I have performed that task to a very high degree of success should warrant a 4 on any rational scale of performance and which should result in substantial increases in my responsibilities and resources.'

141. The appraisal was not finally signed off.

142. Around this time, the Claimant was in touch with a recruitment consultant. On 3 April 2009, in response to an email from one of them, he wrote:

> 'Things are going pretty well. My current work involves me in many of the core issues about the future regulation, things like Macro Prudential metrics and policies. So that is going well. I also have increasing contact with the Chairman as I mentioned I wanted to achieve. Still looking to keep an eye out for other interesting jobs in the market, though.'

The 2010 appraisal [*D5*]

143. A 360° feedback report was completed about the Claimant on 8 December 2009. In the section which asked contributors what one thing the individual could do to improve, the Claimant wrote:

> 'Convince the FSA they need to follow my advice and leadership.'

Mr Nelson wrote:

> 'Walker would be more effective if he was more adaptable. His style is very much to articulate an alternative and challenging vision and then argue for others to sign up to it. This is instead of working with the current vision giving it more of a Walker accent.'

144. The 360° feedback did not feed directly into the appraisal process. It is unclear whether an appraisal took place in 2010. Ms Shepherd put to the Claimant that the fact that there was no appraisal document from early 2010 did not mean an appraisal did not take place, merely that the document was no longer in existence. We find that is entirely possible: a disclosure exercise of documents associated with an organisation conducted years after it ceased to exist is unlikely to produce a complete record.

145. In any event, the Claimant's recollection was that there was no completed appraisal that year:

> '[Mr Nelson] and I had reached this stand-off where he knew I would raise the same issues in the first appraisal and he did not want to elevate those issues to his manager'.

146. We note that, at this point, there is a substantial gap in the chronology of allegations: there are none between those relating to this appraisal and the 2011 appraisal.

The 2011 appraisal [*D5*]

147. In a 360° Feedback Report, dated 29 October 2010, the comment from colleagues as to the one thing the Claimant might do better was as follows:

> 'Work out ways to map a track from others' perspectives towards yours, then help them travel it. Walker could think about whether the way in which he delivers comments sometimes may inadvertently have a negative impact on others.'

148. On 22 November 2010, late in the evening, Mr Nelson sent the Claimant an email with the subject header: 'Starter for 10'. Mr Nelson's evidence (which we accept) was that this was his way of initiating the appraisal process. The odd feature is that the email is blank, other than some manuscript annotations by the Claimant. We concluded that it must have contained content of substance because, by email early the next morning, the Claimant responded to it:

> 'Quick response. In general I see the point you are trying to make but I think you mistake the problem. Moses led his people for 40 years across the desert, which actually is quite looking for a way out [*sic*]. The compass I provide is to more or less where Regulation needs to get to. So my work is more like an Astronomer at a convention of Astrologers who are trying to figure out what the heavens all mean, or like Galileo trying to explain that actually the earth goes around the sun; everything is much clearer once you take that viewpoint. I made these same points in my T&C. My professional responsibility is trying to get the answers across, not to provide answers people want to hear. That is also my challenge, and I could use your active support starting with enough resources to be successful at that important task, rather than encumbered.'

149. There is a performance management document, dated 29 November 2010. Claimant received a performance review, rating him as 'meets FSA expectations', to which Mr Nelson contributed. In this document, Mr Nelson commented as follows:

> 'Walker's remit supports the general principle of this objective – that of thinking in a risk-based way, rather than supporting ARROW per se. In this respect Walker has made progress on delivering risk-based analysis to the organisation. Feedback from the organisation is limited but mostly positive. Market-based metrics are still a challenge for many, but Walker is a strong advocate for the approach. The main development area is probably striking the appropriate balance between setting out a possible risk management vision and providing smaller steps for the organisation to take to get to get there. Walker maintains this is a resource issue, but we are where we are on resourcing and we need to make the best of what we have and what we can afford against the immediate priorities of delivering a risk management process now […] Walker still struggles to influence the organisation as much as he or I would like, however I can see some traction – notably from the collaboration with Alex.'

150. The Claimant set out his disagreement with the conclusion at some length in a separate section, including:

> 'This significant piece of work deserves full consideration and high marks in this appraisal […] This work is very advanced and what I need is Lyndon's support and resources to make it useful to the FSA.'

151. It appears (although it is not certain) that no final appraisal was agreed in this year. Given the exceptionally high opinion the Claimant had of his own work– we note the, seemingly unironic, references to Moses and Galileo in his response above–we find it unsurprising that there was no meeting of minds.

The Claimant's involvement in the RBS report (June 2011 to December 2012) [*PID 9* and *D6*]

152. In December 2010 Rosemary Hilary (Director of Internal Audit) was asked to lead a review as to how and why The Royal Bank of Scotland failed in October 2008 ('the RBS review'). Ms Hilary led a team of ten and worked closely with Lord Turner to produce the final report, which was a report of the FSA Board

153. The Claimant was asked to provide information to the report team. It is his case that, in doing so, he made protected disclosures (*PID 9*).

154. Mr Nelson was also interviewed for the report. Among other things, he said:

> '… the HARM metric had enabled him [Mr Nelson] to allocate resource within the Strategy and Risk (now Risk) to those firms that appeared more risky according to this, and other, metrics and measures. LN also said that he used the HARM metric to help determine who attended ARROW Panels, for example, to decide how many Panel members with prudential skills were required.'

155. On 6 December 2011, the Respondent published 'The Failure of the Royal Bank of Scotland' report. It found, among other things, that the key prudential regulations being applied by the FSA (and by other authorities across the world) were dangerously inadequate and that this increased the likelihood of a global financial crisis. It found that the failure of RBS could be explained by six factors, the first of them being weaknesses in its capital position, as a result of management decisions by the bank, permitted under the prevailing, but inadequate, regulatory framework. It did not find breaches by RBS of the regulatory minimum capital requirements in force at the time; its capital position at the end of 2007 met the minimum 8% requirement; by mid-2008, after the RBS had raised £12b in additional capital, that figure had increased to 13.2%.

156. The Harm metrics were referred to in the report at paragraphs 492-502. The Claimant alleges that the information he had provided to the review was deliberately misrepresented in the final report, because of his protected disclosures, and that this was a detriment to him (*D6*).

The 2012 appraisal [*D5*]

157. The Claimant agreed that there was a 360° feedback report in around November 2011. No copy of this, or any other appraisal-related document, has survived for inclusion in the bundle.

Application to become Governor of the Bank of England

158. In September 2012, the Claimant applied to become the next Governor of the Bank of England. In his witness statement he explained his reasons for doing so:

> 'To provide the leadership needed to reduce Harm to the public and adhere more closely to the FSMA statutory obligations, I applied to become the next governor of the Bank of England in September 2012. I wanted to either be chosen or at a minimum to make sure the regulatory failure was understood and addressed.'

159. He was not interviewed. He sought to include that decision as a detriment in these proceedings, but the claim was struck out at an early stage.

The 2013 appraisal

160. The Claimant's personal objectives for the year 2012/2013 were reflected in a document dated April 2012. His evidence was that the objectives were set by Mr Nelson, but the appraisal was not conducted by him, because Mr Nelson was already moving away from the FSA towards a role in the PRA. A fellow manager in the Risk Department did the Claimant's appraisal in early 2013.

The Claimant's overall response to the appraisal process in the FSA

161. The Claimant did not challenge the appraisals, or the lack of them, through the FSA's grievance procedure. He explained that he did not think it would be constructive to do so. His overriding objective was to ensure that his work was accepted, and he believed that a grievance would not achieve that. He explained to the Tribunal that he had what he described as 'pretty good contacts across the organisation, including the CEO and other prominent people' and his strategy was to try and influence them, alternatively to wait for the sort of people to arrive who would be willing to address what he saw as the ongoing regulatory failure. The fact that the Claimant had a direct line to senior management (including through his daily newsletters) is, we find, inconsistent with his repeated assertion that he was 'isolated' or 'quarantined'.

162. We were struck by a particular passage in the Claimant's witness statement (at paragraphs 328-330), in which, having summarised the importance of the Harm metrics, he went on to observe:

> 'However since 1981 while working on my French thesis on the History and Philosophy Science I have realised that often the simplest step or observation leads to all pieces of the Jigsaw puzzle finally falling in place. And that the assembled puzzle can threaten ingrained interests. Even leads to isolation and excommunication. The standard textbook examples are Copernicus and Galileo as summarised in the Wikipedia articles […]. In short Copernicus published his works posthumously to avoid censor. Galileo was tried by the Inquisition, found '"vehemently suspect of heresy" and forced to recant. He spent the rest of his life under house arrest' for publishing the fact that the moons of Jupiter revolve around Jupiter rather the Earth. At the FSA and FCA I often thought of them and my isolation and similar house arrest and treatment.'

163. The comparison of his own treatment with that of Galileo and Copernicus, and the reference to being subjected to house arrest, appeared to the Tribunal to disclose a concerning lack of perspective.

The split of the regulator

164. On 1 April 2013 the FSA was abolished and the FCA (the Respondent) and the PRA were established in its place. The FCA was principally concerned with how business was conducted, the PRA with the safety and soundness of banks and insurance companies.

165. The Claimant's employment transferred to the FCA. Mr Nelson moved to the PRA, initially as Director for Macrosupervision. He had been managing the Claimant less since around the beginning of 2012 and ceased to manage him altogether after the organisational split.

THE FCA PERIOD 1: 1 APRIL 2013 TO MARCH 2014

166. The FCA came into existence on 1 April 2013. Mr Martin Wheatley joined the FSA as a Managing Director around nine months before the FCA came into being, at which point he became CEO of the FCA. Mr John Griffiths-Jones became non-executive Chairman, a post he held until April 2018.

167. In the FCA, the Claimant worked in the Risk Division. His line manager was Mr Gavin Stewart (Head of Risk), who reported to Mr Christopher Woolard (Executive Director for Policy Risk and Research).

168. The Claimant wrote to Mr Woolard on 11 March 2013 to provide his ideas on the work he wanted to do in the new structure, which coincided with the role he felt the organisation needed. Among other things, he wrote:

> 'For example, although I have not applied for the role of Director of Competition, I hope you will consider whether that or some similar role - perhaps Head of Regulatory Research - would help you and Martin the most'.

169. The Claimant accepted in cross-examination that Director roles were at a much more senior level in the organisation than his. We note that his approach, rather than applying for a role in the usual way, was to suggest either that he should be promoted without the need to apply or that a role should be created for him. His approach was the same five years later when he was put at risk of redundancy. Elsewhere in the letter he explained that he had had access to a database which he said cost over $200,000 a year.

170. Mr Woolard met the Claimant and decided that the Harm metrics might be useful, and that the Claimant should continue to work on it under Mr Stewart. The FCA continued to fund the database, but the Claimant no longer had a graduate working directly for him; he had no 'team' to manage from this point onwards. Because of this, he had no one to write the panel packs which he used to send out with the daily newsletter. His evidence was that he did little work on Harm in 2013 and did not start to work on it again until 2014, when he moved to the CED (para 192 onwards). He explained in cross-examination that, at this point, the Harm metrics were 'no longer my focus' and he worked on other projects instead, including some work on shadow banking for Mr Woolard.

171. In September 2013, the Claimant started sending a personalised version of the daily newsletter to Mr Wheatley. Mr Wheatley's evidence was that he read it with interest. Again, this is difficult to reconcile with the Claimant's case now that he was isolated/quarantined.

The external whistleblower

172. In May 2013, the Claimant introduced an external whistleblower to the FCA/PRA. He later alleged that they failed to act on the information the whistleblower provided.

173. This was investigated by Mr Vito Capobianco (Risk Department Manager), who reported his findings in an email of 24 July 2014. He found that a meeting took place in May 2013 between the external whistleblower, the relevant supervision managers of the PRA and FCA and a member of the FCA whistleblowing team. The Claimant was also present.

174. At the meeting it was agreed that the allegations would be taken forward by the PRA, partly because they were prudential in nature (and relevant to the PRA's financial stability objective) and partly because there was no suggestion of misconduct in the UK. The PRA provided information to the relevant overseas regulator in March 2014. Mr Capobianco found that the delay was caused by the need to sanitise the information to protect the source.

The Claimant's working relationship with his line manager, Mr Gavin Stewart [*PID 12*]

175. The Claimant's relationship with his line manager, Mr Stewart, was not an easy one. On 19 December 2013, Mr Stewart wrote to Mr Woolard, copying in HR, stating that, although there were some positives about the Claimant's performance, he was struggling to agree objectives with him. These concerns, in part, were in relation to the Claimant's view of events at the FSA:

> 'A lot of this goes back to the c.6 years when he was managed by Lyndon Nelson, to Walker's view of what that meant, and to what he sees as the rights and wrongs of how his work was treated by the FSA that time. I started focusing on this in Sept at his interim review, since when I've argued hard with him that he needs to make a fresh start with the FCA as a new organisation and with me as his new line manager, but so far I've made little progress. He believes the issues are so fundamental - essentially around what he sees as the deliberate ignoring of his work about the financial crisis - that he doesn't want to move on until what he believes are the underlying issues are resolved satisfactorily. As things stand, I've been debating with Walker what should be his objectives - essentially, as I understand it, he doesn't want to sign up to objectives that do not address these "legacy" issues as he calls them.'

176. He concluded:

> 'grateful for any thoughts on a constructive way forward. I've always thought Walker had something valuable to offer but at the moment it simply isn't working and the present situation isn't sustainable.'

177. The Claimant explained in cross-examination that the position he adopted with Mr Stewart was that, because he had not been properly appraised for work he

had done in the past, 'there was no baseline to have a conversation from which to make a fair assessment of my work.'

178. In an earlier email of 23 October 2013 to the Claimant, Mr Stewart had written:

> 'as I said, if you genuinely believe, as you say you do, that your work was wilfully ignored in 2008, you should take it up through the right channels, i.e. to Philip Salter [of Internal Audit] in the first instance…'

179. Despite this advice, the Claimant neither brought a grievance nor engaged the Respondent's whistleblowing procedure. Instead, he replied:

> 'It is really quite simple. Harm measures the amount of Consumer and Market detriment. In 2008 it was in the tens of billions per major firm. It is not [*now?*] closer to 100b for [*redacted*] as I have recently shown you. Then as now, the consumer and market detriment is overwhelming and calls for changes in business models and policies. Then as now it is hard to be simpler or clearer. Also Phil Salter is not the correct next step.'

180. This passage (which we return to later in the context of *PID 12*) captures a feature of the way in which the Claimant talks about his work: at one moment he describes his work as being 'quite simple', such as here; at others he describes his work as being of such complexity and sophistication that not even professional colleagues at the FSA/FCA could be expected to understand it (for example, see para 126). Which of these two characterisations he adopted appeared to us to depend on what he was trying to achieve at any given moment. Here he was trying to resist the conventional approach of making a complaint to Mr Salter in Internal Audit because (he suggested) the matter was so that the organisation simply needed to believe him and implement his work.

181. In cross-examination, the Claimant gave various explanations as to why Mr Salter was not the right person to approach: because he was in Internal Audit and they wrote the RBS report, so he might be conflicted; because he was too junior; because the Claimant knew him too well because they were in the ski club together. Finally, he explained: 'I was already elevating it to Mr Woolard, I don't see how Mr Salter was going to help me get it over the line.'

182. And so the Claimant still did not raise a formal grievance. He and Mr Stewart reached an impasse, just as the Claimant and Mr Nelson had done. As Mr Stewart explained in his email, the Claimant's view of his role was much wider than the work Mr Stewart was asking him to do; as the Claimant explained in his statement, he did not want to do that work, but wanted to focus on what he described as 'more fundamental issues'. He wrote:

> 'I was clearly making some progress with Martin [Wheatley] and Chris [Woolard] and did not need Gavin to help me do that […] In my *de facto* role (similar to a Senior Adviser) all I needed was respect and protection to constructively help the organisation.'

183. A number of things emerge from this: the Claimant had little regard for his immediate line management or for the Respondent's formal processes (such as Internal Audit); he had a direct line of communication to the most senior management; in his own mind he had a '*de facto* role', which was different from

his formal role, notwithstanding the fact that he had neither sought, nor been given, promotion (see below at para 846 onwards).

184. Mr Stewart's conclusion in his December 2013 email was that the Claimant might be 'sitting in the wrong place in the structure'. In view of those concerns, Mr Woolard approached Mr Peter Andrews (Chief Economist). Between them, they decided that the Claimant would be seconded to the Chief Economist's Department (CED), which also fell within Mr Woolard's division. CED was where experimental thinking took place, which they thought might suit the Claimant. Mr Andrews offered to work with the Claimant, either on the Harm metrics or on other topics. The Claimant agreed to the secondment, although he was equivocal about the move ('I could see it as a poisoned chalice but was somewhat hopeful it might work out'). The secondment took effect in around May 2014.

185. In the final appraisal document, Mr Stewart wrote:

> 'I have found it hard to properly appraise Walker's performance this year as we have been unable to fully agree on his objectives although we have regularly discussed and agreed broad areas for Walker to concentrate on. To help focus and appraisal of Walker's work, I have therefore asked him to set out separately his view of the year […]'

186. Mr Stewart commented on the Claimant's daily email, which he described as 'thought-provoking and controversial' although he queried its comparative value relative to other work the Claimant might be doing. He recorded that:

> 'Walker believes that the FCA (as did the FSA) continues to struggle to digest and take on the input technical specialists can give.'

187. We note that this is consistent with the Claimant's statement in his interview for the RBS review (para 122 above) that there was pushback against his work because people were 'flummoxed' by it.

<u>'Conversations with Mr Woolard and Mr Wheatley' in 2014/2015 [*PID 13*]</u>

188. The Claimant alleged that he had conversations with Mr Woolard and Mr Wheatley in 2014/2015, in which he made protected disclosures (part of *PID 13*). In cross-examination he said that the core message of these conversations was that, because the Harm metrics had not been adopted by the FSA, there was still 'harm' (in the form of undercapitalisation) in the system, and that this had 'downstream consequences' in terms of conduct issues, which were the remit of the FCA.

189. The Claimant did not make notes of those conversations; insofar as he suggested there might be documents in the bundle which alluded to them, they were not identified in the final particularisation of this disclosure and we did not permit him to rely on them, when he sought to raise them in oral evidence.

<u>'PIDA legal advice 2014'</u>

190. In a document dated 10 March 2014, which the Claimant prepared for the purpose of getting legal advice (and which he did not share with the FCA), he identified the following issues:

'There are three inter-related issues about which I seek advice and counsel.

- The first is that I want to blow the Whistle to Parliament on malpractice at the FSA. I feel they were in a position to nip the crisis in the bud from data and analysis I have provided on a daily basis from no later that December 2007 but failed to adequately investigate or understand those warnings.
- The second is that the reconstituted FCA may or may not be following down that same path so I seek advice on how to best get a better outcome short of Whistleblowing.
- The third is that from 2006 the FSA (and now the FCA) has failed to provide me with a fully agreed set of objectives or appraisals. The main reasons is that I have always insisted that my actual work be appraised but my managers have always avoided this as doing so would unmask the fact that they and the FSA had not heeded or explained why they had decided not to heeded the warnings I have provided. As a result I am in an incomplete employment situation where my compensation has scant relationship to my activities or contribution or the managerial process.'

191. The Respondent relies on this document as showing that the Claimant did not consider that he had made public interest disclosures prior to 2014. We disagree: the focus is specifically on blowing the whistle outside the organisation, whether to Parliament or, as the Claimant explained in cross-examination, by starting Tribunal proceedings. On the other hand, the document confirms the Claimant's familiarity with his right to do so; he acknowledged in his oral evidence that he had sought legal advice on more than one occasion.

THE FCA PERIOD 2: MAY 2014 TO MARCH 2015

Alleged disclosures in conversations with Mr Lukacs and Mr Andrews [*PID 14*]

192. While working in the CED, the Claimant's line manager was Mr Peter Lukacs, who reported to Mr Andrews. The Claimant alleges that, in conversation and by emails with Mr Andrews and Mr Lukacs, he repeated protected disclosures, which he had previously made (*PID 14*).

The proposed paper for ExCo

193. When the Claimant arrived in the CED, a decision was taken that evaluating the Harm metrics ought to be the priority. The Claimant continued to advocate for their value, but the Respondent was unclear what that value was. Mr Andrews thought that the technical expertise within the CED might help the Claimant explain his technical ideas in a straightforward manner, which could then be understood by those in senior management, who did not have his technical background. This might help the Claimant gain traction for his work. We find that, far from 'isolating and quarantining' the Claimant, as he alleged, the intention was to find the right home for the Claimant's work. Initially Mr Andrews was optimistic that it might be in the CED. The pre-condition was that the work had to be comprehensible to senior management.

194. The Claimant was asked to write a paper explaining the Harm metrics were; it would then be submitted to ExCo. One of the matters the Claimant was asked to address was why his work was useful to the FCA, when it appeared to be more relevant to the prudential regulation of larger institutions, which by then was the remit of the PRA.

195. The Claimant wrote several drafts of the paper in the course of 2014 and received feedback from his managers. Mr Lukacs found it difficult to get the Claimant to provide a paper which balanced detail and clarity, with a non-technical reader in mind.

196. On 23 July 2014, Mr Wheatley received the Claimant's daily newsletter, in which the Claimant wrote that he had warned supervisors at the outset of the financial crisis that it was starting, but they ignored his warning; and that, when he brought in an external whistleblower two years previously, the FCA and PRA decided not to act on his evidence. Mr Wheatley forwarded the blog to Mr Woolard, asking: 'is he right that he has insights which we ignore?' Mr Woolard replied:

> 'don't know – interesting you get more editorialising version than I do. Will look into it. Having encountered this once before and things weren't as clear-cut as Walker recalls.'

197. Mr Wheatley must also have asked the Claimant to send him more information about the Harm metrics, because, on 15 July 2014, the Claimant sent him a slide deck on the subject. Mr Wheatley forwarded it on to Mr Woolard, observing that 'I struggle to know what to do with it but I welcome your thoughts'.

198. Two things flowed from these interactions with Mr Wheatley: firstly, Mr Andrews decided that the Claimant should prepare a paper on the Harm metrics to be presented to Mr Wheatley and Mr Woolard (rather than ExCo); and secondly, Mr Wheatley decided that the Claimant's suggestion that his warnings about the financial crisis and the evidence of an external whistleblower had both been ignored should be investigated by the Risk Assurance Team (see below at para 207 onwards).

199. On 22 August 2014, Mr Lukacs wrote to the Claimant setting out the questions which should be addressed in the presentation to Mr Wheatley and Mr Woolard. They were as follows.

> 'Issues to address in explaining the approach to harm in addition to the detailed comments from peter on the slide pack which could usefully be addressed.
>
> - How each of your value metrics differs from simple market valuation (i.e. number of shares x share price): what are the formulae? In relevant cases, what option pricing model was used?
>
> - Reconcile your metrics with the commercially available metrics from KMV, so that users can be clear about why yours are preferable
>
> - Demonstrate the stability of your metrics or that the degree of volatility is explicable in terms of real-world events

- Explain how you deal with 'asset class effects': for example, we don't want to deal with a huge discrepancy between market values and accounting values that exists mostly because the risk-free rate is very high, forcing down share prices (worryingly, the opposite would likely be true at the moment)

- Explain how you have dealt with 'network effects' (critical to stability) or that these do not matter when setting capital at individual institutional level

- Explain the causality assessment between harm and GDP. There are many potential determinants of GDP and the correlation between aggregate harm and GDP may be the result of a third factor that influence both. Need to explain how you have excluded or otherwise dealt with that possibility.

- Deal with the explanatory power of harm with respect to GDP. For harm to be useful as a predictor of GDP it would need to be tested against other models for predicting GDP to see that it explains better than existing models.

- Explain more clearly the link between 'harm' and harm to consumers. Bank subsidy and bail out are costly to taxpayers. But why is a shortfall between the bank's book value and market value a cost to consumers? This is not obvious.'

200. Mr Lukacs emphasised the importance of the paper having a very clear structure; he proposed what the structure should be in five short lines.

201. Mr Andrews also repeatedly sought clarification from the Claimant, in particular as to what precisely the Harm metrics added to existing commercial models. Mr Andrews' increasing frustration with the Claimant's unwillingness, or inability, to do so was summarised in the later Internal Audit report:

> 'On 5 August 2014 PA [*Peter Andrews*] stated the WB [*the Claimant*] needed to "explain clearly in writing" […] the formulae and details of the Harm Model, including how it dealt with certain effects, provide a reconciliation with commercially available metrics and demonstrate the Harm Model's stability for real world events. PA also stated:
>
> > "If we do not have clarity on these points, I fear that taking the material to the FPC (or PRA or Bank) would be embarrassing and should not be done. We have to be able to answer such points, and they are bound to be raised
> >
> > Also, as this appears to be rather cutting-edge work, it would be sensible to show it (properly written up, as above) to an external referee [reviewer] before submitting it to Martin/ExCo/FPC, just in case we have missed something important and just in case a bright idea to make the work (even) better is forthcoming.
> >
> > If we cannot proceed along the lines proposed above or on another positive track, it appears quite hard to explain why we are spending resources on this work" […].

> On 22 October 2014, PA set out his assessment of the WB's work on the Harm Model to the Risk Team stating that, "[the WB]'s core data are not different from KMV's, and [the WB's] add-ons about GDP etc not hugely interesting, given other literature – but it took us a long time to establish this given [the WB's] terrible exposition of the material and that [the WB] seemed not to have answers to quite basic questions about it" […]
>
> On 13 November 2014, PA emailed PL and Stefan Hunt, stating that he had had a discussion with the WB to understand the KMV data on which the Harm Model is based. PA stated that his conversation with WB was,
>
> > "as confusing as you'd expect from your own experience of trying to get clarity from [the WB] [...] I asked [the WB] how in practice [the WB] can deploy KMV's assessment of credit risk in [the WB's] wider modelling (given [the WB] cannot derive it). [The WB] said that [the WB] adjusts other values so that credit risk in [the WB's] modelling aligns with KMV's assessment. At this point, given that of course no model was presented for me to read, there was nothing much I could say […] PL replied to PA later that day, stating that his discussion with the WB was similar to the one outlined by PA and that in relation to the calculations used in the Harm Model, "was not wholly clear what [the WB] was doing" […]
>
> In addition to the above discussions, PA informed CW on 13 November 2014 of "our continuing struggle to get [the WB] to be specific about [the WB's] work" […] PA informed CW that PL has "been trying to take this forward but he is still having to ask quite basic questions" […] PA stated, "After some frustrations when [the WB] joined CED [the Chief Economist Department], I tried to map a clear way forward in August but we still don't have a clear exposition of [the WB's] approach and how exactly it differs from the commercially available version of the Merton model for assessing the credit risk of a company" […]'

The email from Mr Andrews of 25 November 2014

202. In the meantime, the Claimant had been raising with Mr Andrews concerns about his appraisals, the failure to recognise his work and the failure to adopt the Harm metrics. In an email of 25 November 2014 to HR, Mr Andrews recorded that he had suggested to the Claimant that he raise a formal grievance, so that his concerns could be properly investigated by an independent person. He went on:

> 'Walker said that he had been advised by the Risk Department that the right course for him might be to be a whistleblower to Parliament, and he had been considering this. I told him that while I do not claim to be an expert on these matters, I disagree with the advice because whistleblowing is about specific improprieties such as breach of applicable laws, whereas Walker's description of his issues suggest that they amount to a difference of judgement: was the FSA's use of the evidence he provided reasonable or not?'

203. From this point onwards Mr Andrews knew that the Claimant was considering blowing the whistle outside the organisation. As we find later (para 370), the first

time that the Claimant explicitly identified himself as a whistleblower within the organisation was four years later at a meeting with Ms Barbara Frohn in August 2018.

204. Despite Mr Andrews' advice, the Claimant did not raise a formal grievance. He explained to the Tribunal that 'I could not see that it was going to fix the problem; until I had traction, it was pointless.' By 'traction', we understand the Claimant to mean that Mr Wheatley should accept the value of his work and acknowledge that the FSA had acted wrongly in not accepting it.

205. It was suggested to the Claimant that he might wish to take advantage of the whistleblower programme. Asked why he did not do so, the Claimant told the Tribunal that he thought it might lead to his dismissal and still would not achieve his goals.

206. The Claimant had a deep-seated sense of grievance that he had not been treated fairly, yet he refused to raise a grievance. He had a conviction that he had uncovered wrongdoing, yet he refused to engage the Respondent's whistleblowing. Instead, he sought to use the paper he was drafting about Harm for Mr Woolard and Mr Wheatley as the vehicle for expressing these concerns. The Claimant told the Tribunal that he was trying 'to make sure I blew the whistle as clearly as possible'. If that was true, it showed poor judgement: it was plainly the wrong medium.

<u>The investigation in 2014</u>

207. In August 2014 Mr Vito Capobianco (Manager in the Risk Department) and Ms Emma Davies (Risk Review team) carried out an investigation into the Claimant's claims. They produced an initial note in August 2014 and a final report on 7 November 2014.

208. Among other things, the report concluded:

> 'Why did the FSA not act on the information, especially senior management–did they know it wouldn't/couldn't help?
>
> a. As the Harm data was being provided to FSA senior management when the financial crisis began and whilst it was going on, it is unclear whether senior management would have done anything differently as a result of the information provided specifically by WS. It is our view that FSA senior management knew that the Harm data was not going to help in their management of the financial crisis or influence the outcome. What is known is that there was no capacity in the market for firms to raise capital in a declining market and that the organisation was doing everything it could possibly have done and reacted as if it had accepted WS's points.'

209. Nonetheless the report gave a range of recommendations as to how the FCA might proceed, including allocating internal expert resource to review the model and engaging an independent expert to review it. The former recommendation had effectively already been actioned by the secondment to the CED and Mr Lukacs' and Mr Andrews' attempts to work with the Claimant. When that failed (see below at para 223 onwards) the latter recommendation was adopted and external academics were engaged in February 2015 to review the Harm metrics (see below at para 232 onwards).

210. Ms Davies was later interviewed on 13 September 2019 in the context of the Internal Audit review, which recorded the following:

> 'ED [Emma Davies] said she thought that the information included in the WB's [the Claimant's] allegations was sufficient to make the FSA/FCA uncomfortable and that she thought the FSA/FCA should be cautious in ignoring the WB. ED recalled the review "was an interesting piece of work" and however in her opinion was not an adequate response to the WB's concerns raised at the time. ED further stated that in her opinion, neither Gavin Stewart nor Chris Woolard appeared to take the concerns of the WB seriously and that she thought this was likely a result of the volume and frequency of information disseminated by the WB previously.'

The appraisal of the Claimant's work during the CED period [*D8*]; the alleged failure to acknowledge the history of C's disclosures at the FSA in the draft appraisal of September 2014 [*D8(i)*]

211. Mr Stewart sent the Claimant a draft appraisal on 8 September 2014. In the draft which the Claimant sent back to him, he included extensive references to events at the FSA between 2007 and 2013, focusing on his view that his 'prescient forewarning has never been recognised or acknowledged in hindsight'. The Claimant effectively gave a précis of the circumstances which led him to believe that 'my work has never been recognised or rewarded, so the FSA and FCA now owe me for over six years of accomplishment'.

212. By email dated 8 October 2014, Mr Andrews wrote to Mr Stewart, copying in the Claimant:

> 'There is absolutely nothing that I or Chris can do about the history and the decisions of a different organisation, the FSA. So I share your view that the case for including it in the appraisal is unclear. As is well-known, it is not possible to use in an appraisal for period B any credit built up in period A.'

213. In an email later the same day to Mr Lukacs, Mr Andrews wrote:

> 'I tried to signal to Walker to stop the history class and focus in [*sic*] the way forward'.

The newsletter of 23 October 2014 [*PID 5*]

214. On 23 October 2014, the Claimant sent out his daily newsletter. It included a number of assertions, including that 'the stress tests have been designed to avoid revealing the underlying reality' (para 555) (part of *PID 5*). Mr Wheatley emailed Mr Woolard, suggesting that he look at it. Mr Woolard did so and emailed the Claimant asking to meet with him and Mr Andrews to discuss it.

215. Mr Andrews replied to Mr Woolard, copying in Mr Stewart, Ms Oakley and Mr Adams:

> 'We think W may be trying to develop some kind of employment claim. I was planning to mention it at our bilat this week. I do not believe his arguments have merit but he is refusing to accept/finalise past appraisals

> and does not respond well to my attempts to get him to look forward. Suggest we meet W after the bilat.'

216. The Claimant prepared a note of the meeting he had with Mr Woolard and Mr Andrews:

> 'As a result of sending the attached comments Chris arranged this meeting to relate that Martin was very nervous about receiving this intelligence and so (1) we needed to get to an official FCA position on Harm (which was already in train) and (2) meanwhile stick to a vanilla version of Regatta.
>
> He also asked if I had had conversations with Vito in regard related issues, I said I had only spoken to Emma but I was aware of what their thinking appeared to be so far. He said he would speak to Vito. A couple days later Emma requested access to the RBS folder which I set up.'

217. Mr Woolard accepted in cross-examination that, in the light of this discussion, it was important that any review of the Harm metrics should be impartial.

<u>The proposed presentation to Mr Wheatley and Mr Woolard, scheduled for December 2014 [*D7, part 1*]</u>

218. A date was set for December 2014, when the Claimant would present his paper on the Harm metrics to Mr Wheatley and Mr Woolard. The Claimant continued to work on drafts of the paper. In an email of 26 September 2014 to Mr Andrews, Mr Lukacs wrote:

> 'I met with Walker yesterday and agreed a way forward which involves him producing an updated Word document by the end of next week. The slide pack contains some useful stuff but too much of it is unintelligible/unexplained. I've asked him to refocus on the Word version because I think it forces him to set things out in a systematic clear way. As such I'm not sure it's worth you engaging substantially with this slide pack. As far as I can understand Walker used the creation of the slide pack as a way to try to figure out the answers to some of the questions we had addressed to him.'

219. In an email of 21 November 2014, Mr Lukacs referred to an even simpler template and urged the Claimant to stick to it as closely as possible 'as this will be a format Chris [Woolard] and Martin [Wheatley] will be familiar with, recognise and quite possibly expect'.

220. Mr Lukacs went through the Claimant's drafts in detail, proposing amendments using track changes, sometimes removing whole paragraphs or sections. In some of this material the Claimant had focused on past events at the FSA, which Mr Lukacs did not consider germane to the central purpose of the paper; he removed other material because he thought it was contentious or inappropriate. The Claimant alleges that this was an attempt to censor/cover up his attempt to the blow the whistle on the failings of the FSA/FCA in not adopting the Harm metrics (part of *D7*).

221. By this stage, Mr Andrews had learned that the Harm metrics closely followed the KMV/Merton model; he had not previously appreciated this and was beginning to think that the Claimant's work was not as original as he had hoped.

Nonetheless, he did not give up on it. In October 2014 he wrote to a colleague with expertise in the field, who had worked in the FSA. It is clear from this email (in which Mr Andrews was expressing his private thoughts) that, while he was sceptical of the work, he was still open to the possibility that it might have value to the organisation. He said that he was writing: 'in case I have missed the beauty of it'.

222. Mr Andrews continued to give feedback to the Claimant on the paper he was preparing for Mr Wheatley and Mr Woolard, urging him to explain clearly how the Harm metrics could be of use to the Respondent. By way of an example, in an email of 12 November 2014, Mr Andrews wrote:

> 'I think the main steps required now are: define the proposition, produce sufficient evidence, and explain it to Senior Management so that any decision can be made on what best to do for the FCA. This process is what Pete's and my comments had been intended to drive.'

223. In the event, neither Mr Lukacs nor Mr Andrews was satisfied that the Claimant had produced a paper of sufficient quality and clarity to present to Mr Wheatley and Mr Woolard. Mr Andrews thought the paper lacked proper explanations, ignored legal realities and misunderstood aspects of regulation. He considered that the Claimant was just using a different version of KMV, and that he had failed to explain any enhancements to the existing models well enough for anyone to assess it. He decided to cancel the presentation.

224. Mr Lukacs communicated that decision to the Claimant at a meeting on 18 December 2014. He summarised the discussion in an email to the Claimant the following day, including his view that:

> 'current and previous drafts you have given me have fallen short of the quality that would be expected of those produced by someone working at Manager or Technical Specialist level. A key requirement of anyone working in CED is that they are capable of producing work that is presented in a manner which is accessible to non-experts.'

225. Mr Lukacs criticised the Claimant for his use of jargon, for not defining central terms, and for making assertions which were not supported by evidence. He observed that the Claimant had been given the same feedback by other colleagues, who had read versions of the documents. He gave the Claimant a book, which he thought might be a helpful guide to the logical structuring of clear arguments in a business context. He also offered to arrange coaching to help him in his drafting style. When taken to this passage in cross-examination, the Claimant's observation was that his colleagues' failure to understand his paper was because they lacked the relevant expertise, 'which must have discomforted them'. As for Mr Lukacs' offer of help, he described this as an attempt to build a case to make him redundant. There is no evidence whatsoever to support that contention.

226. We observe in passing that many of Mr Lukacs' criticisms of this paper might equally be applied to the Claimant's witness statement in these proceedings: it was disproportionately long, poorly structured and rambling. it was unsurprising that the Claimant's managers might have had genuine concerns about his

written communication skills, in particular his ability (or perhaps his willingness) to distil his technical ideas into comprehensible form.

The Claimant's paper in December 2014

227. At this point in the chronology a detour is required. In December 2014 the Claimant wrote a paper: 'Regulatory failure in Basel. The FSA and BoE'. This is no longer relied on by the Claimant as a protected disclosure (because there is no evidence that it was sent). Instead, the Respondent relies on it as providing insight into the Claimant's core beliefs.

228. In the paper the Claimant wrote, among other things, that:

> 'Starting in 2007 I developed and provided the FSA with a set of Harm metrics that measure financial detriment missed by Basel capital rules […] the market/regulatory failure needs to be understood in order to make appropriate changes in legislation that mandate additional regulatory objectives and cultures.
>
> […]
>
> The Harm metrics pick up detriment that the Basel regime misses […] One of the best high-level explanations is that the Basel and supervisory process does not require firm executives or regulators to look at, or be on top of, the various detriments revealed by the advanced models.
>
> […]
>
> The simple flaw is that Basel is based on CNAV [constant net asset values], whereas smart investors use VNAV [variable net asset values] to track how much risk is contained in financial firms, asset management funds, products and any other service. This is where a structural flaw in the Basel process is revealed.
>
> […]
>
> They also may have no legal means of tackling it. For example in principle the CRDIV baskets could be used to tackle this detriment, but it would probably be illegal to do so unless such use could be disguised as credit to GDP ratios and behind the scenes jawboning. This situation needs to be understood by Parliament and other regulators involved in the Basel accords so they can use it mandate changes in the system. It does not appear that on their own regulators can design and deliver a fix. They do not have the skill, experience or mandate to make such profound changes […] The changes need to come through legislation and directives'.

229. We agree with the Respondent's submission that, in this paper at least, the Claimant was not arguing that firms and regulators were in breach of existing legal obligations; he was arguing that the legal obligations on firms and regulators were not fit for purpose, that there were fundamental flaws in the legal/regulatory framework.

230. Understandably, Ms Shepherd made great play of this document; it was the first document she took the Claimant to in cross-examination. She argued that this is what the Claimant genuinely believed at the material time and that any

attempt to say otherwise for the purposes of these proceedings was self-serving and damaged his credibility.

231. We have concluded that the fact that in this paper the Claimant expressed the view that the legal/regulatory framework was fundamentally flawed (a belief, incidentally, which others shared, albeit for different reasons) does not exclude the possibility that at other points, both earlier and later, he may also have believed that firms and/or regulators were failing to comply with their existing legal obligations within that framework. In our judgment, we still had to consider what the Claimant's subjective belief was in relation to each of the alleged disclosures; that is the approach we take below.

The instruction of the two academic reviewers in early 2015 [*D8(ii)*]

232. Notwithstanding what Mr Andrews clearly regarded as the debacle of the paper intended first for ExCo and then for Mr Woolard and Mr Wheatley, he proposed that the Claimant prepare another paper, which would be sent to two external academics with expertise in the relevant field for an independent view. This would be an academic paper, aimed at a specialist audience.

233. On 29 December 2014, Mr Andrews approached the first of the reviewers (an academic based in Germany) to sound him/her out as to whether s/he would be interested in doing the work. Among other things he wrote:

> 'While we like the idea of using market prices to draw inferences about the state of firms, we are sceptical about the extensions which, frankly, appear to be rather grand claims at odds with familiar literature. But we could be wrong, and it would be a shame to abandon radical ideas without giving them the fairest chance of being found useful. So we would like to send material to someone for an independent and rigorous view, and I wondered whether you would be willing to do this.'

234. In the meantime, on 17 December 2014, Ms Tessa Humphreys had written to the Claimant about the renewal of the subscription to the data which he required for the Harm metrics. On 16 January 2015, Mr Andrews approved a short-term renewal.

235. On 7 January 2015, Mr Andrews wrote to the Claimant:

> 'By the way, the referees will certainly not be told of any reservations people in the CED or elsewhere in the FCA may have had or may still have about what you are doing. The whole point is to get an objective view of your work.'

236. When he wrote this, Mr Andrews had already hinted at his reservations to the first reviewer in his email of 29 December 2014.

237. On 26 January 2015 Mr Lukacs sent Mr Andrews a draft of the proposed letter of instruction for the two external reviewers. Later the same day, Mr Andrews replied saying (among other things):

> 'I think we should say that we struggle to accept parts of the paper but in fairness want it to have a truly independent review by people closer to the issues than we are.'

238. Mr Lukacs sent the Claimant's paper to the two reviewers on 4 February 2015. In the covering emails he wrote:

> 'As background, the attached paper has been prepared by an FCA employee with a background in financial risk management, rather than economics. One future option could be to submit the paper, or a revised version, for consideration by the Financial Policy Committee. However the paper makes some bold and contentious claims, about which we have some reservations. Before we consider such a step we would like to obtain an independent and rigorous assessment of the paper, hence we are sending the paper to external academic reviewers.'

239. We find that that Mr Lukacs inserted the reference to 'bold and contentious claims, about which we have some reservations' in response to Mr Andrews' request. He copied Mr Andrews into the final version, to which Mr Andrews replied: 'Well done, thanks'.

240. Mr Andrews' evidence was that the reason why reservations were expressed in the instruction was because he was embarrassed about the quality of the paper and did not want the reviewers (with whom the FCA wanted to maintain an ongoing relationship) 'to think that we were idiots'. The Claimant's case was that he was sending a clear signal to the reviewers about the kind of message they were hoping to get back; it undermined the stated purpose of the exercise, which was to get a genuinely independent view.

241. The Claimant did not provide either reviewer with the underlying data generated by the Harm metrics.

<u>The first academic report</u>

242. The first academic reviewer provided their report on 17 February 2015. In the covering email, s/he wrote:

> 'I have decided to make it "broader" instead of focusing on a few arguments (and making those more technical, e.g. including detailed literature discussion). I hope that this shows that the paper has, in my view, a very "broad range" of problems – apart from, as I also briefly comment, a general problem with its overall style, at least from the perspective of a working paper in a semi academic working paper series. (I thought that it is best if I adopt such a "standard" to have some guidance and to make my assessment somewhat objective and transparent). I hope this is of some help. As I said, this was more informative and interesting than much of the usual academic refereeing work […]'

243. The attached report was five pages long. It is clear from the introduction that the reviewer believed the purpose of the report was to assess whether the paper met certain standards of publication: in other words, it was primarily a review of the paper, rather than of the model (although plainly there is an overlap). The reviewer gave their headline conclusion at the beginning of paper:

> '1. It does not meet standards that I would apply from an academic perspective, that is:

a. Whether the methods used in the paper are up-to-date and whether it sufficiently takes into account the outstanding literature (and the respective arguments).

b. Whether claims made in the paper are sufficiently backed up by theoretical arguments or by empirical analysis.

2. It seems to presuppose certain objectives and priorities, which the FCA may not share or at least may not wish to communicate in this way.

3. Its overall style may not (yet) be suitable for a publicly available working paper.'

244. The review then went on to expand on those propositions. The principal criticism was articulated on the second page, which was that the Claimant had ignored 'a large body of literature was written over the last three decades in all three relevant fields of asset pricing, corporate finance and banking.'

245. When the Claimant saw the first reviewer's report, he vigorously disagreed with the suggestion that he had ignored recent developments. He believed that the reviewer was talking about some of his/her own work on Modigliani Miller which the Claimant, when he read it, thought was so fundamentally flawed that it should be withdrawn. Nonetheless, he accepted that the result of the first reviewer's report was 'lukewarm', although he observed that the reviewer had commented on the fact that his paper was more interesting than much of the work he was asked to review.

The second academic report

246. The second academic reviewer provided their feedback on 1 March 2015. The reviewer was not unsympathetic to the Claimant's broad philosophy, observing:

> 'I am one of the financial economists that believe, like the author does, that one of the biggest problems in banking regulation is the so-called "regulatory forbearance" (allowing large financial firms to operate with negative equity or, alternatively, allowing the market value of the banking assets to approach and even fall below the book value of liabilities).'

247. The review was not without positive comment. At para 2.6 s/he wrote:

> 'As the author convincingly argues, the canonical representation of the bank balance-sheet within the Merton framework helps the regulator to draw a more complete and realistic picture of the solvency of a financial firm and to take prompt remedial actions (reorganization, restructuring, recapitalization…) well before the firm enters the Zombie state. For instance, the current Prompt Corrective Actions (PCA) system in use in the US, created at the beginning of the nineties, after the adoption of the Federal Deposit Insurance Corporation Improvement Act (FDICIA), is far from functioning properly especially during crisis periods. This is because the system uses book-value solvency (risk-based) ratios and book-value leverage (unweighted) measures to trigger mandatory and discretionary provisions. As it is well known, the book-value triggers reflect material changes in financial conditions with some delay. From this point of view,

> the Harm metrics described in the paper (e.g. the LMVA ratio) are theoretically a much better choice.
>
> Another potential use of the Harm framework would be to construct several forward-looking risk measures for each bank or financial institution: the distance-to-distress; the risk-neutral and actual probabilities of default; the expected loss to depositors and debtholders; the potential size of the implicit subsidies over time. Although not discussed in the present Overview Paper, some of these metrics could be aggregated in order to compute systemic risk indicators (e.g. average or portfolio distance-to-distress; the system expected loss). Finally, the Harm framework may be used in conjunction with the stress tests to gauge about how much additional capital banks should hold given a target for the actual default probability, let's say 1% over a one-year horizon. '

248. However, the reviewer concluded that 'the current draft falls well short of its potential', observing (like the first reviewer) that the Claimant omitted reference to recent literature and had not attempted to differentiate his work from other papers in the field. S/he wrote:

> 'I think the author of the present paper will have to make a serious effort to establish what incremental contribution his work makes. All the results in this paper are basically derived from a well-known setting (CCA) applied to the banking firms. And, as I mentioned before, some of the results have been documented. So what do we learn from this paper, compared with other contributions to the same literature? Absent a clear and explicit answer to that question, it is not easy for a reader to figure out what the main contributions are. The onus is on the author to establish that.'

<u>The Respondent's interpretation of the academic reports [*D8(iii)*]</u>

249. Mr Andrews wrote to Mr Woolard on the same day as the first report was received (17 February 2015), saying that, unfortunately, his view of the paper coincided with that of the first reviewer and recording that he had mentioned several times to the Claimant 'that he was neglecting a lot of important and relevant work, to little avail'.

250. On 12 March 2015, Mr Andrews, Mr Woolard and Ms Oakley (of HR) had an email exchange in which they discussed the second reviewer's view. Mr Andrews wrote:

> 'The reviewer does not suggest it can be used by a conduct authority. As the reviewer says, the paper is unduly long, does not explain itself properly and does not establish any substantive originality, either in theory or in terms of prudential policy solutions (because, remarkably, it ignores others' work and policy developments). And this is after masses of comments to similar effect that we have already given, and the adjustments that Walker agreed to make. The reviewer says that the paper is not suitable for publication in any respectable journal or working paper series of a respectable central bank supervisory authority, which is quite damning when one considers the amount of work put into it […] Which I think brings us back to the discussions before my holiday about alternative roles for Walker.'

The performance rating at the end of the CED period [*D8(iv)*]; the alleged failure in January 2015 by Mr Woolard, Mr Wheatley and Mr Griffith-Jones properly to appraise the Claimant's work, to promote him and to increase his pay [*D9*]

251. On 13 March 2015, Mr Andrews proposed to Mr Woolard that the Claimant return to the Risk and Compliance Oversight Division. He wrote:

> 'Natasha [Oakley] mentioned that you will be speaking to Richard [Sutcliffe] about a possible role for Walker in Risk. Provided he does not have his data endlessly to recalculate 'Harm', I think he might do a good job there as a challenging person with relevant knowledge in some areas.'

252. In an email of 16 March 2015 to Mr Woolard and Mr Andrews, Ms Oakley wrote that she had spoken to Mr Sutcliffe (at that time Acting Director of Risk and Compliance Oversight Division), who had agreed to take the Claimant on his headcount. A decision still needed to be taken as to which team the Claimant would be most suited to. She then raised the subject of the Claimant's appraisal grade and wrote:

> 'I think we should stick to our original plan of awarding [Walker] a 2L in terms of appraisal. Peter and I feel his frustrations had been based on him not being the right team and using his skill sets correctly. I also worry that he takes on this new role with a noose around his neck if we proceed with a 1. Chris [Woolard] – are you happy to proceed with 2L?'

253. A grade of 2L was 'satisfactory but trending low'. Mr Andrews had previously expressed the view that, given the Claimant's performance across the year, a lower grade of 1 would be appropriate. In his view, the Claimant had failed to achieve the principal task which had been assigned to him, which was to write a clear and persuasive explanation of what the Harm metrics could offer to the FCA. Had the Claimant been graded 1, he would probably have been put on a performance improvement plan on his return to Risk.

254. Mr Andrews signalled his agreement to the grade later the same day and said that he thought they should notify the Press Office. Mr Andrews already knew that the Claimant had been contemplating blowing the whistle outside the organisation (see para 202). It was obvious that he would not be happy with a 2L grade. Notifying the Press Office was not an attempt to prevent the Claimant from taking any action he wished to take, merely an attempt to ensure the organisation was forewarned. There was nothing improper in it.

255. Mr Woolard agreed with Ms Oakley's suggestion to award a 2L grade. As a result, and on the advice of HR, the Claimant was awarded a higher rating than his managers thought he deserved. Mr Wheatley (CEO) and Mr Griffiths-Jones (Chair) had no involvement in the Claimant's appraisal/grading.

256. On 16 April 2015, Mr Lukacs wrote to the Claimant, asking to meet him to agree an appraisal review that could be passed to his new line manager. The Claimant did not respond.

The decision to stop the Claimant's work on the Harm metrics [*D7/2*]

257. Mr Andrews decided that, following receipt of the academic reviews, the Claimant should stop work on the Harm metrics. Mr Woolard agreed. Mr Woolard also asked the Claimant to stop circulating the daily newsletter.

258. Mr Andrews and Mr Lukacs communicated both decisions to the Claimant on 23 March 2015. Mr Andrews summarised the meeting in an email later the same day:

> 'Pete [Lukacs] and I just had a lengthy conversation with W[alker]. He did not make a fuss about stopping Regatta but he was predictably upset about stopping the Harm Metric and associated work. He argued that nobody understands it and that if we did understand it we would not stop the work. He was fairly professional, though, and did not say anything obviously untoward […] He did not seem to accept that working for years with no customers was unsatisfactory (he actually called it a high point), dismisses the referees' comments, and says we have not given him a proper chance (despite painful meetings and mail exchanges and extensive comments on documents). I did not put the point quite like this but his paper on Harm is the worst I have seen in 20 years of reviewing economics and finance papers.'

259. Bizarrely, the decision that the Claimant's work on the Harm metrics should stop was not formally recorded, nor was it communicated clearly to the Risk Department, to which the Claimant was soon to return. Nor was the data subscription cancelled at this point. This failure to follow through the decision later gave rise to confusion, as we shall see.

260. The Claimant sought to rely on this in his oral evidence to suggest that, in fact, Mr Andrews and Mr Lukacs had *not* made clear to him that he should stop working on Harm. That is demonstrably untrue: he complained that day to Mr Wheatley about the work being stopped (para 263); and he relies on the instruction to stop work on the Harm metrics as detriments in these proceedings (*D7/2 and D9*).

261. His reasons for making this assertion in oral evidence give some insight into his underlying attitudes. He asserted that, 'as a whistleblower', he was entitled to continue blowing the whistle until such point as the content of Harm was properly dealt with. He observed: 'I don't take instruction from Mr Lukacs or Mr Andrews, or Mr Woolard or Mr Wheatley, or even the Chair. I don't accept I have to stop saying what needs to be said'.

262. In fact, the Claimant acknowledged in oral evidence that he did not do any substantial work on Harm in the following year, even though the data was still available to him.

<u>The Claimant's complaint to Mr Wheatley about the decision to stop work on the Harm metrics [*D10*]</u>

263. On 24 March 2015 the Claimant sent an email to Mr Wheatley, complaining about being told to stop working on the daily newsletter/Regatta and on the Harm metrics.

264. Mr Wheatley asked Mr Woolard to prepare a response for him, who in turn asked Ms Oakley to draft a short reply for Mr Wheatley, directing the Claimant

back to him. She did so and Mr Wheatley adopted that draft in his reply to the Claimant on 13 April 2015:

> 'Thanks for your email – I have been away over the Easter period so I apologise for the late response. I have enjoyed reading Regatta, but do understand the decision to discontinue it. In terms of discontinuing the work on the Harm metric, I have had discussions with Chris and I know this has been given careful thought as a management decision. We have to base our decisions on where we deploy resources on relative value we can gain from ongoing work. If you would like to discuss this further then please see Chris or Peter.'

265. In his response the Claimant acknowledged in respect of the newsletter that 'for me its usefulness has declined given that the quality of analysis related to regulatory issues has been dropping off for some time.' However, he continued to argue for the importance of the Harm metrics, observing that Mr Lukacs did not understand it, while Mr Andrews did not agree with it for reasons which the Claimant either did not accept or thought unclear.

THE FCA PERIOD THREE: APRIL 2015 TO OCTOBER 2018

266. The Claimant moved back to the Risk and Oversight Compliance Division in the FCA on 1 April 2015. His immediate line manager was Mr Azhar Rizvi (Acting Senior Manager). Mr Jose Morago was Head of Department from October 2016 until December 2019.

The alleged disclosure to Mr Nelson at the PRA [*PID 15*]

267. At this point, Mr Nelson, who by now was Deputy CEO of the PRA, comes back into the picture; he and the Claimant had not worked together for the best part of three years, but their relationship remained cordial (up to and including the hearing before us). On 24 July 2015, Mr Nelson contacted the Claimant, asking him to share 'a slide deck of some of your best stuff' relating to expected default measures, which Mr Nelson could share with the PRA Board.

268. The Claimant replied immediately, and enthusiastically:

> 'This is still an essential message to get across and I think you of all people understand most that my analysis has always been fundamentally more or less on the money. Things will only truly get better and safer when it is properly used at the heart of market regulation.
>
> […]
>
> Mainly I have broadened out to cover market integrity (liquidity and systemic risk), entire savings to investment loops, fair and efficient markets. Also still trying to grapple with the political and ideological blinkers of the status quo that really does not want to grapple with the root cause of the financial crisis and thus fix the market/regulatory faults that are still widespread.'

269. He later sent Mr Nelson some materials (*PID 15*), but Mr Nelson did not use them. He did not regard the information as providing evidence of a breach of regulatory requirements, nor did he consider that, in providing this material, the

Claimant was making public interest disclosures. There is no evidence that anyone in the FCA knew about this exchange.

The Claimant's application to become the next CEO of the FCA [*PID 16* and *D11*]

270. Mr Wheatley stepped down as CEO of the FCA in September 2015. A recruitment process began. On 27 September 2015, the Claimant submitted an application for the role, which he relied on in these proceedings as a public interest disclosure (*PID 16*).

271. In his application, which ran to six pages (despite the specified limit of two), the Claimant explained that, if he were appointed, and the approach he was advocating were adopted (i.e. Harm), it would be:

> '[a] game changing course for the City and UK [which] will lead to a well-deserved and needed economic reboot that will then function reliably for generations.'

272. According to the Claimant, his secondary purpose in making the application was to make public interest disclosures about his achievements with the Harm metrics to the Chairman of the FCA (Mr Griffiths-Jones) and the Chancellor of the Exchequer (Mr George Osborne). There is no evidence that his application was seen by either of them, or anyone within the FCA.

273. The recruitment process was managed by the Zygos Partnership, an external agency. We have no doubt they would have conducted an initial paper sift. The Claimant was not shortlisted (*D11*).

The Claimant's letter to Ms Frohn on 10 October 2015 [*PID 17*]; stopping the FCA subscription to the KMV data [*D12*]

274. In around September 2015, Ms Barbara Frohn joined the FCA as Director of the Risk and Compliance Oversight Division. The Claimant wrote to her soon after she arrived, welcoming her and explaining his background. He mentioned the Harm metrics (though not by name) and commented:

> 'Last year I wrote an academic paper describing these techniques; the peer reviewers said my approach is solid and robust. The paper contains highly market sensitive information as it shows firm by firm the amount of consumer and market detriment they cause. So far the senior management at the FSA and FCA have not known how to use or employ this intelligence, I think for lack of sufficient confidence and understanding of such sophisticated mathematical techniques. I hope you can help work out the best way to bring this critical risk management intelligence into regulation, and how to explain it in layman's terms.'

275. This account is notable as much for what it left out as what it included. The Claimant omitted the reservations expressed by the academic reviewers, the fact that Mr Andrews had taken a much less positive view of Harm, and that he had been instructed some months before to stop working on it. Nor did he mention, as he told the Tribunal in oral evidence, that he had not been doing much work with the Harm metrics in 2015 (we note that the highest Mr Kemp could put it in closing was that 'when the Claimant returned to Risk, he was still working on the Harm metrics to an extent.') The Claimant appeared to believe

that the arrival of a new Director gave him an opportunity to wipe the slate clean and mount a fresh campaign for the adoption of the Harm metrics.

276. On 6 October 2015, Mr Rizvi emailed Ms Frohn, attaching a paper which the Claimant had prepared, in which he set out arguments to justify renewing the databases which underpinned the Harm metrics, at an annual cost by this point of £180,000. Mr Rizvi acknowledged that the Claimant believed strongly in the Harm metrics, but explained:

> '…there is no support within the FCA for the Harm metrics, and only limited appetite for the model driven approach to Risk identification that other potential uses would imply. The 1LOD would need to show buy-in to the approach that is currently not evident. In addition, the IT systems to manipulate the data are not supported by the IS department, whilst the staff to manipulate data and perform analysis would need to be recruited. Budgeting to purchase data without organisational buy-in, IT support or qualified staff, is cart before horse. Let me know if you would like to discuss.'

277. Ms Frohn did not immediately accept Mr Rizvi's steer but asked the Claimant to explain his model to her in more detail, in particular which risk factors he was using (Ms Frohn had been Global Head of Model Valuation for Santander).

278. On 10 October 2015, the Claimant wrote to Ms Frohn (*PID 17*). The second paragraph reads as follows:

> 'I regret that in 2015 I have to report to you a failure that dates back to 2007 that the FSA/FCA have failed to deal with as required by our objectives and professional codes of conduct. As an outsider with industry risk management experience and an appreciation of how quantitative analysis adds substantial value to best practice risk management, I hope you will trust me, as I am trusting you. Upon reflection and investigation I hope you will join me to help the FCA address and get rid of this failure.'

279. The email went on to describe the Harm metrics in detail, the Claimant's view of its importance and his belief that the FSA failed in not adopting the model and acting on the data generated.

280. The email also included sections which deal with his own employment situation:

> 'My hard work and success with the Harm metrics and related networking and analysis has never made it into any of my annual appraisals, indeed only one or two have been completed in the past nine years. As a result I maintain that I have suffered great and continuing detriment and I want the FCA to lift this detriment from my shoulders and acknowledge my extraordinary work and its failings'.

281. The email prompted Ms Frohn to email Ms Jarvis of HR half an hour later: 'we may have to discuss this going forward'.

282. Ms Frohn replied to the Claimant on 11 October 2015, saying that she noted that there were two issues in play: the Claimant's Harm metrics and his own employment situation. Both needed careful consideration; she asked for time to reflect, but observed:

> 'I still do not fully understand what the exact inputs and outputs of the model are and how it can be forward-looking. Market values are imperfect metrics and will never be able to capture culture and PPI type probabilities. That said, I would want to understand better'.

283. Around this time Ms Frohn also spoke to Mr Woolard, who explained that the story of the Harm metrics was a long one but that, after internal discussion and external review, a decision had been taken that the FCA would not use the model.

284. On 13 October 2015 Ms Jarvis replied to Ms Frohn's email:

> 'Thank you Barbara and I appreciate the position. As Azhar mentioned in his email, this may be a metric that is no longer a priority in the wider market.'

285. Ms Frohn replied the same day:

> 'The issue is not so much about the metric but about the person. He sent me another email complaining about various people in the FCA and I think a grievance process cannot be ruled out if we don't tread carefully.'

286. The Claimant had a long meeting with Ms Frohn on 26 October 2015. She summarised its contents on the same day in an email to Ms Vivien Jarvis (of HR) and others. Ms Frohn explained that she had decided - and agreed with the Claimant - that the Harm metrics would be the subject of a further, independent assessment in a one-off exercise by one of two consultancies specialising in financial models. The Claimant would be permitted to spend one month assembling the documentation necessary for validation. Ms Frohn would bear the cost of the exercise. She emphasised that:

> 'The aim of the independent validation is to get closure on this topic for him. It will *not* mean that the FCA will use the model if the independent validation confirms that the model does what Walker claims it does (I made it clear that this is a lost battle after 9 years).
>
> […]
>
> After the one month of model documentation preparation, Walker will deliver me his objectives which focus on work as a business partner in Risk; they will not include any work on HARM even though he may use modelling in the work he does. RCO will grade his performance against these new objectives, taking into account not just the quality of his work, but also the effectiveness of his advice to the supervision divisions. During this period the consultancy will perform the validation.
>
> With this, he will become an employee like any other employee in the team.'

287. The Claimant disputed the accuracy of this note, in particular the idea that he had agreed to an exercise which, even if it vindicated the Harm metrics, would not lead to the FCA adopting the model. Ms Frohn was questioned at some length as to the rationale of spending further resources investigating Harm.

288. Initially the Tribunal found this counter-intuitive: why spend further resources on a model, if it was never going to be used? Ms Frohn explained that she regarded it essentially as a combined HR/welfare exercise. She had fixed on an approach which she hoped would finally provide closure to a long-running battle (which, as she told him at their meeting, the Claimant had already lost), while seeking to demonstrate the organisation's ongoing commitment to him as an individual, who might go on to do other valuable work.

289. We accepted that explanation and the accuracy of Ms Frohn's note. We found her to be a credible witness and a compassionate, and above all decisive, manager. As we will go on to explain, for a while at least, she appeared to have achieved her goal.

290. At the same meeting, Ms Frohn discussed again with the Claimant whether he wished to raise a grievance; he declined to do so. He accepted in cross-examination that he did not tell Ms Frohn that he regarded himself as a whistleblower; he told us that he expected her to deduce that herself.

291. In November 2015, the FCA published its report into the collapse of Halifax Bank of Scotland ('HBOS'). The Claimant had provided some input into the investigation. It was not explored in any detail in the hearing before us, although it is relevant to *PID 22*.

292. On 16 December 2015, Mr Rizvi confirmed that the data subscriptions needed for Harm would not be renewed for the following year.

Ms Frohn's characterisation of the RD report and alleged unjustified accusations against the Claimant [*D12*]

293. The consultancy chosen to conduct the review exercise was Risk Dynamics ('RD'), a Brussels-based firm specialising in risk models. The cost to the Respondent was around £10,000.

294. The process included a one-day meeting between RD and the Claimant in Brussels, which took place on 14 January 2016, so that he could talk them through the model, demonstrate it and explain how it added value to existing models. The Claimant submitted the same paper to RD which he had submitted to the academic reviewers nearly a year earlier. He did not revise it, notwithstanding the criticisms made of it by the reviewers (which he had dismissed); he did not even reinstate the material which Mr Lukacs had edited out (which he later characterised as an attempt to silence him). It seems extraordinary that, given this opportunity, the Claimant took no steps to develop it. Nor did he provide RD with the data or the workbooks, even though this would appear to have been an ideal opportunity to have them validated. He told the Tribunal that this was not his decision; we found that implausible. There was no evidence of the Respondent putting any restrictions on the material he could provide to RD.

295. Risk Dynamics provided their report on 31 January 2016. Ms Frohn shared it with the Claimant on 11 February 2016. The headline conclusions were as follows:

> 'By design, the HARM metrics can be considered as (1) 'early warning' indicators of banks fail, and (2) measures of capital buffers to prevent loss of funding
>
> The HARM framework also aims at providing insights into the behaviour of market participants (banks, investors, customers, public authorities), especially from a capital and liquidity perspective
>
> It is not clear whether these metrics are fully relevant to the Financial Conduct Authority and its objective to protect consumers, protect financial market and promote competition
>
> > These metrics seem to be more relevant to the Prudential Regulation Authority (PRA), which has the general objective to promote the safety and soundness of the financial institutions it regulates with a clear view on the capital aspects.'

296. The inset conclusion immediately above this paragraph had originally read: '*At first sight* these metrics seem to be…'. On 1 February 2016, Ms Frohn had written to RD asking for clarification:

> 'Could you please delete: 'at first sight' or otherwise make clearer?'

297. RD took out the words 'at first sight'. We find it unsurprising that they agreed to such a minor change, given that elsewhere in the report they flagged up essentially the same concern in different language:

> 'Before a full independent review could take place, its is [*sic*] of utmost importance to clarify the purpose the HARM framework and its metrics could target in the FCA environment.'

298. The report went on to identify aspects of the model which it considered required improvement and recommended that the performance of the metrics needed rigorous testing:

> 'This testing should also help to substantiate or not the following statements:
>
> - Some banks avoided the bailout because they have taken management actions to move their market value of assets above their book value of liabilities
> - The banks that failed to move back above the 'distress point' had eventually to be bailed out because shrewd investors stopped funding these banks
> - The loss of (consumers) wealth is the direct cause of economic stagnation; hence the HARM metrics are predictive of future GDP growth
>
> Additionally, the forward-looking characteristic should be verified. In particular, how much time in advance is the signal from the HARM framework providing a real indication of deterioration and/or distress.'

299. On our reading of these recommendations, which go to the heart of whether the model could do what the Claimant claimed it could, the RD report appears to be inconclusive. In particular, RD had not reached a positive conclusion that Harm was an early warning indicator of the failure of banks.

300. Nonetheless, the Claimant told the Tribunal that he regarded the report as 'positive for me' and blamed the fact that it was not more positive on the fact that RD had limited information, i.e. the academic paper. It had been his choice to rely on that alone: Ms Frohn had given him a month to assemble his documentation.

301. Ms Frohn accepted that around this time she told the Claimant that she thought one of the weaknesses of his model was his use of Modigliani-Miller. Before coming to the FCA, she had been working in Washington and was involved in a committee discussing the future of Basel III models. Modigliani-Miller had been used by an academic to seek to strengthen the models but the Basel Committee rejected its use. The Claimant also alleges that Ms Frohn told him that he was 'out of date academically and in risk terms'; the Claimant could not identify when this was said to have occurred; Ms Frohn denied saying it, and we accept her evidence.

302. Ms Frohn reconfirmed that the Harm metrics would not be used by the FCA in the future, and the Claimant should not continue to work on it during his employment. The Claimant was not happy with the outcome and tried again, unsuccessfully, to persuade the Respondent to maintain the data subscription. He then appeared to accept the decision and began to do other work.

303. In February 2016, the Claimant received a 2 rating in the pay review round.

304. As the Claimant confirmed in cross-examination, he had not been working on the Harm metrics in 2015. In March 2016 the data subscription needed for the work expired. He did no further significant work on the Harm metrics after this. Much of his work in 2016/2017 was on P2P lending, which we now turn to in more detail.

The Claimant's work on P2P lending [*PID 18*]

305. Crowdfunding is an alternative method of financing, which allows individuals and organisations to raise money through online platforms, cutting out financial institutions. Some crowdfunding is regulated, some unregulated and some exempt. The FCA regulates loan-based crowdfunding platforms, known as peer-to-peer ('P2P'), through which people lend money to individuals or businesses in search of financial return by way of interest.

306. Operating a P2P platform became a regulated activity on 1 April 2014. Firms initially applied for interim permission, pending full authorisation within two years. Their business models were rapidly evolving, with the potential to give rise to consumer detriment. As the Claimant put it in cross-examination: there were different ideas within the FCA about what they would (or should) do.

307. On 18 March 2016, the Claimant sent what he agreed in cross-examination was a 'thought piece' to Ms Frohn, in which he identified concerns about P2P, which he regarded as particularly timely, given that full authorisation of many firms was

imminent. He relies on this, and other documents, as protected disclosures in relation to P2P (*PID 18*). In the piece he asked the question:

> 'Many of the rules we apply elsewhere are designed to make the system safe for consumers and market integrity through the economic cycle or prevent crises. When a low point in the cycle or crisis hits P2P, will this lack of tools and understanding make the problem unmanageable and very detrimental?
>
> […]
>
> We suggest there are policy and data issues that we need to address to understand what is going on. The main issue is to find out whether P2P should have the same objectives and risk levels we apply to other sectors from a consumer and market standpoint. P2P might be a better way forward (for consumers and markets) so deserve a lighter touch, but if so we should be clear as to why. And if not, we should also be clear and raise the policy and data bar or change the structure of the market.'

308. This paper prompted Ms Frohn to initiate a detailed analysis of the sector. The Claimant accepted in cross-examination that substantial efforts were made by many areas within the FCA to tackle the questions which the Claimant (and others) raised. It was agreed that the Claimant should work with the P2P authorisations team, led by Ms Natasha Pesaro, and he played a prominent role in that work. In December 2016 additional rules were proposed in four areas; in June 2017, ExCo agreed further proposals to be taken forward; a final policy statement was published in October 2018. The Claimant's own evidence was that many of the ideas in that final statement, especially those relating to risk management, resulted directly from his contribution. He described himself in oral evidence as 'a fundamental architect' of it.

309. Mr Woolard was involved in this work on the policy side but does not recall having any discussions with the Claimant about P2P.

<u>The discussion with/alleged disclosure to Mr Morago in April 2017 [*PID 19*]; the alleged 'massive row' with Mr Morago [*D13*]</u>

310. The Claimant alleged in the schedule of issues that he made a protected disclosure to Mr Morago about P2P in April 2017: 'that P2P borrowers were considerably overcharged and lenders considerably overpaid in breach of the legal obligation on the FCA to ensure fair pricing and/or fair competition' (*PID 19*).

311. No date is given for the alleged disclosure, other than that it was in April 2017. The Claimant then alleged in the schedule that, in part because of this and earlier disclosures about P2P, Mr Morago had a 'massive row' with him, also in April 2017. In his witness statement (in the section starting at paragraph 1349) the Claimant identified the disclosure and the detriment as having happened on the same occasion. Mr Morago's evidence was that he never had a massive row with anyone at the FCA, let alone with the Claimant.

312. The context is as follows. In an email dated 21 April 2017, Mr Morago had written to the Claimant and Ms Frohn about the fact that, although the Claimant was a member of Ms Julia Tennant's team in the Risk department, he had been

spending most of his time with the authorisations team working on P2P. In his view, either the Claimant should be formally seconded to authorisations (so that Ms Tennant could recruit someone and bring her team up to strength) or he should return to Ms Tennant's team and do the work for her which was currently not being done. Ms Frohn acknowledged these concerns and said she would support whatever decision he and Ms Tennant made, although her view was that the Claimant's input into the P2P work should by this point be minimal.

313. Soon afterwards, Mr Morago raised this with the Claimant in the office. He asked him to return to the Risk department and work in Ms Tennant's team. The Claimant became agitated and angry. Indeed, according to his own letter of 17 January 2019: 'I had as a result to blow the whistle (and my top in the open plan office) to Jose Morago in April 2017'.

314. He told Mr Morago that he (Mr Morago) needed to sort out what he called 'the legacy issues' from the FSA period. He told Mr Morago that his work on the Harm metrics had never been acknowledged, nor had he been properly recompensed for it.

315. Mr Morago, by contrast, remained calm; there was no 'massive row'. We note that, in his witness statement, the Claimant described Mr Morago's attitude as one of indifference. We find that this was because Mr Morago knew nothing about these 'legacy issues': he had never worked for the FSA and had joined the FCA in October 2016, long after the Claimant had stopped working on the Harm metrics. Mr Morago suggested that the Claimant should move on and focus on the future.

316. At this point the Claimant had not worked on Harm for over two years; he appeared to have moved on. We regard it as significant that the Claimant resurrected historic grievances about the Harm metrics when asked to do something he did not want to do. This would not be the last time this happened.

<u>The alleged failure between February 2017 and October 2018 to conduct a 'rolled-up' appraisal of the Claimant's 'de facto role' [D15]; the alleged 'sham' appraisal in November 2017 [*D14*]</u>

317. The Claimant alleged that, between February 2017 and October 2018, Mr Morago, together with Ms Jarvis, Mr Bolton and Mr Hague of HR failed to conduct 'an appropriate and proper rolled up and annual appraisal of the Claimant's work' (*D15*). He also alleges that Ms Tennant and Mr Morago conducted a 'sham appraisal' in November 2017 (*D14*).

318. The Claimant's appraisal was being managed in February 2017 by Ms Tracy Tibos in the Risk Department. On 2 February 2017 she sought input from Ms Pesaro in relation to the appraisal; Ms Pesaro provided her feedback on 10 February 2017. However, although Ms Tibos had clearly initiated the process, there is no finalised appraisal for that year.

319. The Claimant's performance objectives for 2018, which had been agreed between Ms Tennant and Mr Morago, were sent to him by email on 6 October 2017. Ms Tennant conducted an interim review discussion with him on 13 October 2017. According to an email which she sent to Mr Morago the next day, the discussion was not a success. Ms Tennant set out to balance the needs of

the team within which the Claimant worked against what she described as the 'more explorative work he seeks'. The Claimant was not happy about this:

> 'Walker wants to position his technical specialism in the same space as a Senior Adviser and as such wants to focus solely on the big picture interesting issues such as the sector review proposition, diagnostics and developing a framework for the approach documents. None of which I feel we have been given the mandate to focus on – in fact contrary to this Barbara has asked us not to engage at this level particularly in relation to the sector views.'

320. Ms Tennant prepared the appraisal documentation, which she sent to Mr Morago. They agreed the objectives on which the Claimant should focus. Ms Tennant met with the Claimant again on 10 November 2017, but the Claimant objected to carrying out the work Ms Tennant was asking him to do (with Mr Morago's support).

321. Ms Tennant wrote to the Claimant on 16 February 2018 with some notes to add to the people hub for his end of year review, inviting his comments. In that document she specifically referred to the work that the Claimant had done 'with the Senior Advisers and Director to support a number of objectives outside of the team's direct remit'. She also referred to the work that the Claimant had done within the team and made some observations about how he might improve his manner of communication with colleagues in the team.

<u>The restructure exercise; the alleged demotion of the Claimant and the alleged failure to offer the Claimant a suitable role [*D16*]</u>

322. In 2017, Ms Frohn formulated a plan to restructure the Division and the composition of teams. Its purposes included simplifying the Division operations, clarifying reporting lines and redefining job roles and responsibilities according to business needs. The division had historically been two teams, which had been brought together. Ms Frohn considered that the current structure did not fit the mission statement of the Division; it did not have the level of seniority needed as a second line of defence to challenge the first line of defence; and some job titles did not align with the roles being carried out. There were a number of Managers, including the Claimant, who had no line management responsibility.

323. The proposal was for the Division, which consisted of two Heads of Department, two Senior Managers and nine Managers to become a division of two Heads of Department, four Senior Managers, two Managers and two Technical Specialists. The Claimant and the other eight Managers were placed at risk of redundancy.

324. Some employees had to reapply for their jobs, or for alternative roles; the Claimant did not.

325. On 15 November 2017, the Claimant was told that he was at risk of redundancy. He was offered the role of Technical Specialist. The Claimant characterises this as a demotion. We are satisfied that it was not. The Technical Specialist role was on the same level as the Manager role in terms of grade, pay and benefits. Ms Frohn considered that this more accurately reflected the Claimant's responsibilities, as well as his lack of responsibility for direct reports. The

Claimant had had no one reporting to him during the whole of his time at the FCA. One of the Claimant's colleagues (at that time seconded to HMT) was in precisely the same position as the Claimant and accepted the Technical Specialist role.

326. The Claimant regarded the Technical Specialist role as one which might have been appropriate at the beginning of his career but did not now reflect his professional qualifications, in part because it did not come with what he described as 'the 70% unassigned time' he had been permitted to develop policy. In oral evidence the Claimant referred, as an example, to the fact that, although based in Ms Tennant's Department, he had recently been working mainly on P2P with another team.

327. We find that the Claimant did not have a contractual term, entitling him to '70% unassigned time', that is to say time which he could spend doing whatever work interested him. No submission was made that such a term existed. The Claimant worked with other teams or in other departments, either because he was formally seconded there (e.g. the period in the CED) or because he was released to work elsewhere by management (e.g. the P2P work). The arrangement was always by agreement with management. Even during his time with Mr Nelson, when he had sometimes been left to work on his own, it was always with Mr Nelson's consent.

328. We accept Ms Frohn's evidence that she had no intention to make the Claimant redundant: if he had accepted the proposal, he would have stayed within the Division and transitioned into the Technical Specialist role; his name appeared on the post-restructure organisational chart.

329. On 16 November 2017, the proposed restructure was announced to employees in a detailed presentation. There was an initial six-week consultation process for the affected Managers, which ran from 22 November 2017 to 2 January 2018. HR support was offered to directly affected individuals.

330. Mr Morago wrote to the Claimant on 22 November 2017, explaining that the consultation period could be increased at the FCA's discretion. The Claimant would be placed on the FCA's redeployment register and would receive all internal vacancies at the same level as his current role before they were advertised; he would automatically be interviewed for any role he wished to apply for within Risk.

331. Ms Frohn held several meetings with the Claimant, together with Mr Morago. They explained that the Claimant could either accept his current role with the title change, or apply for other roles, if he did not wish to be at risk of being made redundant. He was provided with all job vacancies for more senior roles and was also free to apply for them.

332. In our judgment, this would have been a practical step towards achieving the level of seniority which the Claimant considered he merited. He took a different view: 'why would I move into a role where I am crystallising the detriments to me?' By this, we understand him to be referring to his belief that he should already be occupying a role at the very top of the organisation - and to accept anything less (even if more senior than his current role) would be to acquiesce

in an ongoing failure to recognise his work. We explore these views further in our conclusions below (para 846 onwards).

333. The Claimant made no application for any other role.

Ms Tennant's departure and the alleged failure to offer the Claimant her role [*D16*]

334. Ms Tennant left the organisation in February 2018. Her role was advertised and individuals affected by the restructuring could apply for it. The Claimant did not apply and was not appointed (*D16*). Mr Ashley D'Sa was appointed in due course. Mr Morago announced this on 16 April 2018. The Claimant responded the next day in an email to Mr Morago and Ms Frohn:

> 'I am a manager. I will not report to another manager or convert to a tech specialist or work without my professional skill set for the reasons I have already outlined to you.'

The alleged decision between December 2017 and October 2018 not to acknowledge the Claimant's accomplishments, to appraise him properly and to offer him suitable alternative employment [*D18*]

335. The Claimant explained in oral evidence that, by this point, he had realised that he would almost certainly be leaving the FCA and wanted to leave with 'an untarnished reputation. I was saying fine, you don't want me; fine, undetriment me.'

336. On 1 December 2017, the Claimant sent a long email to Ms Jarvis and Mr Morago (*PID 20*). Among other things, he asked why, given his previous experience in industry, he was not automatically appointed as a Senior Manager in the new structure without going through a promotion process - albeit that he regarded even that role as acceptable only if it was expanded to suit his qualifications and experience.

337. Towards the end of the email, the Claimant wrote:

> 'To be fair, I request and believe the FCA needs to remove the history of detriments and to make me redundant or redeploy [me] from the *de facto* role I have had, not the detrimental role I am in. So I ask the FCA once again to acknowledge my actual work, substantial and prescient contribution in the Harm metrics. I ask to be put […] Into the position (role and my market salary) I would be in had the detriments not occurred. Then from that non-detrimental position you can decide that that unique contribution and role are not needed or very valuable.'

338. We note that he made it clear at the beginning of the letter that he expected this situation to be remedied by the time he returned from leave in February 2018 and asked for an extension of six weeks to the consultation period so that the Respondent could achieve this. To be clear: the Claimant did not ask for these concerns to be dealt with under the Respondent's grievance process. He confirmed in oral evidence that he never raised a grievance, because he regarded it as inappropriate to him.

339. We explore in our conclusions below what the Claimant meant by the idiosyncratic expressions he used in his email ('*de facto* role…detrimental role'

etc.) (para 846 onwards). In brief, what he was asking requiring the Respondent to do was to look back over his employment, accept that he had been right about the Harm metrics all along, promote him to a very senior role, increase his pay accordingly and then recommence the redundancy consultation process, at which point it would be obliged to acknowledge that he was indispensable.

340. We find that the Claimant knew that what he was proposing could not happen in practice. We accept Mr Woolard's evidence that the Respondent did not operate a system of automatic promotion. When roles became available, internal and external candidates could apply for them. If an individual wanted to progress to the next level, they had to apply. We accept Ms Shepherd's submission that this email was tactical. In his witness statement (paragraph 1364), the Claimant wrote this:

> 'After the "Reorganisation" of the Risk Department was announced I consulted PIDA. At the time I considered that it might be possible to make a whistleblower "*redundant*" but that it would take a great deal of care. For example, the job of everyone on the compliance side of Barbara's Risk and Compliance Oversight Division was to spot failures to comply with legal obligations or at least internal policies. Some may have felt they were treated detrimentally for raising inconvenient matters. So the selection process and outcomes would have to be super clean, transparent and fair.'

341. The individual consultation period was initially extended to 16 February 2018. It was subsequently extended to 29 March 2018, and later until October 2018. The Claimant confirmed in cross-examination that HR sent him details of jobs he might want to apply for. He indicated that they were too junior. HR sent details of more senior jobs; he rejected them because he regarded them as unsuitable.

342. Ms Jarvis responded by an email dated 16 March 2018, in which she wrote (among other things):

> 'If you felt at any stage throughout your employment with the FCA that you are not being treated fairly or consistently in terms of your pay, it was open to you to raise this at the relevant time. I note that you have been encouraged in the past to raise such issues with HR as part of a formal grievance, but have declined to do so. As you are aware, the FCA has a Grievance Procedure in place for anyone who wishes to raise a grievance. In the meantime, this consultation process is not the right forum in which to have this matter investigated, and your request for an adjustment to your salary is declined on this basis.
>
> The classification of Technical Specialist was developed within the FCA to provide and satisfying career path for employees who seek further challenges within the organisation but do not desire a managerial role. A Technical Specialist is considered to be a highly qualified and specialised role, with pay and status being equivalent to that of a Manager […]
>
> […] As communicated to you in our discussion regarding the proposed changes, we do not propose to alter any aspect of your employment other than the position title, and expect that your work will remain largely the same as a result of the restructure. To remind you, the formal consultation

> was extended until 29 March and we hope to reach a conclusion by this date.
>
> A Senior Manager role, on the other hand, is a role that is above your current grade and pay level and would therefore be considered a promotion. As with any promotion opportunity, you are welcome to apply for Senior Manager roles and we would give due consideration to your application. However, we do not agree that you are automatically qualified for such a role and that you should be exempt from the role application process. I would encourage you to apply for any roles that you are interested in, in order to maximise/broaden your redeployment prospects given that you have signalled that you are not interested in the Technical Specialist role.'

343. In an email of 19 March 2018 to Ms Jarvis, the Claimant rejected Ms Jarvis's explanation and stated: 'I do not agree to downgrade my skills or career to fit the roles you have proposed'. He required the FCA to create a bespoke role for him:

> 'I think rather the situation is that the FCA needs to make a strategic decision to use such skills and then start to design itself around such key work streams. I am uniquely qualified to help it understand how this is critical to the success of the Mission and how to do so at low risk.'

The conversation with Ms Frohn on 15 December 2017 [*PID 21, D12 (Part 2), D17*]

344. The Claimant and Ms Frohn met for coffee on 15 December 2017. He alleges that he made a further protected disclosure (*PID 21*) and that he was subjected to detriments (*D17* and part of *D12*) on this occasion.

345. In relation to *D17*, the Claimant alleges that Ms Frohn told him that the CEO and Chairman caused her to eliminate his role in an effort to stop him from blowing the whistle, that they would never acknowledge the Claimant's actual work and would ruin him if he persisted in asking for that. Ms Frohn categorically denied these allegations.

346. The Claimant gave a different account in his letter of 18 January 2019 to Mr Mark Carney (for the context of which, see para 409 onwards):

> 'Two weeks later [i.e. two weeks after 1 December 2017, referred to in the previous paragraph] Barbara made it clear that Chris Woolard, Andrew Bailey and John Griffith Jones were *preventing her from offering me a suitable role*. She also made it clear that I was in a career limiting situation if I continued to speak up about my prior work which they were both familiar with. *I took that to mean* they wanted me out. It was a constructive dismissal' [*emphasis added*].

347. The differences are plain: in this account there is no reference to senior management causing Ms Frohn to 'eliminate' the Claimant's role; that senior management wanted the Claimant out of the organisation was an inference he drew, rather than something Ms Frohn said; there is no reference to them never acknowledging the Claimant's work; and the reference to 'ruining' the Claimant is replaced by the more anodyne 'career limiting'.

348. The Claimant also made his own note of this meeting. It records things which Ms Frohn is alleged to have said, which are not part of the pleaded allegation (including telling him that he was a genius).

349. We find it implausible that Ms Frohn would have told the Claimant that his work on the Harm metrics was never going to be recognised as the ground-breaking achievement which she considered it to be, because she did not consider it to be ground-breaking.

350. We find it improbable that she told him that 'they' would ruin him if he persisted in asking for that acknowledgement for two reasons: firstly, the Claimant had been asking for acknowledgement of his Harm metrics for many years, and no steps had been taken to 'ruin' him; secondly, having heard evidence from, and observed, Ms Frohn, such melodramatic language struck us as out of character.

351. As for the allegation that Ms Frohn told the Claimant that the CEO (Mr Bailey) and Chair (Mr Griffiths-Jones) of the FCA 'caused her to eliminate his role in an effort to stop [him] from blowing the whistle', we find that Ms Frohn did not say this. We accept her evidence that it was she, not they, who took the detailed decisions as to the shape of the proposed structure. There is no evidence that the Claimant's name came up in the discussions she had with Mr Bailey. The Claimant's note records her saying that Mr Bailey had asked her who was affected by the restructuring, which is more consistent with a lack of prior knowledge of the impact on individuals than with a targeting of an individual.

352. If Ms Frohn had made such an extraordinary statement, we have no doubt that the Claimant would have recorded it in his note. We found his explanation for not doing so, frankly, absurd. He said that, if he recorded fully what had been said at the meeting in this email (which he forwarded to his home address), it would have triggered his immediate dismissal. He stated that his communications were being monitored because at this point the Respondent was 'electronically tracking people with sensors under the desk'. It emerged that this was a reference to the fact that the Respondent was operating a hotdesking system in the office and there were movement sensors on desks to monitor how often they were used and by whom. The Claimant did not explain how those sensors could intercept his emails. Of course, if this was a genuine worry for him, he could have handwritten a note and taken it home in his briefcase (or written it down when he got home).

353. In the Tribunal's view, the implausibility of this evidence damaged the Claimant's credibility more generally in relation to his account of this conversation.

354. To summarise: the decision as to the Claimant's role was Ms Frohn's, not Mr Bailey's or Mr Griffiths-Jones's; that decision was not 'to eliminate the Claimant's role', it was to reduce the number of Manager roles overall, which included, but was not limited to, the Claimant's role; although he was affected by the exercise, he was not the focus of it.

<u>The Claimant's email of 24 February 2018 [*PID 22*]</u>

355. On 24 February 2018, the Claimant wrote to Mr Bailey and Ms Frohn, referring to the FSA/FCA's non-use of the Harm metrics and the failure to acknowledge his accomplishments. The email began: 'For the last 11 years there has been a serious employment and public value issue'. In it he wrote (among other things):

> 'I should have substantial internal, public and academic credit for its discovery and implementation at the right time and in the right location to make a difference.
>
> […]
>
> There are specific reasons for doing this now. The first is that the FSA/FCA has failed to acknowledge and appraise this accomplishment, doing so is necessary to make proper of [*sic*] this discovery. The second is that the current reorganisation of the Risk Division puts me at risk of redundancy, so we both need this appraisal while I am still employed in order to treat me fairly in the reorganisation, make me redundant, or find the right role helping it to fulfil the Mission using the Harm framework. The third is that I only intend to work a few more years in finance so there is not much time to pass on this knowledge. I have rare skills and experience that should be of great value to the FCA, other regulators, and especially to the financial economy, consumers and taxpayers.'

356. He went on:

> 'As a result and in any event as my right as an employee, to get to the core issue I expect the FCA to formally and publicly validate this factual description'.

357. There is then a large block of text in italics, setting out the history of the Harm metrics, its successes, the alleged failure of the FSA/FCA to heed its warnings and the purported inability of any of the independent reviewers to find faults in it. The italicised text ends:

> 'However informally I have been told by [Lyndon Nelson] that I deserved a Nobel Prize for this work and by [Barbara Frohn] that my problem was that no one at the FCA understood my work because I was a genius.'

358. The Claimant then informed Mr Bailey and Ms Frohn that he would be away until 9 March 2018,

> 'but I hope upon my return you can confirm the factual accuracy, intellectual and public value of the foregoing statement as well as your commitment to fixing this fairly and publicly.'

359. The Claimant relies on this email as a public interest disclosure (*PID 22*). He accepted that his intention, in part, in sending this email was to achieve recognition for his work. He envisaged that the FCA would agree to provide this statement if they were approached for a reference, and this would help him with the fact that he would be leaving the organisation with 'a tainted CV'. in addition to being a draft agreed reference, he explained it would also say: 'I warned them about this and they took no action'. Asked if it was also a draft admission of liability, the Claimant replied that he was 'looking for something like the Turner report or the RBS report: we knew this and did not take action; we admit we made a mistake'.

360. There was no possibility that the FCA would agree to make this statement, given that no one within the organisation shared the Claimant's view of the Harm

metrics. It is difficult to know whether the Claimant was being naïve or disingenuous in asking for it.

361. Ms Jarvis sent the Claimant an email on 16 March 2018 in response to some points raised in his email.

362. On 19 March 2018, the Claimant wrote to Ms Jarvis, stating again that none of the proposed alternative roles were suitable and that the Respondent should create a bespoke role for him. In the later meeting on 29 August 2018, the Claimant confirmed again to Ms Frohn that 'he accepted that there was not an existing role available for him'.

The alleged failure to inform Mr Randell upon his arrival as Chair of the Claimant's disclosures and detriments [*D22*]; the Claimant's email of 22 April 2018 [*PID 23*] and the initiation of the Internal Audit report

363. On 1 April 2018, Mr Charles Randell succeeded Mr Griffiths-Jones as non-executive Chair of the Respondent. The Claimant alleges that Mr Bailey, Mr Woolard, Ms Frohn and Mr Andrews (among others) deliberately failed to recognise his work by not informing Mr Randell on his arrival about his protected disclosures and their collective failure to address them (*D22*).

364. It is right that no one informed Mr Randell of these matters on his arrival. The Claimant did so in an email, dated 22 April 2018, to Mr Randell, Mr Bailey and Ms Frohn (*PID 23*). The email began:

> 'on 24 February, I wrote to EXCO and the Board (copied below) to describe the significant market failure revealed by the Harm metrics that the FSA/FCA has avoided dealing with almost 12 years. Now I write with recommended solutions.'

365. Before receiving this email, Mr Randell was not aware of the Claimant; he did not meet the Claimant before these proceedings. Mr Randell decided that the Claimant's concerns warranted review by the Respondent's Internal Audit department. He emailed the Claimant on 9 May 2018 to tell him that this was how he was going to proceed.

366. The review was a joint process between Internal Audit and Deloittes. It was led by Mr Jonathan Roffey (Audit and Risk Advisory Deloitte LLP). Between 6 and 20 June 2018 interviews were conducted with six people, including Ms Frohn and Mr Woolard.

367. On 2 July 2018, Mr Roffey gave Mr Randell an update. On 4 July 2018, Mr Randell met with Ms Nadine Hughes (Assistant Director, Deloitte Forensic), who told him that initial enquiries had revealed that many of the issues raised by the Claimant had been investigated before, and the Respondent had already commissioned external advice to validate the Harm metrics. Ms Hughes sent a copy of the Risk Dynamics report to Mr Randell.

368. Internal Audit prepared a memorandum on 30 July 2018, giving its view that there was no requirement to initiate a formal Internal Audit review. Notwithstanding this, Mr Randell decided, partly in response to persuasion by Ms Frohn at a meeting in mid-August 2018, that the process should continue. She thought that Internal Audit should complete a full review of the allegations

made by the Claimant, particularly as his more recent correspondence (including the April 2018 email) made allegations against the FCA of concealment. Mr Randell deferred to that view.

The draft Insight Article [*PID 24*]

369. Meanwhile the Claimant put forward an idea for an insight article in July 2018 about the P2P market, titled: 'Modern Finance is the ideal tool for Consumer Protection, Illustrated by Analysis of Harm in P2P.' He relies on this as a public interest disclosure (*PID 24*).

The meeting on 29 August 2018 [*D19 and D20*]

370. On 29 August 2018, a meeting took place involving the Claimant, Ms Frohn and Mr Bolton of HR. The Claimant alleges that at this meeting, Ms Frohn wrongly described the issues the Claimant wanted to resolve as a grievance, rather than as whistleblowing (*D19*). He also alleges that the Respondent failed to investigate and resolve his grievance in accordance with the ACAS Code (*D20*).

371. Mr Bolton's notes contain the following passage:

> 'WS said "I am a whistleblower and I have always been so". (He repeated this a couple of times)
>
> BF said so what is the subject of your complaint, is it your model and its non-usage?
>
> WS confirmed that it was.'

372. Mr Bolton did not substitute the word 'grievance' for 'whistleblower'; he recorded what the Claimant said. The Claimant accepted in cross-examination that he was told at this meeting that if he wanted to make a complaint about his personal situation, such as the failure properly to appraise him and to acknowledge his achievements with the Harm metrics, he should raise a formal grievance (to which the ACAS code would apply). He refused to do so because he was 'not going to allow the organisation to separate the issues'.

373. This was the first occasion on which the Claimant had explicitly described himself as a whistleblower during his employment with the FSA and the FCA. He explained that he took a deliberate decision not to do so or to use the Respondent's formal whistleblowing channel, which he described as 'inappropriate'.

The Claimant's involvement in the Internal Audit review

374. The Claimant was invited to an interview by Internal Audit on 2 October 2018, at which he was asked to provide documents relevant to the review. A copy of the notes of the interview were sent to him on 22 November 2018 for review. He replied the next day, saying that he had 'skimmed the first page or two' and they appeared to be in order. He said he would come back to them but did not do so; nor did he provide any documents. He told the Tribunal he did not feel safe doing so because he had no confidence in the process. We found that explanation unsatisfactory.

375. Internal Audit summarised the four main concerns raised by the Claimant as follows:

> 'The creation of and subsequent results of a financial model that the WB [whistleblower] had created (the Harm Model) were not responded to appropriately by the FCA;
>
> The FCA did not properly investigate allegations made by an external whistleblower. This was not raised in the emails to the FCA Chair but was raised in the meeting on 2 October 2018 with Internal Audit;
>
> The performance of the WB was not appropriately assessed throughout their employment; and
>
> The FCA does not have suitably skilled and knowledgeable individuals to regulate the financial services market effectively.'

376. On 14 December 2018, Internal Audit contacted the Claimant to ask for his assistance in reviewing the documents obtained during their physical document search, to help them identify relevant material. They asked for a follow-up meeting. In relation to his concerns about the external whistleblower, they asked for more information to identify the relevant whistleblower report. The Claimant replied later the same day asking for confirmation that his assistance was required.

377. On 20 December 2018, Internal Audit suggested a meeting on 4 January 2019 to review the physical documents, with the electronic files on the Claimant's laptops to be reviewed at a later point. They wanted to give him an opportunity to identify documents and emails which he thought pertinent to each of the concerns he had raised. The Claimant replied saying that the date was too early and the arrangements inadequate. He asked for details about their approach to the investigation.

378. On 21 December 2018, Internal Audit relied, agreeing to postpone the January meeting and asking him to propose alternative dates. They wrote:

> 'the Internal Audit team is investigating your concerns (insofar as they fall within the scope of the Whistleblowing Policy in the FCA Employee Handbook) with all due diligence and rigour, with a clear and unlimited scope, as we take all reported concerns seriously. To this end, as explained previously, we do require input from you regarding the documents and emails which you feel are pertinent to the issues of concern which we are investigating.'

379. The Claimant did not reply and had no further involvement in the process.

380. Internal Audit concluded that the third and fourth of the Claimant's concerns (above at para 375) did not meet the criteria of a 'reportable concern' and fell outside the scope of the whistleblowing policy. It confined its investigation to the first and second of his concerns: the FCA's failure properly to consider the Harm metrics and the treatment of the external whistleblower.

381. In its investigation Internal Audit held fact-finding meetings with relevant individuals, including Mr Woolard and Ms Frohn, a review of FCA policies and

procedures; a review of physical documentation obtained from the Claimant's storage cabinets and HR file; a review of electronic files stored on his laptops; and a targeted review of the emails of relevant individuals. Over 13,000 documents were manually reviewed.

The end of the consultation period

382. The redundancy consultation was not finalised until October 2018. The Claimant did not apply for any other roles, either within Risk or any other Division.

383. Some others in the division had to reapply for their roles: one was not successful and resigned before being made redundant; another was offered a more junior role; a third had been a Manager, but (like the Claimant) had no reports; he accepted the Technical Specialist role.

The conversation with Ms Frohn on 23 October 2018 [*D21*]

384. On the afternoon of 23 October 2018, the Claimant approached Ms Frohn. He had been invited to meeting the next day, at which he knew he would be dismissed. He was very agitated indeed.

385. The Claimant made a note of the encounter, as did Ms Frohn.

386. The Claimant described himself as 'firm and forthright', Ms Frohn says that he was 'angry and screaming'. The Claimant accepted in cross-examination that others would have been shocked and unsettled by the manner in which he approached a Director in an open office. Ms Frohn suggested they talk privately.

387. The Claimant alleges that Ms Frohn said during their subsequent discussion:

> 'everyone can see that the Harm metrics work [to predict the inability of firms to fund themselves in the market] but they will never admit to it'.

388. Ms Frohn strongly denied saying this. The Claimant accepted in cross-examination that the words in square brackets in the pleaded allegation above were not spoken by Ms Frohn, they were 'implicit'. We find that she did not say it (because she did not believe it).

389. In his own note of the discussion, the Claimant recorded Ms Frohn as saying:

> '"Everyone can see" that by comparing accounting and market data your Harm metrics can isolate loss of market funding for individual firms. I just don't agree, and you know I have never agreed with everything, that it can do as much as you say. For example predict a financial crisis
>
> […]
>
> You have always said you want this to be public and to have the recognition for your work, "they" are not going to give that to you.'

390. This note is significantly different from his pleaded allegation. We find that he sought to put words into Ms Frohn's mouth and, by doing so, misrepresented the conversation; his evidence about this conversation was unreliable.

The dismissal

391. On 24 October 2018, the final consultation meeting with the Claimant took place, with Ms Frohn and Mr Bolton in attendance. The Claimant asked to be allowed to record the meeting. The request was refused and the Claimant left before Ms Frohn was able to communicate the decision to him.

392. On 25 October 2018, Ms Frohn wrote to the Claimant, informing him that his employment was terminated by reason of redundancy. He was paid in lieu of notice. The Claimant referred to this as being 'summarily fired by courier', an obvious mischaracterisation. Ms Frohn told him that, if he wished to appeal the decision, he should submit his appeal to Mr William Hague (HR Director) by 1 November 2018. The Claimant was offered an enhanced redundancy payment, if he signed a settlement agreement, which was a standard practice, contained in the Respondent's employee handbook. The Claimant did not take up the offer.

POST-DISMISSAL: OCTOBER 2018 TO JULY 2020

The Claimant's further emails to Mr Randell in 2018/2019 [*PID 25*]

393. On 30 October 2018, the Claimant wrote to Mr Randell, the Treasury Select Committee and others, appealing his dismissal. He enclosed documents relating to the Harm metrics (*PID 25*). The email began:

> 'Unfortunately my whistleblowing over the last 10 years on the failures of the FSA to use the Harm metrics to nip the financial crisis in the Bard and afterwards prevent harm are not being taken seriously by the FSA [*sic*]. Indeed they have just fired me. In these documents I will (1) describe the failures at length, (2) appeal against my dismissal and (3) explain what the investigation needs to cover in my view.'

394. The Claimant chased Mr Randell for a response on 5 November 2018. Mr Randell's evidence was that this was the first time he saw the October email. On 7 November 2018, he wrote to the Claimant, telling him that he had asked Mr Hague to look into his appeal against dismissal.

395. On 26 November 2018, the Claimant wrote to Mr Randell and the Board, complaining that the proposed appeal process was misguided and unfair. Mr Randell forwarded the email to Mr Hague.

The appeal against dismissal [*D24*]

396. The Respondent's Redundancy Policy provided:

> 'If redundancy is confirmed you may appeal against selection for redundancy by using the following procedure. For the avoidance of doubt, as the individual consultation period is an opportunity for you and the FCA to explore alternatives to redundancy, appeals should not be lodged during this period.
>
> An appeal against selection for redundancy must be made in writing within five working days of receiving written confirmation of redundancy. The appeal should state the main reasons why you should not have been selected for redundancy.
>
> […]'

397. Ms Julia Hoggett was appointed to deal with the appeal against dismissal by Ms Amanda Jackson (the Respondent's former Employee Relations Manager).

398. The Claimant describes this as a 'sham appeal' (*D24*). He initially objected to Ms Hoggett's conducting it because he thought she was too junior and not sufficiently independent. In our judgment, Ms Hoggett was an appropriate person to deal with the appeal: she was Director of Market Oversight; she was not someone to whom the Claimant had previously made disclosures, or against whom he had made allegations; she had had limited contact with him previously; and she had had ample experience of dealing with difficult investigations and appeals, including in relation to more senior members of staff than the Claimant.

399. The Claimant was invited to attend an appeal hearing on 28 November 2018. It emerged that he was unavailable for much of the winter; the hearing was rescheduled for 31 January 2019. He declined to attend because he believed the process was 'a *pro forma* exercise, designed to create a paper trail'. Ms Hoggett had been clear that, if he did not attend, the appeal would be considered in his absence.

400. Ms Hoggett dismissed the appeal by letter dated 29 April 2019. She set out her decision in some detail over four pages. She summarised the grounds of appeal, noting that the Claimant's position was that the termination was because he had been blowing the whistle on industry malpractice, including by the FSA and FCA. She alluded to the fact that a separate investigation was being undertaken by Internal Audit. She wrote:

> 'Whilst I appreciate that you believe that the various matters are intertwined, my role has been to focus on considering whether or not there was a genuine redundancy situation within the Risk and Compliance Oversight Division and the impact of this on your Manager role.'

401. She set out her interactions with the Claimant and her decision to proceed with the appeal in his absence. She then described the process of organisational change initiated in November 2017 and the decision to introduce a new management structure for the Risk and Compliance Oversight division.

402. She made findings as to the consultation process, in particular the extensions given to the consultation period with the Claimant. She then set out her conclusion which was that there were genuine business reasons for the restructure and that it resulted in a redundancy situation, namely a reduced need for Managers. In her view, there was no evidence that the exercise was a sham, designed to target the Claimant. Consequently, she rejected the appeal.

403. The Claimant's principal criticism of Ms Hoggett's approach was that the central ground of his appeal was that the real reason he was dismissed was because he had made public interest disclosures.

404. Ms Hoggett accepted in cross-examination that she saw *PID 20, PID 22* and *PID 23*, which had been provided by HR in the zip file of documents for the appeal.

405. We accept Ms Hoggett's evidence that she was advised by Ms Jackson of HR that the Claimant's whistleblowing allegations were currently being investigated by Internal Audit, that her role was to focus on reviewing the restructuring

exercise and that the two processes were separate. Accordingly, she looked into the question of whether or not a reasonable restructuring decision had been made, whether there were grounds for redundancy and whether or not that process was followed appropriately in the Claimant's case. Only if she found that the process was flawed or illegitimate (she explained) would she have approached the head of Internal Audit to ask about its review.

406. Mr Kemp put to Ms Hoggett that the section of the Whistleblowing Policy, dealing with which procedure an employee should use, provided that an employee who believed, as the Claimant did, that he had been made redundant for blowing the whistle, should raise that issue in the context of an appeal against redundancy. Ms Hoggett agreed.

407. Ms Hoggett also accepted in response to questions from Mr Kemp that her function was to consider his grounds; that a fair process would require some explanation to be given as to why a particular ground of appeal was upheld or dismissed; and that this was a basic principle of natural justice. She accepted that her outcome letter did not address the Claimant's central ground.

408. Ms Hoggett also accepted that she reached her conclusions without speaking to Ms Frohn, who took the decision to dismiss. She considered that the position was clear from the contemporaneous documents, without the need for an interview.

The Claimant's emails to Mark Carney, Phillip Hammond and others [*PID 26*]

409. On 18 January 2019, the Claimant sent an email to the Governor of the Bank of England (Mr Mark Carney), the Chancellor of the Exchequer (Mr Philip Hammond), the Shadow Chancellor (Mr John McDonnell), the leader of the Liberal Democrats (Mr Vince Cable) and the leader of the SNP in Westminster (Mr Ian Blackford).

410. The covering email began:

> 'Regretfully I need to speak up about the serious regulatory failures which cause the financial crisis that now blight the UK, hobble the City and discolour even BREXIT. However these whistleblowing matters have been underway for over a decade and it is long overdue to fix them.
>
> You and they have had ample opportunities to take appropriate action in the Turner report, annual business reviews, regulatory change programs, organisational restructurings, RBS and HBOS reviews, Treasury Select Committee hearings, the Vickers' Independent Commission on Banking, the Basle regulatory review process and your day-to-day jobs.
>
> In particular, this reveals the failure of the FSA (and its successors including the Bank) to fulfil their duties under the Financial Services Act 2012 to investigate and report these matters to Treasury and the public. It is so serious that I request that you immediately establish a public enquiry and inform the public at large they have been seriously let down and misled.
>
> I write now because this is more important than BREXIT and needs to displace the BREXIT debate with a more important issue of taking back

> control of the economy, fixing the City and restoring accountability across the establishment. The failures involve your colleagues, predecessors and immediate reports across the FSA.'

411. In the attached document, which ran to some twenty pages, the Claimant (among other things) set out the history of the Harm metrics, the non-use of it by the FSA/FCA and the detriments to which he believed he had been subjected. He asked that the failures he described be investigated but asked that the recipients of the email recuse themselves from any such investigation because he regarded them, their offices and organisations as all 'culpable or conflicted', albeit later in the document he wrote that 'your knowledge, skill and powers are crucial to fixing these failures', as well as '[your] trust in my good faith and scientific accomplishments.'

412. In the final section, he identified the outcomes he was seeking, which included the following:

> 'Next, I ask that 12 years of significant career detriments and lack of advancement be fully compensated monetarily, and through retro-active promotion, training, responsibility and honours […]
>
> As to responsibility, a logical solution is to create a high-profile role for me where I can take a leading role getting the Harm metrics into use in the UK and internationally, especially at the Fed, IMF, EU and through Basle as well as in investigating, and reporting the failure.
>
> Since many of the protagonists have been honoured, and as I arguably deserve a Nobel prise [*sic*] or some equivalent, significant recognition in this manner would reverse this detriment.'

Proceedings in the Employment Tribunal

413. After an abortive attempt to issue proceedings in January 2019 (described below at para 917), the Claimant presented a valid ET1 on 6 March 2019. The various preliminary hearings in Tribunal which then followed are described above (at para 5 onwards).

The Internal Audit report; the alleged 'sham investigation and appeal' between March 2019 and 29 July 2020 [*D23, D-AM-2 and D25*]

414. The Internal Audit report was completed on 28 July 2020. It is a detailed document, running to 157 pages (including appendices). Its decision as to whether the creation of, and subsequent results of, the Harm model were not responded to appropriately by the FCA is supported by a detailed analysis of contemporaneous documents across 53 pages. It is a matter of record and we do not summarise it here.

415. We find that the Internal Audit review was not a sham; it was a thorough and independent report. It did not, as the Claimant alleges and Mr Kemp submits, deliberately fail to consider whether the FSA/FCA acted improperly in the way they responded to the Harm metrics; on, the contrary, the report worked methodically through the chronology of the Harm metrics. In our judgment, it reached conclusions which were open to it on the evidence.

416. The overall conclusion was as follows:

> 'Internal Audit finds there is no evidence to support the whistleblowing claim that the creation of and subsequent results of the Harm Model were not responded to appropriately by the FSA and/or FCA. Notwithstanding this, Internal Audit identified five areas for improvement, with recommendations […]'

417. The five recommendations were as follows.

418. The first was that the FCA should consider the development of an approach to the independent validation of models as early as possible. It found that:

> 'While there is no contractual requirement for the FCA to review models developed by staff […] if such an approach existed the FCA would not have spent time and resources on the number of reviews it commissioned. The FCA would also have been in a stronger position to demand that the WB [whistleblower] stop work on the model earlier. A defined approach would assist in ensuring that there is consistency in the validation of models. In this case, Internal Audit identified throughout its email review that an earlier validation of the model could have prevented questions from the WB about the use and validity of the Harm Model in both the RBS and HBOS reviews. The approach for model validation should set out the circumstances in which a model would be independently reviewed and the timing of such a review. Early validation may have i) provided clarity on the usefulness and application of the Harm Metrics in the supervisory process; and ii) given the WB earlier closure if the model was not going to be used by the FCA.'

419. The second recommendation was that the FCA should use neutral language when sending models for external validation to ensure that its wordings do not influence an external party's view of a model:

> 'Internal Audit identified that the scope of the external academic reviews described the WB's paper on the Harm Model as making "some bold and contentious claims" […]. Such wording could unduly influence a reviewer on the content of the academic paper they are reviewing.'

420. The third recommendation was that, where an employee's roles and responsibilities change, these changes should be documented in their HR file and/or recorded in PeopleHub (an FCA internal system):

> 'Internal Audit identified that the WB was instructed by the FCA's Chief Economist to cease work on the Harm Model and Harm Metrics in March 2015. Notwithstanding this, it appears that the WB continued to work on the Harm Model, as evidenced by the WB's request on 6 October 2015 to Azhar Rizvi (AR), Manager, Risk and Compliance Oversight Division and BF for £180,000 to renew the data feeds for the Harm Model. The WB's request was not approved by BF [Barbara Frohn]. It appears that the instruction issued by the Chief Economist [Peter Andrews] in March 2015 for the WB to stop working on the Harm Model was not communicated to the WB's line manager in the Risk and Compliance Oversight Division.'

421. The fourth recommendation was that the FCA should maintain and retain adequate documentary records of the outcomes and decisions relating to concerns raised by staff; further, that the FCA should ensure that those closely involved in reviewing staff issues are consulted and informed of the outcomes of any reviews in order to bring closure to matters being addressed. Internal Audit noted that there were significant gaps, in terms of record-keeping, in the Claimant's HR file.

422. The fifth recommendation was that, where line managers believed their direct reports may be considering making a whistleblowing disclosure, they should consult the Internal Audit Division to seek guidance on how to handle the matter.

423. As for the issue of the external whistleblower, Internal Audit concluded:

> 'The limited information provided by the WB in relation this matter suggested that the matter may fall within the scope of the Whistleblowing Policy. However, Internal Audit was not able to investigate this matter as requests made to the WB for more information to enable Internal Audit to investigate this matter were not actioned by the WB.'

424. Mr Randell wrote to the Claimant on 29 July 2020, summarising the report. The Claimant responded the next day:

> 'Having carefully considered your report I find that it leaves me with more questions than answers, not least because all aspects of your report seem to date from 2018, the key issues have been summarised in a way I do not recognise and the substance of the (alleged) disclosures does not appear to have been tackled. As a result, I kindly ask you to provide further details on the following issues and further clarification as to the actual investigation.'

425. There then followed three pages of questions. The letter concluded:

> 'I appreciate that you are at the tail end of this saga, that most of it predates you and many of the key issues are now the responsibility of the PRA and BoE, but you have fully inherited all of them, are now the most accountable person for resolving this entire saga and have all the tools and powers required to do so in the public interest as far back as December 2001. I have tried and continue to be as helpful as possible to little avail.'

We observe in passing that the last sentence was demonstrably untrue, given that the Claimant had withheld his cooperation from both the Internal Audit and appeal processes. He went on:

> 'Can you please provide your full and complete response quickly so that I can prepare for the forthcoming trial where all these lingering employment and ongoing whistleblowing issues are in play and complete clarity will be required well beforehand.'

426. In his reply to the Claimant, Mr Randell declined to engage in correspondence about matters which would be the subject of the final hearing in the ET. He confined himself to saying that he considered the scope of the Internal Audit investigation to be appropriate and the investigation robust and thorough. He

asked that any future correspondence be directed to the Respondent's solicitors (Eversheds Sutherland).

427. The Claimant wrote to the Board and to Mr Randell on several occasions in September 2020. Mr Randell continued to ask that the Claimant direct his correspondence to Eversheds.

THE PROTECTED DISCLOSURES

The law

The framework

428. In *London Borough of Harrow v Knight* [2003] IRLR 140, the EAT set out the requirements for a successful whistleblowing claim under section 47B of the Employment Rights Act 1996 ('ERA'):

428.1. The worker must have made a protected disclosure.

428.2. He must have suffered some identifiable detriment.

428.3. The employer, worker or agent must have subjected the worker to that detriment by some act, or deliberate failure to act.

428.4. The act or deliberate failure to act must have been done on the ground that the worker made a protected disclosure.

429. Section 43A ERA defines 'protected disclosure' as a 'qualifying disclosure made by a worker in accordance with any of sections 43C to 43H'.

430. The definition of 'qualifying disclosure', for the purposes of section 43A ERA, is contained within section 43B ERA (inserted by the Public Interest Disclosure Act 1998 and as amended by section 17 of the Enterprise & Regulatory Reform Act 2013).

431. The relevant elements of section 43B ERA are as follows:

> **43B 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—**
> **…**
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> **…**
> **(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.**

432. Section 43(L)3 ERA provides the following provision in respect of 'qualifying disclosure':

> **43L Other interpretative provisions.**
>
> **(1) In this Part—**
> **"qualifying disclosure" has the meaning given by section 43B;**
> **"the relevant failure", in relation to a qualifying disclosure, has the meaning given by section 43B(5).**

> **…**
> **(3) Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention.**

433. 'The person' means the employer or any of the other prescribed persons to whom qualifying disclosures can be made pursuant to sections 43C-43H ERA. Further, the concept of the 'employer' for the purposes of section 43C ERA is undefined. A wide conception must be given to it in accordance with the statutory purpose of the scheme (*BP Plc v Elstone* [2010] IRLR 556 per Langstaff J at [16]-[17]).

434. As noted by the EAT in *Williams v Michelle Brown AM* UKEAT/0044/19, a disclosure must satisfy five conditions in order to constitute a qualifying disclosure:

> **'it is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held. Unless all five conditions are satisfied, there will not be a qualifying disclosure' [9]-[10].**

Disclosure of information

435. The assessment as to whether there has been a disclosure of information in a particular case will be fact-sensitive (*Western Union Payment Services UK Ltd v Anastasiou* UKEAT/0135/13).

436. It is now well-established that the concept of 'information' used in section 43B(1) ERA is capable of covering statements which might also be characterised as allegations. In order for a statement or disclosure to be a qualifying disclosure, it has to have sufficient factual content such as is capable of tending to show one or more of the matters listed in [s.43B(1) ERA] (*Kilraine v London Borough of Wandsworth* [2018] IRLR 846 per Sales LJ at [30] and [35]). A recent application of the proposition of law in Kilraine can be found in *Lecerc v Amtac Certification Ltd* UKEAT/0244/19 at [26-31].

437. Whether each disclosure meets the sufficiency threshold will be a matter for evaluative judgment by the Tribunal in the light of all the facts of the case.

Aggregate disclosures

438. It is well-established that communications which when considered independently would not amount to qualifying disclosures, may when considered together be a qualifying disclosure for the purposes of section 43B ERA (*Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540, EAT, Slade J [22]).

439. Whether the aggregate of a number of disclosures qualifies as a qualifying disclosure for the purposes of section 43B ERA is a question of fact for the ET (*Norbrook and Simpson v Cantor Fitzgerald Europe* [2021] IRLR 238, CA [41]).

440. In *Norbrook*, the EAT directed that communications could be read together for the purposes of section 43B(1) ERA if earlier communications were 'embedded' in later communications. The EAT held that earlier communications were embedded in later communications on account of the shared subject matter. The Court of Appeal in *Simpson v Cantor Fitzgerald Europe* [2021] IRLR 238, at [43] endorsed the approach of the EAT in *Norbrook*.

Public interest

441. In respect of the pre-2013 disclosures, there is no requirement to establish a reasonable belief that the disclosure was in the public interest.

442. In respect of the Claimant post-2013 disclosures, to the extent that there were any qualifying disclosures, the Respondent accepts that the Claimant reasonably believed that his disclosures were in the public interest.

Breach of legal obligation

443. The scope of the term 'legal obligation' under section 43B(1)(b) ERA is broadly drawn and is capable of covering not only those obligations set down in statute and secondary legislation but also any obligation imposed under the common law, as well as contractual obligations and those deriving from administrative law (*Parkins v Sodexho Ltd* [2002] IRLR 109).

444. 'Legal obligation' does not cover a breach of guidance or best practice, or something that is considered merely morally wrong (*Eiger Securities LLP v Korshunova* [2017] ICR 561). The EAT in *Eiger* (at [47]) held that, save in obvious cases, identification of the nature of the legal obligation the Claimant believed to apply and how it was believed there had been (or more precisely, tended to show) a failure to comply, is 'a necessary precursor' to the assessment of whether the Claimant held a reasonable belief.

445. In *Blackbay Ventures Ltd (t/a Chemistree) v Gahir* [2014] ICR 747, the EAT stated 'save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation' [5]. The EAT in *Eiger* (at [46]) considered *Blackbay* and stated: "The identification of the obligation does not have to be detailed or precise…"

446. Further, section 43B(1)(b) ERA does not impose any rule that the disclosure of information must refer to a legal obligation or a statement of the relevant obligation in order to qualify for protection (see, *Twist DX Limited v Armes* UKEAT/0030/20/JOJ per Linden J at [95])

Reasonable belief of the worker

447. For a disclosure to be a qualifying disclosure, the worker must have a reasonable belief that the information disclosed tends to show one of the relevant failures (section 43B(1) ERA).

448. This involves the well-known two-stage test:

    448.1. Did the worker believe that the information disclosed tended to show one of the relevant failures?

448.2. Was the worker's belief, on the facts available to them, reasonable?[4]

449. When assessing the reasonableness of a worker's belief, a mixed objective and subjective test should be applied. The subjective element is that the worker must believe that the information disclosed tends to show one of the relevant failures and the objective element is that their belief must be reasonable (*Phoenix House Ltd v Stockman* [2017] ICR 84).

450. The reasonable belief test applies to all elements of the requirement of a belief in the information as tending to show a relevant failure. This includes whether or not, in the case of a breach of legal obligation, that obligation in fact existed at the relevant time (*Babula v Waltham Forest College* [2007] ICR 1026).

451. The subjective test for belief is a low threshold for establishing that the worker had a belief in the relevant matters. The belief does not have to be proved to be correct. In respect of the objective element, what is reasonable involves consideration of what a person in their position, with their knowledge would reasonably believe. (*International Petroleum Ltd v Osipov* UKEAT/0058/17/DA per Simler J (as she then was) at [26]).

452. It is not necessary for the information disclosed to be actually true. All that is required is that, in the reasonable belief of the worker, the disclosure of information 'tends to show' that there has been, is, or is likely to be a failure to comply with a legal obligation. Wall LJ in *Babula v Waltham Forest College* [2007] ICR 1026, observed:

> **'It is also, I think, significant that section 43B(1) uses the phrase "tends to show" not "shows". There is, in short, nothing in section 43B(1) which requires the whistle-blower to be right. At its highest in relation to section 43B(1)(a) he must have a reasonable belief that the information in his possession "tends to show" that a criminal offence has been committed: at its lowest he must have a reasonable belief that the information in his possession tends to show that a criminal offence is likely to be committed. The fact that he may be wrong is not relevant, provided his belief is reasonable, and the disclosure to his employer made in good faith (section 43C(1)(a))2'.**

453. Although a worker need not have explicitly stated that they reasonably believe that the disclosure tends to show a relevant failing, as the EAT noted in *Twist* at [104]:

> **'the extent to which it is apparent from the disclosure itself that the worker had the specified matters in mind is evidentially relevant to the question whether they had any of these matters in mind at the time of the disclosure, and whether any such belief about what that information tended to show was reasonable'.**

454. The EAT in *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4, held that reasonableness under section 43B(1) ERA involves applying an objective standard to the personal circumstances of the discloser. It added that those with professional or 'insider' knowledge of the business will be held to a different standard than laypersons in respect of what it is reasonable for them to believe.

[4] It was agreed in closing submissions that the relevant belief must assessed as at the time when the alleged disclosure was made

455. The identity and recipient of the disclosure may also be important. If the recipient is a person with insider or specialised status, the fact that they genuinely did not recognise what was disclosed as information tending to show a relevant failure may be evidentially significant. Insider status does not mean that the whistleblower's subjective view that the information tends to show a breach is sufficient; the test remains an objective one. See the EAT decision in *Simpson v Cantor Fitzgerald (Europe)* [2020] ICR 236 at [55]:

> **"Thus, the Claimant's "insider status" means that respect is to be afforded to his view that there is or is likely to be a breach of some regulatory obligation, but that status also means that the Claimant can be expected to apply his knowledge and expertise in properly considering all the material available to him before making the disclosure. The views of others in the organisation are not irrelevant for the purposes of determining whether the Claimant's belief is reasonable. If the evidence suggests that others with equivalent or greater knowledge and expertise of the industry would not regard the information as tending to show a breach, then that would be relevant in determining whether the Claimant's belief was reasonable. Insider status does not mean that the whistleblower's subjective view that the information tends to show a breach is sufficient; the test remains an objective one."**

456. In *Croydon Health Services NHS Trust v Beatt* [2017] ICR 1240, [80] Underhill LJ stated:

> **'…Parliament has enacted a careful and elaborate set of conditions governing whether a disclosure is to be treated as a protected disclosure. It seems to me inescapable that the intention was that the question whether those conditions were satisfied in a given case should be a matter for objective determination by a tribunal; yet if Ms McNeill were correct the only question that could ever arise (at least in a dismissal case) would be whether the employer believed that they were satisfied. Such a state of affairs would not only be very odd in itself but would be unacceptable in policy terms. It would enormously reduce the scope of the protection afforded by these provisions if liability under section 103A could only arise where the employer itself believed that the disclosures for which the Claimant was being dismissed were protected. In many or most cases the employer will not turn his mind to the question whether the disclosure is protected at all. Even where he does, most often he will be convinced, human nature being what it is, that one or more circumstances are present that mean that the disclosure is unprotected – for example, that it was unreasonable for the employee to believe that the relevant "section 43B matter" was engaged…I do not believe that Parliament can have intended employees to be unprotected in such cases. In my view it is clear that, where it is found that the reason (or principal reason) for a dismissal is that the employee has made a disclosure, the question whether that disclosure was protected falls to be determined objectively by the tribunal.'**

457. It is not sufficient for the worker to have a reasonable belief that what he is saying on its face tends to show a relevant failure. Reasonableness of the belief is to be tested having regard not only to what was set out in the disclosure, but also to the basis given for that information and any allegation made (*Darnton* at para 29; *Babula* at para 82).

458. Further consideration of what is required in order for a belief to be reasonable was set out by Sales LJ (as he then was) in *Kilraine* (at para 36):

> **'…If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.'**

459. The motivation of the worker making the disclosure is irrelevant to the question of whether the worker has a reasonable belief under section 43B(1) ERA (*Chesterton Global Ltd and another v Nurmohamed* [2017] IRLR 837, [30]; *Dobbie v Felton* [2021] IRLR 679, [27]; *Ibrahim v HCA International* [2020] IRLR 224, [17], [18], [21], and [26]).

460. The wording of section 43B(1) ERA makes plain that it is the reasonable belief of the worker that is the relevant determinative factor. Linden J in *Twist* stated at [84]:

> **'section 43B(1) [ERA] is concerned with what information was disclosed and what the worker reasonably believed that information tended to show. It is not concerned with what the employer thought the information tended to show, nor whether the employer understood that the worker believed that the information tended to show one of the specified matters, nor whether the employer appreciated that the worker's belief was reasonable'.**

461. Further, in *Twist* at [86 – 87] Linden J stated:

> **'That is not to say that the questions whether the worker mentions, for example, criminality or illegality or health and safety in their disclosure, or whether it is obvious that they had these matters in mind, are irrelevant. What they said, and whether the matter is obvious, are relevant evidential considerations in deciding what they believed and the reasonableness of what they believed…If the nature of the worker's concern is stated – if they say that they consider that the reported information shows criminality or a breach of legal obligation or a threat to health and safety – it will be harder to dispute that they held this belief and that the professed belief that the disclosure tended to show the specified matter was reasonable. The point is the same if what the worker thinks if obvious from what they say in the alleged disclosure. Conversely, if the link to the subject matters of any of section 43B(1)(a)-(f) is not stated or referred to, and is not obvious, an ET may see this as evidence pointing to the conclusion that the worker did not hold the beliefs which they claim, or that the information is not specific enough to be capable of qualifying. But what cannot be said is that unless it is stated that the information tends to show one or more of the specified matters, or it is obvious that the concern falls within section 43B(1)(a) – (f), the information is incapable of satisfying the requirements of that section because it cannot reasonably be thought by the worker that it tends to show any of the specified matters'.**

<u>Disclosure to employer or other responsible person</u>

462. A qualifying disclosure to an employer, pursuant to section 43C(1)(a) ERA, does not have to relate to the conduct of the employer. A qualifying disclosure about the conduct of a third party could be made to an employer under section 43C(1)(a) ERA (*Hibbins v Hesters Way Neighbourhood Project* [2009] IRLR 198).

463. Pursuant to section 43C(1)(b) ERA, a disclosure of information can be made to a responsible person outside of the employer's organisation if the worker believes that the relevant failure relates solely or mainly to the conduct of that person, or to another matter which that person has legal responsibility for.

464. However, although a worker may in fact make a qualifying disclosure to a responsible person, for the purposes of section 43 ERA, the worker may be treated as having made the disclosure to their employer. Section 43C(2) ERA provides that if a worker makes a qualifying disclosure to a responsible person in accordance with a procedure authorised by their employer, the disclosure is made to the employer.

465. In respect of pre-June 2013 disclosures, section 43C also requires that the qualifying disclosures are made in good faith.

Conclusions: Ss.73 and 77 FS 2012

466. In relation to some of the alleged protected disclosures, the breach of legal obligation identified by the Claimant was described as 'a failure [by the FCA] to investigate and report the history of regulatory failures as required by the 2012 Act'. He relied on ss.73 and 77 FS 2012.

467. S.73(1) and (3) FS 2012 provide:

> **Duty of FCA to investigate and report on possible regulatory failure**
>
> **(1) Subsection (3) applies where it appears to the FCA that—**
>
> **(a) events have occurred in relation to a regulated person or collective investment scheme which—**
>
> **(i) indicated a significant failure to secure an appropriate degree of protection for consumers,**
>
> **(ii) had or could have had a significant adverse effect on the integrity of the UK financial system, as defined by section 1D of FSMA 2000 (the integrity objective), or**
>
> **(iii) had or could have had a significant adverse effect on effective competition in the interests of consumers in the markets for the services described in paragraphs (a) and (b) of section 1E(1) of FSMA 2000 (the competition objective), and**
>
> **(b) those events might not have occurred, or the failure or adverse effect might have been reduced, but for a serious failure in—**
>
> **(i) the system established by FSMA 2000 for the regulation of authorised persons and** [F1**of the carrying on of regulated activities,**] **for the listing of securities** [F2**, for the regulation of collective investment schemes or for the regulation of recognised investment exchanges,**]**, so far as it relates to the functions of the FCA, or**
>
> **(ii) the operation of that system, so far as it relates to those functions.**
>
> **[…]**
>
> **(3) The FCA must carry out an investigation into the events and the circumstances surrounding them and report to the Treasury on the result of the investigation.**

468. Based on the materials before us, which did not include authorities or extracts from specialist textbooks, we concluded that the ordinary meaning of these provisions is that the duty imposed on the FCA by s.73 FS 2012 does not apply to failures which occurred before 1 April 2013 (when the FCA came into existence) because the 'serious failure' is expressly confined by s.73(1)(b)(i) and (ii) to matters which relate to 'the functions of the FCA'.

469. The position is different under s.77 FS 2012, which empowers the Treasury (where it considers it in the public interest) to require the FCA to undertake an investigation into specified 'relevant events'. The limiting phrase 'so far as it

relates to the functions of the FCA', which appears in s.73, is not repeated here. There is, however, a different limitation. S.77(4) provides that:

> **"Relevant events" do not include any events occurring before 1 December 2001 (but no such limitation applies to the reference in subsection (2) to surrounding circumstances).**

470. In short, it appears to us that the FCA is required by s.73 to investigate and report into failures which occurred after 1 April 2013, but only insofar as they relate to its functions. The Treasury has a power under s.77 to require the FCA to investigate and report into any relevant matter, provided it did not occur before 1 December 2001.

471. Ultimately, the issue is academic in this case because we have concluded that, right or wrong, this is what the Claimant believed the position to be at all material times. In his document, dated 10 March 2014 (para 190), he wrote:

> 'The FSA no longer exists. One part has been spun out, rebadged as the Prudential Risk Authority and merged with the Bank of England, while the rest has been rebadged as the Financial Conduct Authority. As a result, I believe the FCA is the legal continuation in most respects. That said, I do not believe the current FCA management can on its own make retrospective investigations or judgements about the FSA; for example I believe Parliament has had to authorise it and the PRA to investigate Co-op in lieu of the FSA.'

472. We found Mr Kemp's attempt to put a different interpretation on this statement unpersuasive. We are satisfied that the Claimant believed that the 2012 Act did not place a legal obligation on the FCA to investigate and report in respect of any allegations he made about alleged historic failures by the FSA.

Concessions

473. An unusual feature of this case was that, as Mr Kemp pointed out in his opening skeleton argument, the Claimant's job inevitably involved the making of public interest disclosures. Part of his role (and that of his colleagues) was to identify and report risk and regulatory failure. In oral evidence the Claimant observed that, throughout his work for the FCA, it was natural for him to see failures.

474. However, we reminded ourselves that, if we found (as we did on occasions) that in making certain disclosures, the Claimant was simply doing his job - and he has applied the label of whistleblowing only in retrospect - that would not undermine their protected status, provided all the limbs of the test were satisfied.

475. Further, if we find that the recipients of the disclosures did not regard the Claimant as blowing the whistle, but simply as doing his job, that too will not undermine the protected status of the disclosures. It may have an impact on causation: an employee who expressly calls out wrongdoing may be more likely to provoke a defensive or retaliatory response than one who is perceived as merely contributing to a discussion or debate.

476. Another unusual feature of this case was that the Respondent did not concede that the Claimant made protected disclosures at any point during his employment. Having heard all the evidence, we consider that was an unduly optimistic position. It did, however, make concessions as to two issues: insofar

as the Claimant satisfied the other requirements of s.43B(1)(b) ERA, it conceded that he reasonably believed that his disclosures were in the public interest; and, in respect of the pre-2013 disclosures, and to the extent that they were qualifying disclosures, it conceded that he made them in good faith.

477. Against that background, we also reminded ourselves that, even if we found that the Claimant was motivated in making some disclosures in part by private interests, such as advancing his career or protecting his position in a restructuring exercise, that will not defeat their status as protected disclosures, especially as the Respondent is not taking the public interest/bad faith points.

The alleged disclosures

478. It is not practical to set out in full all the passages in all the documents which the Claimant relies on as protected disclosures; firstly, not all of them were put to the Respondent's witnesses; secondly, they are a matter of record and can be referred to subsequently, if necessary; and thirdly, transcribing them would add dozens of pages to what is already an exceptionally long judgment. In each case, we refer to the page number in the bundle, to which we were taken by Counsel.

479. To be clear: we have taken a strict approach to the legal obligations identified by the Claimant in the final schedule. In the three years between the issue of the claim and the hearing the Claimant had repeatedly been urged, by the Tribunal and by the Respondent, to clarify the legal obligations he relied on; he had had access throughout to expert professional representation. The fact that he had not done so by the first day of the hearing was highly regrettable.

480. We were clear, and Mr Kemp agreed, that since the alleged protected disclosures, and the relevant legal obligations, had not been properly identified by the time the Respondent's witnesses prepared their statements, he would have to put the specific passages (and legal obligations) relied on by the Claimant to the relevant witness to give them an opportunity to comment.

481. Having assigned a day of the hearing for the Claimant finally to clarify the position with his Counsel, we considered it would be disproportionate - and unfair to the Respondent - to allow the Claimant further leeway to adjust his position, as he sought to do from time to time in the hearing. In any event, it would hardly be credible that he had in mind a breach of a particular legal obligation at the material time, which he had not articulated until part-way through his oral evidence.

PID-X-a: In an email to Thomas Huertas, Lyndon Nelson described the theoretical fault within the prudential/liquidity regime from first principles. "… Here is my reply to one of these dated 4 June 2007 entitled Further Considerations for Wrapping up 'Some Unfinished Business?' showing how I was working hard even before the Harm metrics came online at disclosing the hidden nature of the problem from a market and Modern Finance perspective which revealed and confirmed the deep faults in the regulatory approach described by Hector at the PRA conference…"

482. These alleged disclosures were contained in the Claimant's paper of 4 June 2007, in which he responded to Mr Huertas's paper of May 2007. The context is set out above at (paras 75-76).

483. In his paper, Mr Huertas wrote (about the Basel framework):

> 'Pillar I of the Framework/CRD introduces capital requirements for operational risk alongside requirements for credit and market risk. Pillar II requires banks to submit to supervisors a comprehensive statement (ICAAP)[5] of all the risks they assume, including risks (such as concentration risk or interest rate risk in the banking book) that are not covered under Pillar I, as well as an estimate of the capital the bank will require in order to remain solvent, should those risks crystallise.'

484. Mr Huertas went on:

> 'The question is by what standard should regulators evaluate ICAAP submissions? Should this correspond to a AA standard or to some lower credit rating? Where should regulators pitch the minimum?
>
> To answer, it is useful to remind ourselves of the purpose of minimum capital standards. Ultimately, minimum capital standards provide a buffer that allows the supervisory authorities to intervene whilst the bank is still solvent to force the bank to recapitalise and/or restructure itself so that depositors are protected from a loss of liquidity and wealth and market confidence is preserved. Where that standard should be pitched depends, among other things, on the impact that a bank failure would have (and is hence linked to the effectiveness of deposit guarantee schemes and the efficiency of winding up procedures) as well as on the willingness and ability of the supervisor to take early intervention (prompt corrective action) measures (see below).
>
> For banks incorporated in the UK, the FSA will take a failure probability of 0.5% (1 in 200) over the coming twelve months as the standard by which it will evaluate banks' ICAAP. This corresponds roughly to a BBB credit rating. Other Member States have not as yet been as explicit on the standard that they will use.'

485. We were taken to two passages in the Claimant's paper responding to Mr Huertas (at [512] and [513][6]). The highlighted section in [512] - i.e. the passage relied on as containing the public interest disclosure - is shown in italics below.

> 'The Financial Services Industry serves the purpose of recycling savings (globally) into homes, businesses, service and manufacturing investments. Unfortunately one must wonder why this ultimate economy-wide end purpose is not clearly stated in the Financial Services Act. *A strong argument can be made that it is explicit in the objective of "market confidence" for what other purpose is that confidence than in the reliable recycling of money to where it is ultimately needed? A case can also be made that this purpose is ingrained in the "Principles of Good Regulation." Thus, although it would be nice to have this purpose more clearly stated in the Act, little sense can be made of it without this interpretation. If this is the correct interpretation, it follows that the objective of regulation is to make this purpose as efficient, orderly and fair as possible.* In any event,

[5] Internal Capital Adequacy Assessment Process

[6] Pages in the main bundle are shown in square brackets; pages in the supplementary ('deleted') bundle are shown as [DB 512] etc.

the constructive ambiguity in the act would allow the FSA to interpret it in this way.'

486. The second alleged disclosure is at [513]:

> '*We assume that major regulators last forever. In contrast, and contrary to their own views, firms go bust, and before that, and more frequently, they become distressed and cause liquidity risk in the market. If 1 in 200 firms becomes insolvent, perhaps 1 in 40 becomes distressed. The harm distress causes is not born by shareholders, but by those who rely on banks for funds whether directly or through contagion. As a result, and in antithesis to Basle, the regulatory dividing line is not just between "going" and "gone" concerns, but rather and dynamically between "distressed" and "undistressed" firms.*
>
> *The distressed dividing line has many consequences. To start, the distress is usually a direct sign that the fundamental strategy they have pursued has not worked, and invariably leads to a management shake-up. This suggests, contrary to Basle practices, that the firms can do only so much to model these not-so-extreme events through scenario analysis and stress testing. For example, Long-Term Capital knew that it had massive positions built up over many months in credit spreads in most markets. When markets changed, that position had to be unwound, which would have spiralled out of control had the firm not been rescued by its creditors via the SEC. This was not an "out in the tail" event, but rather very much in the highly probably realm. The conclusion is that the regulators have to be prepared to intervene early, not necessarily to save the firm, but rather to prevent it causing distress on the markets.*
>
> *As a result, contrary to Basle, firms are not the best or only managers of risk up to the point of insolvency. Many market-wide mechanism need to work well before then*.'

487. We accept Ms Shepherd's submission that the Claimant did not subjectively believe that he was disclosing information which tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject ('a breach of a legal obligation').

488. The Claimant accepted in cross-examination that he did not disclose in those passages information which tended to show firms not complying with their obligations under the Basel framework. He explained that, at this stage, he did not have the data which would tell him whether they were complying or not. His paper was a critique of the existing regulatory framework ('in antithesis to Basel…contrary to Basel'), rather than a disclosure of information tending to show breaches of it. He accepted in cross-examination that there was a range of viewpoints on these issues.

489. We do not accept Mr Kemp's submission that the Claimant disclosed information which he reasonably believed tended to show that the FSA was in breach of its statutory obligations of market confidence and consumer protection. If the Claimant had had this in mind, he could have said so in terms. He did not. Mr Kemp accepts that he did so only 'by implication'. We note that the consumer protection objective was not even flagged. There was no

obligation on the FSA to prevent firms falling into distress (as opposed to default). The Claimant clearly thought that there ought to be. In cross-examination, he said that he was suggesting that there was a 'loophole' or an 'open barn door that needs to be closed' which if not closed/shut, could develop into a problem.

490. In our judgment, it is clear from the language he used that the Claimant was advocating a change of approach ('a strong argument can be made…a case can also be made…if this is the correct interpretation'); even the title suggests this ('Further Considerations for Wrapping up 'Some Unfinished Business'?) He was offering a view, not making a disclosure.

491. Although the paper was circulated within the organisation, Mr Nelson's evidence was that, insofar as he could recall seeing the paper at the time, it did not in any way suggest to him that the Claimant was making a protected disclosure. Indeed, there is no evidence that this paper stayed in the minds of any of the individuals who the Claimant alleges later subjected him to detriments.

<u>PID 2 (24 to 28 August 2007 and into September): Verbally and by email to Lyndon Nelson and the Planet and Asteroid Teams, C gave information about the undercapitalisation of financial firms in breach of UK regulatory requirements (FSMA) and EU requirements (Basel 2)</u>

492. The Claimant, in dealing with this alleged disclosure in his witness statement (paragraph 292) states that his Harm metrics revealed 'a serious gap in regulatory protection', which he immediately disclosed to Mr Nelson and the Planet and Asteroid teams.

493. The only document to which we were taken in relation to *Disclosure 2* was an email of 28 August 2007 at [14657], which contains a graph relating to whether, if a firm received a ratings downgrade, that would in itself make a second downgrade more likely.

494. Ms Katherine Evans (Mr Nelson's PA) emailed the Claimant, asking:

> 'Can we conclude from this that in general banks are in a position to burn c.10% of the 'spare' capital without suffering a ratings downgrade?'

495. The Claimant replied, explaining the graph in more detail. He relies on the italicised passage below as a protected disclosure.

> 'The curved line is the distribution of outcomes. According to KMV, HBOS will go bust when the value of assets declines to 494b, which is well below the value of 583b when its actual equity runs out. *To interpret this, I think it best to consider that the actual equity and virtual equity are intermingled, that is they both run out when assets reach 494b. In the first study I decreased the 'combined' equity by 10%* […]'

496. The Claimant accepted in cross-examination that he was not conveying facts that tended to show that HBOS was in breach of minimum capital requirements and commented 'perhaps I should have…' Mr Kemp did not put this email to any of the Respondent's witnesses (presumably because of the Claimant's concession).

497. The Claimant also relied on the legal obligation on the FSA under FSMA to apply threshold conditions to financial firms, including that they are viable ('the threshold conditions'), alleging that the FSA was in 'breach by allowing the undercapitalisation to continue/failing to act'. The Claimant confirmed that he meant by this the FSA's application of minimum standards for firms being and remaining authorised. He explained which of the various conditions he had in mind. He accepted that there was no mention of this in the email and stated that 'you have to infer it from the chart'.

498. The Claimant also relied on verbal disclosures in conversations with Mr Nelson. It was put to him that in those conversations he did not say that firms or the FSA were breaching legal obligations and he agreed that he did not do so 'in those terms.' He went on to say that he 'would have said they were demonstrating more than the 1 in 200 occurrences and so were not meeting that condition.' Mr Nelson does not remember the Claimant making any reference at the time to breaches of the minimum capital requirements or the statutory objectives. The Tribunal is not prepared to make a finding that a protected disclosure was made orally in circumstances where the Claimant cannot assert anything more than that he 'would have' said something, cannot give a date for the alleged conversation, and characterised this in his oral evidence as an 'embryonic disclosure'.

499. The Claimant also relied on the information he provided about firms in the form of a spreadsheet at [696]. He accepted that the spreadsheet said nothing about whether firms were meetings their capital requirements.

500. We are satisfied that the Claimant did not, by any of these means, make a disclosure of information which was sufficiently specific in its content, such that it tended to show a breach of a legal obligation by HBOS or the FSA.

<u>PID 3 (13 November 2007): By email to the Bank of England and the FSA, C providing a list of banks not complying with capital/liquidity rules (FSMA and Basel 2) and stated that Northern Rock would have been at the top of that list by December 2006 if C's Harm metrics had been in place at the time</u>

Further findings of fact

501. On 13 November 2007, the Claimant sent an email to Mr Nelson:

> 'My modified KMV model produces some interesting results using historical back testing. For example NRK [Northern Rock] would have been top of the list by 31 December 2006'.

502. The alleged disclosures of information are highlighted in the document he attached (at [DB 1026][7]) and include a table.

503. In an email of 20 December 2007 to Mr Julian Adams, Mr Nelson commended the paper to him, describing the results as 'compelling'.

Conclusion

504. In cross-examination, Mr Nelson appeared to accept that, given the scale of the 'harm' identified in the table, the data would tend to show that Northern Rock

[7] Pages in the supplementary (or 'deleted') bundle are shown as [DB 1] etc.

was in breach, or likely breach, of minimum capital requirements in December 2006.

505. However, he did not understand the Claimant to be referring to those requirements at the time. Nowhere in the document did the Claimant refer to minimum capital requirements. Even in the first highlighted passage, where he did touch briefly on concepts of legality, he was careful to make a distinction between a firm 'legally default[ing]' and being 'near or passed [*sic*] insolvency on a marked-to-market basis.') Furthermore, the language he used was tentative ('I have tried to estimate…they may be near…' etc.).

506. We have concluded that the content of the table was sufficiently specific to constitute 'information'. However, in our judgment the Claimant did not subjectively believe that it tended to show a breach of a legal obligation (whether by the firm or the FSA); we do not accept that he was thinking in those terms at the time. We accept the Respondent's submission that he was simply sharing 'Very Interesting Results' (as the Claimant put it in the subject field of the email), produced by his embryonic model. The fact that the document is capable of bearing the interpretation the Claimant puts on it now does not show that that is what he believed then. In our judgment, his interpretation of it in these proceedings is retrospective.

507. This was not a protected disclosure.

PID 4 (4 December 2007): By email to the Planet and Asteroid Teams, C gave information in tabular form showing the undercapitalisation of around 150 regulated firms in breach of UK regulatory requirements (FSMA) and EU requirements (Basel 2).

508. The pleaded allegation relates to a spreadsheet at [861], which the Claimant circulated on 4 December 2007 (para 86). Although in his witness statement he mentioned other documents, our focus must be on this.

Further findings of fact

509. In the spreadsheet the Claimant advanced the theory that, having regard to the market data which underpinned his Harm metrics, firms needed to raise billions of pounds of fresh capital. He accepted in cross-examination that the spreadsheet did not show a calculation of each firm's individual capital requirements, indeed it made no reference to minimum capital requirements. In his witness statement (at paragraph 422) he wrote that: 'in my view these firms are in virtual violation of the Basel prudential/liquidity requirements.' He accepted in cross-examination that his use of the phrase 'virtual violation' showed that his document was not referring to actual breach of capital requirements. Nor did it allude in any way to the FSA's statutory objectives or legal obligations. We reject the Claimant's assertion that it would have been obvious to the reader that he was doing so.

Conclusion

510. Again, although the table was sufficiently specific to constitute information for these purposes, and although Mr Nelson was prepared to accept in cross-examination that, given the very large figures involved, a number of the firms listed were likely to be in breach of minimum capital requirements if the data was correct, we have concluded that, at the time, the Claimant himself did not

have in mind legal obligations, whether on firms or on the FSA. His focus at this early stage was entirely on proposing a new approach to measuring 'undercapitalisation', as revealed by market data, which was distinct from the legal/regulatory measure.

PID 5 (December 2007 to 2014): By daily email update to the AMRiskMapRecipients@fsa.gov.uk account which included the then CEO, Chairman and all relevant directors of the FSA / FCA, C gave information (the Harm metrics) about the undercapitalisation (or subsidy) of financial firms in breach of UK regulatory requirements (FSMA) and EU requirements (Basel 2).

511. *PID 5* is a multi-part issue: alleged disclosures contained in daily emails over a six-year period. The Claimant complained that he was obliged to rely on samples, because he had not been provided with disclosure of all the emails and invited us to draw an inference from this. We heard no detailed evidence or submissions as to disclosure, from which we might draw such an inference, and we declined to do so. We focused on the specific documents to which we were taken.

Further findings of fact

512. We begin by making some general findings in relation to the daily newsletters. Attached to each of them was a detailed spreadsheet. It was put to the Claimant in cross-examination that nobody who opened the spreadsheet, and understood it, would discern that the Claimant was telling them that a particular firm was not complying with its minimum capital requirements. The Claimant agreed he did not say that, but asserted that it would be apparent to them. We note that, in order to illustrate why these tables did tend to show what the Claimant meant by 'undercapitalisation', he had to add three columns for the purposes of these proceedings. That would tend to suggest that the originals did not speak for themselves.

513. He then characterised the information as 'the information you need to make the decision as to whether a firm is meeting its capital requirements under the Directive'. He accepted that that was different from information that tended to show a particular firm was not doing so. Providing a kit from which someone can work out whether there has been a breach of a legal obligation does not amount to disclosing that there had been, or was likely to be, a breach. The Claimant said in cross-examination: 'it is market data, and the FSA needs to decide if that means it is meeting its threshold'.

514. Then there is the position the Claimant set out in an email of 27 June 2008, which we have quoted above (para 129). In it the Claimant explained that he was using the term 'undercapitalisation' in a way which 'can differ from the accounting or regulatory meaning'. However, he then capped that by saying that 'firms should raise that much capital or a bit more') which, we have found below, suggest that the Claimant subjectively believed that, if the FSA was not requiring those firms to raise that much capital (which it was not) then it was not discharging its statutory functions.

515. Further, it is clear from the December 2014 document (para 227 onwards) that the Claimant believed that the legal obligations themselves were not the right legal obligations, in part because they were set by reference to

accounting/regulatory capital, which he thought was the wrong measure. It was his belief that the correct measure was the market's view of capitalisation on a marked-to-market basis. On one view, he was disclosing information which, according to the Harm metrics, tended to show that firms were undercapitalised, whether or not they were in breach of minimum capital requirements.

516. For all these reasons we have concluded that we cannot take what is essentially a blanket approach, one way or the other, as urged upon us by both Counsel; rather we must look at each document on its own terms.

517. We turn now to the individual examples of *Disclosure 5*.

The 2009 document

518. The Claimant relied as an example of *PID 5* on a daily newsletter [2930], with attached spreadsheets, sent out at some point in 2009 (the date is redacted).

519. It was put to the Claimant that the information he was providing did not equate to the minimum capital requirements. The Claimant said 'I don't know – this document does not show what capital firm requires'. It was put to him that, if he did not know what the minimum capital requirement was in relation to each firm, he could not have been disclosing a breach of it.

520. As for the FSA's obligation, the Claimant accepted that he was saying in this document that the data generated by the Harm metrics broadly agreed with the supervisory assessments (although, in his view, it did so in a more sophisticated way).

521. He summarised the purpose of the spreadsheets as gathering together all the information the supervisors might need, in order to work out what was required. He confirmed that 'the legal requirement I felt I was under, and the staff and the FSA was under, was to take important information like Harm and deal with it'. However, he did not say that at the time, either explicitly or by implication. This is a significant difference between these and later disclosures, which did state in terms that the FSA, and supervisors in particular, had failed in their obligations by not using the Harm metrics.

522. On balance, we have concluded that, although this document disclosed specific information, the Claimant did not subjectively believe at the time he made the disclosure that it tended to show that firms or the FSA were in breach of legal obligations.

523. The Claimant faces an additional problem with this disclosure in that it is contained in an email from Jonathan Linley, his associate, not from him.

The 2010 document

524. The next document relied on by the Claimant is an email of 30 November 2010 [14684]. He accepted in cross-examination that none of the highlighted passages relied on in this document implicitly or explicitly suggested a breach of a legal obligation by a firm or by the FSA. We understand Mr Kemp's submission to be that it is the data embedded in the spreadsheets attached which constitute the disclosure. We were not taken to any specific data in support of that submission.

525. In any event, we have concluded that raw data, without more, does not amount to 'information' for the purposes of a public interest disclosure in this context. In order for there to be the required degree of specificity, there must be some commentary provided by the Claimant, pointing to its significance. There was none in this example.

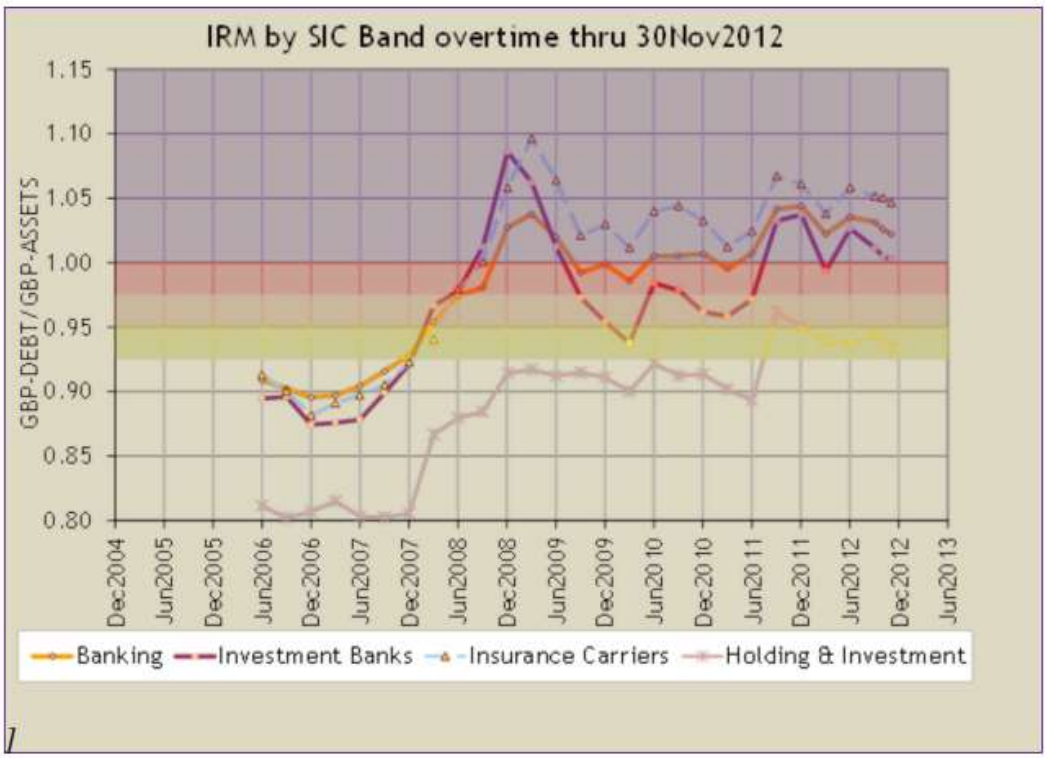
526. We are satisfied that this document does not contain a protected disclosure.

The 2012 document

527. The Claimant's next example was an email of 22 May 2012 [15144-15145]. Nothing in the highlighted passages contained specific information which tended to show that any firm or the FSA was in breach of any legal obligation. The email was not from the Claimant, but from Mr Greig Guthrie (Associate). This document does not contain a protected disclosure.

The 2013 document

528. On 10 January 2013, the Claimant added Mr Chris Woolard to the subscriber list for his newsletter. The day before, the Claimant sent out a daily newsletter [6357-6358], which contained a graphic, taken from the Independent newspaper website, of a heatwave in Australia, with the hottest temperatures shown in purple. Along with this illustration, there was the following chart:



529. Below the chart was the following text:

> 'We also have a purple zone for similar reasons: we need to indicate when things are off the scale in regulatory risk terms and in need of special attention. In particular, when the markets turn away from financial firms,

> some might call it a "market failure", but in reality investors are just telling the financial firm to change business models or fail at that point. Instead too-big-to-fail firms get bailed out and can become dependent on ongoing support, as in the UK and Europe. This alone is capable of fully explaining the financial crisis as our market and accounting data has long indicated. For example the following chart shows that the entire banking, investment banking and insurance sectors entered the 'purple' zone at the start of the crisis and are still stuck in that zone. They all need to change business models or fail, but they keep getting bailed out. A couple days ago the Rolling Stone article explained that position in America, which is unfortunately by far the best of the lot according to the data and analysis. Despite that, today we see [*redacted firm*] trying to claim they were unnecessary victims of the crisis. We also have John Kay explaining that the lessons of the crisis have not been learned by regulators since they continued to focus on the wrong things.'

530. We are satisfied that the Claimant, in this document, disclosed specific information (including data in the form of the chart) which he subjectively believed tended to show a breach of minimum capital requirements by firms. Although the Claimant accepted that he did not use that language in his commentary, he referred to firms being 'off the scale in terms of regulatory risk'. In our view that is sufficiently clear.

531. We then asked ourselves whether a person in the Claimant's position, with his knowledge, would reasonably believe that this information tended to show that breach. We concluded that he would. His belief was based on the output of a model which used objective data as its input. The model had been funded by the FSA since 2007 (in itself, presumably, a marker at least of the potential worth of the model). The Claimant's former line manager, Mr Nelson, believed in the utility of the model, even though others were less convinced. There had been no external review of the model by this point to cast doubt on its value. Whether the Claimant was right to hold this belief is a different matter; that is a matter which the Tribunal is not in a position to assess.

532. We have concluded that this document does contain a protected disclosure.

533. Although there is a reference to lessons not having been learned by regulators 'because they continue to focus on the wrong things,' the Claimant is there quoting the opinion of someone else (Mr John Kay, a British economist), not disclosing information himself.

The email of 23 July 2014 to Mr Wheatley

534. This relates to the email from the Claimant to Mr Wheatley of 23 July 2014, about which we have made findings of fact above (para 196 onwards).

535. The Claimant's evidence in his statement (paragraph 1152) was that 'I provided the FSA/FCA with insights which they ignored, which made Martin ask Chris Woolard whether I was right'. There are two aspects to this disclosure: the failure of the FSA/FCA to take into account the information generated by the Harm metrics; and an alleged failure to act on evidence provided by an external whistleblower.

536. Dealing with the first aspect, this relates to the text box on [8836], in which the Claimant provided commentary on an article about Deutsche Bank (at [8337]); it was this which prompted Mr Wheatley to contact Mr Woolard.

537. The language of this document is very different from previous alleged public interest disclosures. It is explicitly critical of FSA supervisors' failure to use the Harm metrics. He wrote:

> 'One of the warning signs of any process is whether it is automatic or subject at many steps to human intervention and overrides. For example the Harm system automatically responds to changes on market/accounting data while the supervisory process ignores market data (determined by all investors) in preference to judgmental insights from internal visits.
>
> As a result when I the [*sic*] warned supervisors at the outset of the crisis that it was starting and provided a table of firms that were most in need on redirection, they would look within their own process and (in the case of the 12 intensely supervised firms agree there were significant stresses) to conclude (even in those cases of stress) no particular firm let alone the financial system as a whole need redirection or scaling back. Good human analysis would have corroborated the Harm metrics (and still would) but the system we have is not designed to make those tough calls.
>
> Even when I brought in a whistleblower a couple years ago who had detailed evidence similar to the ones found at Deutsche both the FCA and PRA decided not to act on that hard evidence.
>
> Putting people at the trigger point almost surely leads to too much stress for the big decisions to change course to be made. Few people can make the leading edge decision because in the moment it will always be contrarian... but if one waits for more and more evidence and a consensus to emerge... it will always be too late to change course in the bigger crises.
>
> The idea of the advanced models used by firms is that they provide an automatic risk-management process with rare, deliberately made and clearly documented overrides. That system works better in principle. The problem at Deutsche and the whistleblower's firm (and many others by implications of the data) is that they start making more and more overrides to get through the crisis... as the automatic system would indicate they have problems they are failing to address.
>
> So the problem with many of the advanced models in practice is that they are not being used to keep the firms safe in the way intended once human overrides become dominant.'

538. Mr Woolard, in cross-examination, accepted that a reasonable interpretation of this document was that the Claimant was saying: because the supervisors were not using the Harm metrics, they were not properly discharging their regulatory functions.

539. Although he does not say in terms that supervisors/the FSA were in breach of the statutory objective to protect consumers by neglecting the Harm metrics, we are satisfied that the Claimant subjectively believed that this is what the

information tended to show. We consider it would have been apparent to the reader that that is what he meant, notwithstanding the absence of an express allusion; that is why Mr Wheatley responded as he did.

540. We then asked ourselves whether a person in the Claimant's position, with his knowledge, would reasonably believe that this information tended to show that breach. We concluded that he would for the reasons we have already given (para 531).

541. Turning to the second aspect of this alleged disclosure - the external whistleblower - we are satisfied that the Claimant did not subjectively believe that there was a breach of a legal obligation, in not addressing matters raised by an external whistleblower. He knew, or ought to have known, that the matter was discussed at a meeting, at which he was present, and that action was taken as a result, albeit not by the FCA, but by the PRA (para 172 onwards).

The newsletter of 22 October 2014

542. The Claimant sent out a newsletter on 22 October 2014, entitled 'Will Stress Reveal the Underlying Problems?' [9550]. In a passage at [9553] he wrote:

> 'A colleague at the FCA working on many FPC issues recently noted that "We all know the stress tests are designed to show the banks are okay" ... so don't expect these stress tests to reveal many problems.
>
> In contrast, investors make their funding decisions based on whether the banks are actually running sound business model, and if they could, consumers would like to know why they are bearing the brunt of the detriment. The latest Harm figures from July below show that Barclays is the biggest risk across all firms operating in the City with Credit Agricole, Deutsche and other big banks like RBS just behind. The big insurers like Aviva and Axa maintain worst offender spots as well. In general the results are slightly better [than] the May update which revealed that on average financial had repaired business models to Medium-High or 'orange' levels. The problem is these large too-big-to-fail banks are stuck deep in the purple Zombie zone where investors won't put fresh money in (without state bailouts which the next article shows they are getting). Consumers bear the indirect and direct costs of this support as those costs pass through the economy.'

543. Below that the Claimant included a table of firms, showing the figure for 'cumulative harm' which the Harm metrics had generated. The figures (which in total ran into hundreds of billions of pounds) were so large that Mr Woolard accepted in cross-examination that, if they were correct, they would tend to show that it was impossible for all the firms not to be in breach of minimum capital requirements.

544. Mr Woolard objected however, that the question of whether the figures generated by the Harm metrics were plausible was 'the big question'. Asked by the Tribunal whether it would be reasonable to infer from the amount of time, effort and money put into developing the Harm metrics by this point that it had a certain degree of plausibility, Mr Woolard replied that it would. He observed that there was a question in his mind as to whether the Claimant was 'onto something we ought to be paying attention to, even if some things coming out

of the Harm metrics did not appear particularly plausible'. That answer was hardly surprising: if the Harm metrics lacked all plausibility, why was the FCA continuing to spend hundreds of thousands of pounds on the data required to feed it?

545. We have no doubt that the Claimant subjectively believed that his Harm metrics were correct. As to whether it was reasonable for a person in his position, with his knowledge, to believe that it was correct, we have concluded that it was, for the reasons already given (para 531 and the paragraph immediately above).

546. For these reasons, we conclude that this passage and the accompanying table did constitute a protected disclosure. The other passages did not, for the reasons we give below.

547. The Claimant relied on a short passage on [9557] about the privatisation of RBS. The Claimant wrote:

> 'The foregoing harm figures indicate this sale cannot go through without continued subsidy from taxpayers. If you come across any analysts report which claims otherwise I would be interested in reviewing it… But the more likely scenario is that they have not done enough forensic accounting to spot the underlying problems.'

548. It was not apparent to us from this passing reference that the Claimant had in mind a breach of a legal obligation, let alone what that obligation was. There is no reference to either of the two regulators (FSA/FCA), whom the Claimant now suggests were responsible for legal failures in this context. The passage was not put to any of the Respondent's witnesses by Mr Kemp.

549. The Claimant then relied on a passage at [9558]:

> 'the FSA, the UK's most powerful regulator, fails to follow upon identified risks that have cost UK taxpayers well over six years of financial crisis and counting… The lessons that need to be learned are still a skeleton buried in the closet'.

550. We accept Ms Shepherd's submission that this was a bare allegation. The Claimant sought to rely on a table immediately above this statement, but that table related to the position at the time he was writing, not the historic position during the FSA period. The Claimant then sought rely on the fact that 'Mr Wheatley already knows I have lots of information'. That is not enough: the disclosure itself did not contain information of sufficient specificity.

551. This was an example of the Claimant seeking to shift his ground in cross-examination: he asserted that he was disclosing a breach of an obligation on the FCA to investigate and report into failures by the FSA. However, that was not pleaded. In any event, and for the reasons already given (para 471), the Claimant knew that no such obligation existed.

The newsletter of 23 October 2014

552. On 23 October 2014, the Claimant sent out a blog [9592] with what he describes in his statement (at paragraph 1161) as 'such a clear description of the series

of warnings and the consequences that Martin Wheatley CEO (probably because of a reaction from the PRA) became very concerned'.

553. In a passage on [9594], the Claimant wrote:

> 'Since the FSA gave very little regard to accounting and financial information in general, including more advanced forms of forensic accounting like Harm, it is to be expected that this would be missed. It would be missed today at the PRA and FCA for the same reasons. Worse they are not using the more advanced forms like Harm that would greatly enhance their understanding and ability to spot and fix problems in the most forward looking way possible. At the moment, regulation is the tail of the dog rather than the nose.'

554. We agree with Ms Shepherd that this is a bare assertion: it contains no specific information, it makes no reference - even in general terms - to a breach of a legal obligation; it appears to be a further attempt by the Claimant to advocate for the adoption of his Harm metrics. This passage was not put to Mr Wheatley or Mr Woolard; Mr Andrews was dismissive of it.

555. The Claimant also relied on a chart, with accompanying text, at [9598]:

> 'The stress tests will not reveal whether these or other banks have cleared up their balance sheets because too many of them are still toxic. So the stress tests have been designed to avoid revealing the underlying reality. As a result, there will be little pressure on the banks to reform, and little chance that investors will poor back in for the subterfuge.

This chart illustrates the problem. The green line shows the level of debt within the firm relative to assets as reported by management (which is very similar to the numbers accepted by regulators). It shows that [*redacted*] is in a 'strong' position and was only mildly stressed during the early part of the financial crisis. By this metric the bank looks strong.

The red line is one of the Harm metrics. It shows the same numbers from a neutral investors perspective. It shows that investors abandoned the firm during the buildup to the financial crisis and think it remains as toxic as it was

> at the start of the financial crisis. Neither shareholders or bond holders will put new money into the firm without very strong too-big-to-fail guarantees. This bank will fail any market based stress test; it requires significant work to fix its balance sheet, funding and business models before true and full market based financing is possible. Meanwhile it will subsist in a Zombie state relying on state funding while causing consumer/market/taxpayer detriment.
>
> [*Redacted*] is about the same as [*redacted*] but [*redacted*] are worse.
>
> [*Redacted*] is just getting back to where it should be, as are [*redacted*].
>
> In contrast, the Wall Street Journal analyst is not looking at the true underlying state of these banks ...'

556. Mr Kemp put to Mr Woolard that the Claimant was saying that some of these forms were significantly undercapitalised, as represented by the red Harm line in the graph, and that the extent of the deviation was so great that it tended to show a breach or likely breach of minimum capital requirements. Mr Woolard accepted that proposition (if the data produced by the Harm metrics was correct). Further, if it was correct, Mr Woolard accepted that it fell to the regulator to 'do something about it – that is the job of the regulator' and that if it was failing to do so, it was failing in its legal obligations.

557. In our judgment, the information is sufficiently specific. We accept that the Claimant subjectively believed that it tended to show breach of legal obligations by the firm and by the FSA/FCA and, in the light of the concessions made by Mr Woolard, and the reasons given above (paras 531 and 544) we have concluded that the Claimant's belief was reasonable. This was a protected disclosure.

558. In the light of the email exchange between Mr Wheatley, Mr Woolard and Mr Andrews (para 214 onwards), we are satisfied that Mr Andrews regarded this as more than the Claimant simply doing his job and sharing his opinions; he thought the Claimant was laying the groundwork for an Employment Tribunal claim.

The newsletter of 7 January 2015

559. On 7 January 2015 the Claimant sent out a daily email [10918], which he summarises in his witness statement (at paragraph 385). The Claimant commented on a report that the Bank of England was unaware of the impending financial crisis in 2007.

560. The version of the document identified in the schedule of issues contained the following passage at [10921]:

> 'This is selected corporate amnesia. The FSA was aware at that time. By April based on preliminary Harm analysis I had warned it in clear terms that a crisis was imminent and by the time Northern Rock went down I had the Harm metrics in place. By September a graduate working for me had written a paper comparing the results to supervisory scores which did not pick up the signal. Lyndon Nelson called it one of the best papers he had ever read. I started feeding the Harm metrics into the secret teams outlined below and

> discussing it with them. I also presented the results at the BoE. In the period 2007-2009 the FSA and Bank were fully aware of the Harm data and main interpretation; the banks were causing tens of billion growing to hundred of bullion [*sic*] of detriment and need to change business models and capital structures to compensate. The regulatory/economic framework would interpret this as a 'liquidity' gap, a false diagnosis that I often discussed with Lyndon. They took no action despite have the right diagnosis to hand.'

561. After some investigation, it emerged that this was not the version that was sent, which did not contain the reference to 'corporate amnesia'.

562. The passage was, the Claimant accepted, inaccurate in an important respect. It suggests that, by April 2007, he had warned the FSA in clear terms that a crisis was imminent. In fact, the Harm metrics were not being rolled out in April 2007.

563. The Claimant then sought to suggest that he had warned of the crisis at a brainstorming meeting. We were not taken to any contemporaneous record in April 2007 of a meeting, recording that the Claimant made such a warning. Mr Nelson was taken in cross-examination to a bare list of meetings, which told us nothing. Unsurprisingly, he could not say, some 15 years later, what occurred at those meetings, other than that around that time there was a general view that there were 'challenging conditions'.

564. We were also taken to a paper of December 2014 (which we have already referred to in another context: para 227 onwards), in which the Claimant referred to 'actively developing the Harm metrics in April 2006' and conducting a brainstorm session then. That date is even more inaccurate: the Claimant did not begin working for the FSA until October 2006. It might be thought that this was merely a typographical error, were it not for the fact that the Claimant gave the same 2006 date in the document relied on in this part of *PID 5*.

565. We remind ourselves that funding for the data underpinning the Harm metrics did not commence until May 2007, i.e. after the point at which the Claimant claimed in 2014 that he was already warning of an imminent financial crisis. There is then the Claimant's paper of 4 June 2007, to which we have referred in another context (paras 76 and 482), in which there is no mention of an imminent crisis.

566. Northern Rock failed in August/September 2007. We have already found that the Harm metrics did not go online until August 2007 (para 84). It was only on 13 November 2007 that the Claimant wrote to Mr Nelson, saying that what he was then referring to as 'my modified KMV model' (it was not even called 'Harm' at that point) had identified '*using historical back testing*' that Northern Rock '*would have been* top of that list by 31 December 2006 [emphasis added]'. We also note that, in his email to Ms Hilary in connection with the RBS report (para 613 below), the Claimant wrote that the information required to understand the risks to individual firms and across the financial sector was 'widely available within the FSA throughout 2008'; he did not assert that that information was made available by him in 2007.

567. We find that the Claimant's assertion in this alleged disclosure, 'by April 2006 [*or 2007 depending on the version*] based on preliminary Harm analysis I had warned it in clear terms that a crisis was imminent' is untrue. We agree with Ms

Shepherd that, in this document from January 2015, the Claimant was rewriting history. He cannot have believed that there was a breach of a legal obligation by the FSA in failing to foresee the crisis by ignoring his warnings based on the Harm metrics, when they did not yet exist. If he did believe it, that belief was unreasonable.

PID 6a (January 2008 to 2014): By monthly email update to the AMRiskMapRecipients@fsa.gov.uk account (the recipients of which included the then CEO, Chairman and other directors of the FSA / FCA), C gave information to show undercapitalisation by individual firms, sectors and departments in breach of UK regulatory requirements (FSMA) and EU requirements (Basel 2).

568. On the face of it, *PID 6a* relates to the monthly newsletters which the Claimant circulated within the FSA/FCA (para 89). In fact, we were only taken to one monthly newsletter from June 2010. Although we were invited by the Claimant to infer that he made protected disclosures in others, we decline to do so; we did not have sufficient evidence as to what information, specifically, was disclosed in them; a finding that there was a public interest disclosure in the absence of that evidence would be speculative.

569. The Claimant also relied on a moving graphic which we deal with below.

The monthly update in June 2010

570. The Claimant circulated a monthly update on 16 June 2010 [4090-4097], titled 'Keeping up dividends when they should be cut'. The highlighted passages read:

> 'My concern is that most banks have maintained dividends when they should be reduced or suspended, so I was hoping the foregoing would shed more light or provide more ammunition in this regard.
>
> […]
>
> In other words the money for these dividends has been taken from total liabilities without adequate compensation for the amount of risk involved. Repeated over many years, and across most firms, the problem becomes systemic and only a matter of time before the system falls apart, as it has.
>
> […]
>
> One of the lessons learned from this is that firms and regulators have focused on the wrong metrics. They have looked at shareholder returns without asking where those returns have come from, and whether those returns are sustainable stop there should be no reward for returns that come from debt rather than a higher and sustainable return on assets.'

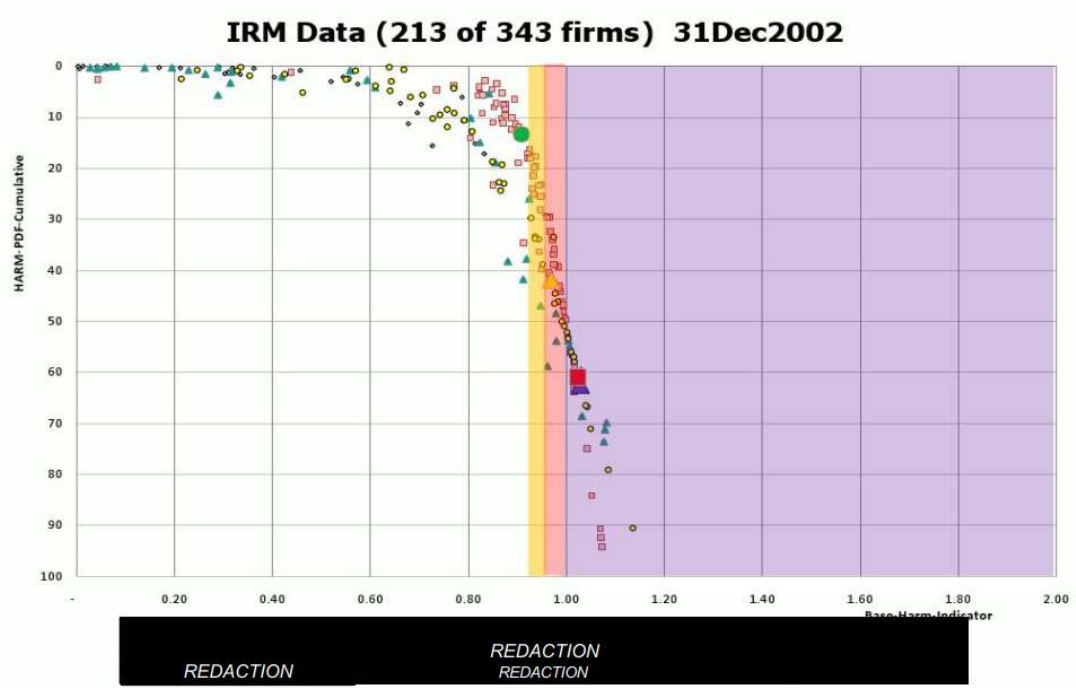
571. We accept Ms Shepherd's submission that this document does not contain any specific disclosures of information. The passages set out above merely express, in generalised terms, the Claimant's opinion that dividends should be reduced or suspended and that firms and regulators have focused on the wrong metrics. In relation to this document, we infer from the fact that there is no reference to any legal obligations, on firms or on regulators, that the Claimant did not have them in mind when writing it.

572. The Claimant also relies on a 'Harm User Guide' which is attached to the newsletter. This is an explanatory guide; it does not contain specific disclosures of information tending to show breaches of legal obligations.

573. We note that this document was not put to any of the Respondent's witnesses in cross-examination. In his written closing submissions, Mr Kemp relies on the fact that the Claimant disclosed monthly data 'which would have shown when and the extent to which firms were undercapitalised', along with a 'Scaffold workbook', which 'would have been disclosed on a monthly and daily basis'. We are not prepared to make findings in relation to protected disclosures without being referred to the specific information which it is said 'would have' been disclosed.

The moving graphic the Claimant showed in September 2010

574. The document relied on [4552] is a still version of a moving graphic, relating to December 2002, which the Tribunal viewed at the beginning of the Claimant's oral evidence.



575. The moving version of the graphic shows firms toppling into the 'purple zone', where, according to the Claimant, in the opinion of the markets, they would need bailing out. The Claimant explained in his witness statement (paragraph 10) that he used this in 'a presentation I gave from around 27 September 2010 to a packed audience in the main FSA auditorium'. It essentially represents his central message in graphic form.

576. The Claimant accepted that he did not tell the audience in terms that this chart showed firms breaching minimum capital requirements, or the regulator breaching its statutory obligations. However, in relation to this document, we accept that he was disclosing information which he subjectively believed showed massive undercapitalisation, which was likely to be in breach of minimum capital requirements. For the reasons we have already given (paras

531 and 544), we accept that his belief was reasonable, whether or not it was correct, and this was a protected disclosure.

577. However, we note that there is no evidence that anyone who subsequently took decisions which the Claimant identifies as detriments saw this presentation or, if they did, that they remembered it long after the event, let alone that their actions were materially influenced by it.

PID 6b (2008 to 2013): By email and in person by providing bespoke reports for each firm, C indirectly disclosed through the supervisory teams to Sam Woods and Andrew Bailey [amongst other members on scores of panels] whether the firms were and had historically been undercapitalised. The other panels included those for AVIVA, RBS, Barclays and Goldman Sachs.

578. *Disclosure 6b* relates to the provision of bespoke reports in relation to each firm.

Partial list of Harm reports to panels; undated report about RBS; undated report about redacted firm

579. The document at [DB 1469-1470] is nothing more than a list of those reports, which went before a panel of supervisors dealing with those firms, at which the supervisors presented all the data they had on their firm and then faced challenges from the Risk Department. This list, in itself, cannot discharge the burden on the Claimant to show that he made public interest disclosures. Nor are we prepared to make findings that disclosures were made orally, without reference to any specific occasions, or in writing, without sight of the relevant document, or other evidence confirming the precise information allegedly disclosed. Consequently, we confine our conclusions to the documents to which we were taken at the hearing.

580. There were two such documents, one in relation to RBS [5098-5102], the other in relation to a firm whose name had been redacted [14070-14074]. Neither was dated, the Claimant had to guess when they might have been produced.

581. In both cases, the Claimant referred to the firms being undercapitalised; in neither case were we persuaded that the Claimant had in mind at the time that they were in breach of minimum capital requirements. He accepted that he made no mention of those requirements in either document. On the contrary, we note that, in relation to the RBS report [5098-5102], which the Claimant thought was probably from June 2009, he stated in the document that 'there is a very significant difference between the accounting assessment and the market assessment over RBS' financial soundness.'

582. In relation to the anonymised firm [14070-14074], the Claimant posed some general questions and made observations about the market's perception of financial soundness of the firm. At one point he suggested that the firm might be 'at risk of insolvency', but we accept Ms Shepherd's submission that is not the same as disclosing that there was a breach/likely breach of legal obligations, either by the firm or by the regulator.

583. At [14071] the Claimant made clear that the Harm metrics 'provide an objective way of identifying firms which financial soundness is compromised according to the market viewpoint'. He explained in cross-examination that he was providing information and that it was then the panels' obligation to analyse it, to reconcile

differences and to arrive at objective conclusions. At no point in the document did he suggest that the regulator was in breach of those obligations.

584. At the hearing before us, the Claimant stated that he did not believe that the panels conducted the necessary objective analysis ('I saw no evidence that they read it and took it into account') and that this was a serious regulatory failure. If it was, it was a failure which post-dated the reports, rather than a failure which was disclosed in them.

585. For these reasons, on the evidence available to us, we are not satisfied that these were public interest disclosures.

PID 7 (May to September 2008): By email to AMRiskMapRecipients@fsa.gov.uk C provided three Executive Harm Update reports, which included information on the undercapitalisation of individual firms, sectors and departments in breach of UK regulatory requirements (FSMA) and EU requirements (Basel 2)

The Executive Harm Update of 31 May 2008

586. The Claimant sent the first Executive Harm Update on 31 May 2008 to executives and all newsletter recipients [DB 1459]. The Claimant agreed in cross-examination that by this point, the financial crisis was well underway and that it was common knowledge that levels of risk had increased.

587. The Claimant gave the following summary:

> 'SUMMARY:
>
> - Current level of Harm(£) is just over £378bn for our IRM portfolio of firms
> - Top of Harm% list is Security Capital Assurance
> - Top of Harm(£) list is The Royal Bank of Scotland Group
> - New Star Asset Management Group has experienced the greatest fall in Harm% rank over the past 6 months
> - Sub-sector with the largest value of Harm(£) and total debt is the Wholesale Investment Banks: Group 1 with over £167bn of Harm(£) and over £12 trillion of total debt
> - Sub-sector with the largest Harm% is private client investment managers, private client stockbrokers, private banks.'

588. The chart on the following page showed over £28b of 'Harm' in relation to RBS. It was put to Ms Hilary that that magnitude of undercapitalisation tended to show that RBS was in breach of minimum capital requirements (although those requirements were not alluded to in the document). Ms Hilary disagreed and observed that the RBS report found that no evidence of breach of the minimum capital requirements then in force. Reference was also made in cross-examination to the 'threshold requirements'

589. The Claimant accepted that he did not refer to breaches of legal obligations either in relation to firms or by the FSA: 'I was not using legal language.' He explained in his oral evidence that it was 'a logical impossibility' that the whole

system was undercapitalised to such an extent (£378b) but that no individual firms were in breach. We accept that, based on the data generated by his Harm metrics, and disclosed in this document, that is what he subjectively believed at the time. Moreover, that belief was reasonable, for the reasons we have already given (paras 531 and 544).

590. Further, and although (again) he did not say this in the document, we have concluded that the Claimant subjectively believed that the information he was disclosing also measured the FSA's compliance with its statutory objectives. We have concluded that that belief was reasonable. Mr Kemp put to Mr Nelson that the same data tended to show a likely breach by the FSA of the market confidence and/or consumer protection statutory objectives; Mr Nelson agreed. He accepted that he would have understood at the time that the Claimant was saying that the Harm metrics were also a measure of the FSA's compliance with its statutory objectives.

591. This was a protected disclosure.

The Executive Harm Update of 26 June 2008

592. On 26 June 2008, the Claimant sent out a newsletter, writing as follows [2331]:

> 'The attached Newsletter describes the current state of Harm. Overall, it shows that the 226 largest IRM investment banks, insurance firms and retail banks are undercapitalised by about £378b, a rise of about £60b in the last six months. It also illustrates how harm evolves and relates to accounting data and news events related to individual firms over time. We can produce this for all 226 firms and are in the process of supplying Supervisors with this information in these tools for their individual firms for potential inclusion on the watchlist.
>
> The attached paper shows that Harm is correlated to writedowns and accounting ratios across Banks and Insurance firms. Many of you will have received and hopefully recall the following memo where I originally opined that Harm appeared to be correlated to writedowns and recapitalisation by firms. For example just today BBC reports that [redacted] is raising £[*redacted*] in capital while our Harm metric puts its 'under-capitalisation' at £[*redacted*]; in contrast [*redacted*] is trying to raise £[*redacted*] when its Harm is £[*redacted*]. Meanwhile, following that original conjecture I asked Jean-Pierre Conte to attempt to prove it, which he has managed to do in the attached paper. It comprehensively compares Harm to relevant banking and insurance accounting data. This comprehensive data and analysis should help those of you who find Harm a little opaque to trust it more, and also re-assure everyone that traditional baseline supervision leads to similar results on average. It also provides a way, once Harm signals that a firm or sector is in trouble, to pinpoint which accounting and business items are causing the problem.

593. In an email dated 27 June 2008, Mr Huertas wrote:

> 'I think we should be cautious in using the word "undercapitalised" in connection with this, lest it create the impression that the HARM metric conforms in any way to threshold conditions or to a standard that we would require banks to meet.

> Although the statistical work is of interest, and although I look forward to reading the paper, the HARM metric should NOT as yet in my view be a regulatory standard.
>
> I would greatly appreciate a fuller reporting on instances where the HARM metric may have given falsesignals. Your notes to date have reported instances where the HARM metric has signalled write-downs or capital raising that ultimately occurred, but have there been instances where the HARM metric has sent an incorrect signal? Most regressions fail to predict a significant number of outcomes, and I would be surprised if HARM were any different.'

594. The Claimant accepted that Mr Huertas was drawing a distinction between the Claimant's use of 'undercapitalisation' and the concept of breach of minimum capital requirements and Mr Huertas was saying that the two were not necessarily equivalent. In retrospect the Claimant suggested that Mr Huertas said this because he found the Claimant's information 'inconvenient'. If the Claimant thought that at the time, one would have expected to see it reflected in his response; it was not. On the contrary, he appeared to accept the distinction identified by Mr Huertas:

> 'We have purposefully used the term "undercapitalised" from the inception of the model about ten months ago, because Harm is designed to measure the degree to which firms are 'undercapitalised' in a marked-to-market sense. We try to always stress this "mark-to-market" meaning, as well as make clear that this can differ from the accounting or regulatory meaning. Naturally this can lead to confusion, in the same way that Equity, Assets and Liabilities can be used in more than one sense. Now that you have kindly pointed this out, I hope that everyone will understand that Harm measures 'undercapitalisation' in the sense that the market thinks the firm is undercapitalised-- irrespective of what the accounts or regulatory returns say--and that them firm should raise that much capital or a bit more.'

595. We have concluded that his very last sentence ('and that them [*sic*] firms should raise that much capital or a bit more') is evidence that the Claimant subjectively believed that, if the FSA was not requiring those firms to raise that much capital (which it was not) then it was not discharging its statutory functions. For the reasons we have already given (paras 531 and 544), we have concluded that belief was reasonable, whether or not it was correct.

596. For these reasons, we have concluded that this newsletter was a public interest disclosure.

The August and September 2008 Executive Harm Update

597. The Claimant sent out Executive Harm Updates in August and September 2008.

598. In the Summary section of the August update [DB 4124], he wrote:

> 'SUMMARY:
>
> - Current level of Harm(£) is just over -£396bn for our IRM portfolio of firms as opposed to -£303.5bn at the start of the year.

- Top of the Harm% list (worst performing) is [*redacted*] at -4.81%, which is much worse than [*redacted*] at -2.77% and [*redacted*] at -2.16% when they got into trouble. Top of the Harm(£) list is still The [*redacted*] at -£29.5bn.

- [*Redacted*] is still the firm which has experienced the greatest fall in Harm% rank over the past 6 months.

- [*Redacted*] remains as the primary sub-sector with the largest level of Harm(£) of over -£168Bn and over £12.7 trillion of total debt. Primary sub-sector with the largest Harm% is still private client investment managers, private client stockbrokers, private banks with Harm% of -1.9.'

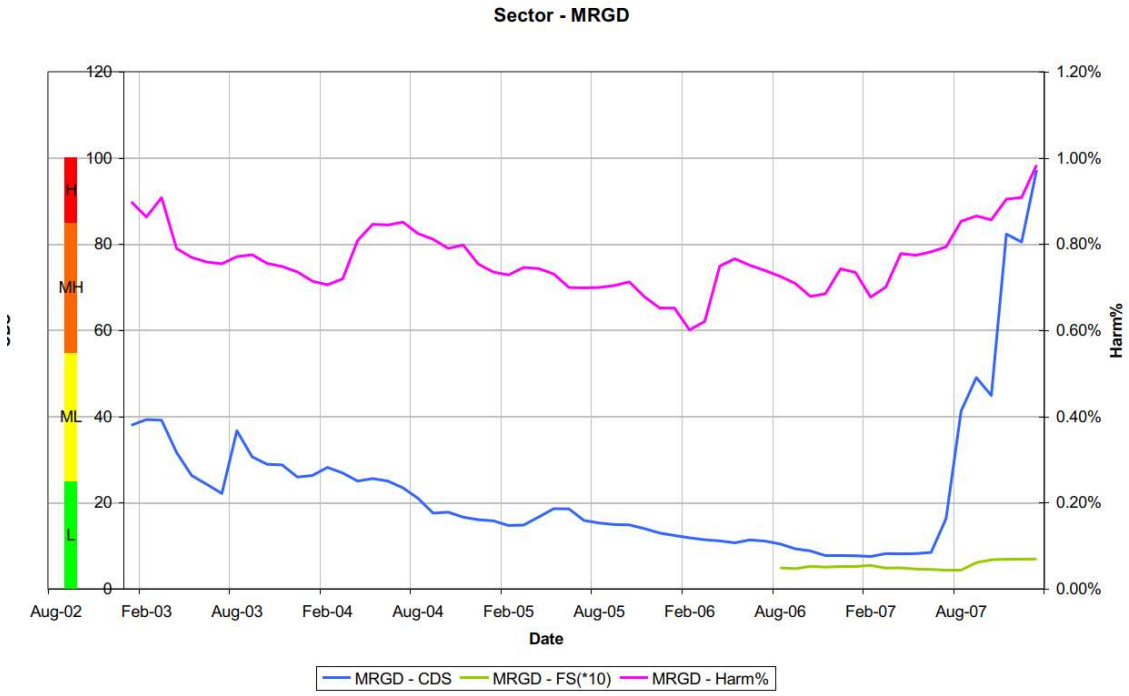
599. In the September 2008 update [DB 4132] he wrote (among other things):

> 'The value of assets in the FTSE all share financial sector is £7,040bn, which represents 77% of the assets in the all share index. This compares with liabilities of £6,846bn, or 90% of the index. This implies that the financial sector has a debt/market-capital ratio of 2.76% as compared to the overall index average of 17%. In January 2006 (a period when the sector was healthy) the corresponding ratios were 12.37% and 32% respectively.
>
> This suggests that the financial sector needs to increase capital significantly to return to favourable 2006 levels. The S&P500financial sector needs to raise its market capital about 3.3 times and the corresponding FTSE all share sector 4.49 times. Presumably this requirement must be met primarily through real new capital (or state aid as in the United States bailout), significant downsizing of the industry and confidence boosting measures.'

600. We have concluded that the undercapitalisation disclosed in these updates was so large that the Claimant subjectively believed that at least some of the firms in these sectors were likely to be in breach of minimum capital requirements, and the FSA was not discharging its statutory functions. For the reasons already given (paras 531 and 544), we have concluded that his belief was reasonable, whether or not it was correct. To this extent, this was a protected disclosure.

<u>PID 8 (January to March 2009): By email and in person C provided Lyndon Nelson and Adair Turner with evidence of the undercapitalisation for inclusion in the Turner Review dated March 2009.</u>

601. The document relied on by the Claimant as amounting to *PID 8* was a graph relating to a group of firms [1701, 1749], which he provided to Lord Turner in 2009.



602. This was not the actual chart he sent to Lord Turner, but it was similar. Mr Nelson, who worked on the report, accepted that he had no reason to doubt that a chart such as this was provided to him and Lord Turner. On the basis of that concession, and given that the information disclosed in the chart is specific, we are prepared to consider this document, even though the original was not before us.

603. The graph compares Credit Default Swap (CDS) prices (the blue/middle line) with Harm metrics data (the pink/top line) and the supervisors' scores for the same firms (the green/bottom line). The Claimant's explanation of the chart, as summarised by Mr Kemp in his closing submissions. was that it showed the implied subsidy that was measured by the difference between the Harm and CDS lines, with the CDS 'suddenly snapping up when the markets realised the subsidy had come to an end'.

604. The Claimant explained that this 'shows that supervisors have hardly reacted at all in a situation where everyone else knows there is a problem'. We accept that the Claimant subjectively believed that this information tended to show that at least some of these firms were in breach of minimum capital requirements and the FSA (though its supervisors) was in breach of its statutory objective of consumer protection by not addressing the issue.

605. Mr Nelson disagreed with that analysis and thought the most likely interpretation of the disconnect between the supervisor line and the Harm line was that the rules which applied at the time were wrongly calibrated, not that there was a failure of compliance. Nonetheless he accepted that, given the very high figures shown in the Harm line, the interpretation advanced by the Claimant was a reasonable one.

606. In the circumstances, and for the reasons already given (paras 531 and 544), we conclude that the Claimant's belief was reasonable, whether or not it was correct. This was a public interest disclosure.

PID 9 (June 2011 to December 2012): By email and in person provided Rosemary Hilary and the RBS Report staff with detailed evidence of the undercapitalisation for inclusion in the RBS report

Further findings of fact

607. Initial findings of fact are set out above at para 152 onwards; further findings are made here about the alleged disclosure; findings about the related detriment (*D6*) are below at para 756 onwards.

608. The Claimant first became involved in the RBS review process in around May 2011. On 27 May 2011 Ms Anna Thursby (Associate, RBS Review Team) emailed the Claimant, asking him to provide:

> 'a piece of analysis … that looks at the credit spreads on sub-debt for RBS and its major UK banking peers (for this purpose: [*redacted*]) and, to provide some non-UK comparison, also some of the major US investment banks such as [*three firms redacted*].'

609. The Claimant responded [5038]:

> 'You should be aware that throughout 2008 we were flagging RBS as a risky firm using our other metrics, and have various historic record to draw upon for that. They work better than CDS or bond spreads because both of those build in the probability of being too big to fail, which our other metrics leave out.'

610. On 2 June 2011, he sent an email to Ms Hilary and Mr Alan Adkins, entitled 'RBS review and Harm Early Warning Indicators' [5043]. He wrote:

> 'During this period [late 2007 and throughout 2008] I flagged that RBS was our biggest total risk (using a variety of market metrics roughly equating to probability * impact), and that its 'probability' of falling down was imminent. This was reported in a variety of ways: through emails, through periodic summary reviews and through one off emails. In particular I recall a decisive e-mail (which would need to be retrieved from archives) where I warned some weeks or months beforehand that RBS and [*redacted*] were the 'next to go', which was not at all well received by various directors, nor was that warning acknowledged when they both faced rescue.'

611. The Claimant went on to say that he considered that his work on Harm 'provided a clear indication of the looming risk to the UK financial system, with RBS a likely focal point.' He asserted that the FSA had not learnt the lesson of the Harm metrics, which he believed should be a 'guiding hand' in the new regulatory bodies (FCA/PRA).

612. We accept Ms Shepherd's submission that a large part of the Claimant's purpose in this email was to promote his work on the Harm metrics, with a view to securing a role for it (and himself) in the new regulatory bodies; however, we

accept the Claimant's evidence that it was also a genuine attempt to flag up concerns which he felt needed to be addressed and taken forward.

613. On 2 June 2011, Mr Alan Adkins responded positively, as did Ms Hilary who asked the Claimant to retrieve the material he referred to in his email as having sent at the time. He responded by email of 6 June 2011 to Ms Hilary [DB 4101]. It is in this email, and the meeting on the same day, that the Claimant says he made *PID 9*, relying on the italicised passages below.

> 'As an example of the reports I sent out, I have attached several pdf files. *These "Executive Harm" reports--sent to everyone on the "Morning Report" list starting in June 2008--clearly show the firm specific and aggregate build-up, including the information that RBS was the FSA's biggest 'total' risk.*
>
> *I also intend to provide you with examples of the daily reports (from early January 2008, but perhaps only one from each month) we sent out, but these are too big to send via email. I will arrange to put them in a folder which you can access, and/or provide them to you on a CD or something. By January 2008 I had met with all MRGD HoDs to explain these metrics and consequences.*
>
> In mulling this over during the weekend, I wanted to find a summary description of how the 'man in the street' would see this situation, in order to see how I should guide myself through it, and explain it to you.
>
> > In the build-up to the current financial crisis a 'sufficiently skilled' person with access to lots of market data was at all times in a position to observe the location and amount of risk building up in the system. Such a person had various responsibilities and opportunities depending on his position:
> >
> > - *Within a particular firm--for example an RBS or Goldman's--such a person should have worked to change the firms' business models and strategies, and/or raise more capital, to prevent that firm being caught in the mire.*
> > - *Within a regulator, such a person should have used that information and knowledge to prevent both firm-by-firm build-up as well as aggregate build-up across the industry.*
> > - *Within an investment bank or hedge fund--ignoring whether they were right to do so--such persons often sought, and managed, to profit from the build-up of risks and lack of corrective action taken by the two preceding persons.*
> > - *No one should expect a retail customer to have this skill or data, or be in a position to use it if they had it, that is the role of firm directors, supervision and other central authorities.*
>
> I do not believe that this is in any way seeing the past with the benefit of hindsight. The techniques I used and the data I provided throughout make it clear this was possible at all times. This is also clear from the actions of certain firms and hedge funds. *As a result, before and during the crisis, I*

> *often felt like I was watching a crash in slow motion, doing as much as I could to warn appropriate persons across the FSA of the consequences and magnitude of the problem to little avail and great personal risk and sacrifice.*
>
> There are many reasons why that message was hard to convey, and many why it was undoubtedly hard to receive, understand and accept. *My point is simply that the 'sufficiently skilled' information was widely available within the FSA throughout 2008, it was not used as it should have been used, and this is of interest to the man in the street and Parliamentary inquiry.*
>
> *It is also crucial to the operational and risk management needs of the future regulatory bodies*.'

614. The Claimant attached to the email his Executive Harm Update of 31 May 2008 [DB1459], in which he wrote that RBS was at the 'Top of the Harm£ list' (the Claimant defined Harm£, in the glossary to the Update, as 'the undercapitalisation value in sterling or market value of the debt less the face value of the debt'). The Update also contained a chart which indicated that the magnitude of RBS's undercapitalisation was £28.8b. In an Update from August 2008, that figure had increased to £29.5b.

615. The fact that RBS needed additional capital was not news to the FSA in May 2008. It had been aware of RBS's capital position since December 2007 and had been pushing RBS to raise as much capital as possible. There was a rights issue (one of the largest ever) in April 2008 which raised £12b. What the Claimant's data suggested, however, was that £12b would not be enough. In the event, RBS failed. However, we note at this point that other firms, which the Claimant identified as at imminent risk of failure, did not.

616. On 6 June 2011, members of the RBS review team met with the Claimant [5047]. In that interview he elaborated on essentially the same information contained in his email: he had told colleagues that the Harm metrics showed RBS as undercapitalised and 'the biggest risk'; he felt the organisation was 'wearing blinkers' and relying on an approach which did not work in a crisis; he tried to escalate the Harm metrics within the organisation; there was a failure by the FSA to engage with it.

617. Ms Hilary believed that the Claimant was simply sharing information as a colleague, not making protected disclosures. Ms Hilary noted that she was the whistleblowing champion within the FSA at the time. At no point did she receive a formal whistleblowing report from the Claimant.

Conclusion

618. We have concluded that, in his email of 6 June 2011, the Claimant disclosed specific information, derived from the Harm metrics, about what he believed the extent of RBS's undercapitalisation to have been in May 2008. We accept that, subjectively, he believed that it tended to show that RBS was likely to be in breach of minimum capital requirements, in part because the figure was so large. We accept Mr Kemp's proposition, put to Ms Hilary in cross-examination, that, if the figure was correct, that belief was reasonable for the reasons we have already given (paras 531 and 544), whether or not it was correct.

619. Further, we are satisfied that, in his email, specifically in the passages dealing with what a 'sufficiently skilled' professional ought to have done, the Claimant was disclosing information which he subjectively believed tended to suggest that, by failing to engage with the information he had provided at the time, the FSA was likely to be in breach of one or more of its statutory objectives, in particular the 'protection of consumers' objective. Ms Hilary, after some considerable hesitation, accepted that what the Claimant was saying in this email was that 'someone within the FSA had not been doing their job properly'. In our judgment that belief was reasonable: for the reasons we have already given (paras 531 and 544), we are satisfied that he was reasonably entitled to believe in the value of the model; we have already found (para 111 onwards) that the Claimant had experienced resistance from supervisors when it came to its acceptance; it follows, in our judgment, that his belief that its neglect represented a breach of the FSA's objectives was reasonable, whether or not it was correct.

620. Consequently, we have concluded that, in his email of 6 June 2011 and at the interview on the same day, the Claimant made protected disclosures. He did not describe them as such, but on this occasion that does not, in our judgment, alter their status.

PID 12 (2013-2014): C reminded Gavin Stewart of the cumulative history of protected disclosures 1 to 9 above and detriments 1 to 8 below verbally and in writing. Gavin Stewart helped initiate and participated in some of the discussions with Chris Woolard and Martin Wheatley as set out in protected disclosure 13 below. Gavin also initiated discussions with Chris Woolard and Lesley Swarbrick to resolve detriments 1 to 8 below.

621. The Claimant relies on paragraphs 1055-1060 of his witness statement and an email from Mr Stewart, dated 19 December 2013 [7291-7292] (which he quotes in full and which we have quoted in part at para 175). He does not go into any detail as to the dates on which alleged disclosures were made, what exactly was said, or by reference to what legal obligation.

622. It is right that the email from Mr Stewart confirms that the Claimant raised concerns with him on many occasions about the FSA period, indeed Mr Stewart was complaining in the email that he would not let it go. However, we are not prepared to make findings that those conversations contained protected disclosures when the Claimant cannot identify the dates on which they were made or the specific information disclosed.

623. However, there is one email, dated 23 October 2013 [6833], which we have quoted above (para 179). Although it was not listed in the Claimant's schedule of issues, the Claimant was cross-examined on it by Ms Shepherd. In the circumstances we are prepared to treat this document as evidence of a communication of the sort referred to in the Claimant's statement and Mr Stewart's December email.

624. We find that the email does disclose, in the passage quoted above information about undercapitalisation. We accept that the Claimant subjectively believed that the extent of it was so great that it tended to show likely breaches of minimum capital requirements. He also subjectively believed that the FSA had failed to act on the information provided by the Harm metrics, which tended to show a breach of its consumer protection objective. For the reasons we have

already given, we are satisfied that his beliefs were reasonable, whether or not they were correct.

625. This was a public interest disclosure.

PID 13 (throughout 2014 into 2015): During conversations with Chris Woolard and Martin Wheatley C described the matters discussed with Gavin Stewart at the time of the 2013 annual appraisal (which took place in 2014). In doing so, C provided information to Chris Woolard and Martin Wheatley about the conduct failures which resulted contrary to FSMA and the Financial Services Act 2012. C also provided analysis of the failure to deal with these failures within standard FSA and BoE working practices and governance committees.

626. For the avoidance of doubt, *PID 13* is restricted to its original form, which is as set out in the subheading above; the Claimant was not permitted to amend to rely on the reports of 4 February 2014 and 10 September 2014.

627. We were not taken to any documents, in which the Claimant recorded discussions with Mr Wheatley or Mr Woolard about the alleged disclosures. He purported to provide clarification of *PID 13* at paragraph 920 of his witness statement: he provided a bare list of examples of the failures he said he had disclosed, but no particulars of the dates on which he did so or the specific information disclosed.

628. Mr Wheatley could not recall any specific occasions when the Claimant raised conduct failure or undercapitalisation of banks with him. No specific information, which the Claimant is said to have disclosed to him in relation to this alleged disclosure, was put to him in cross-examination.

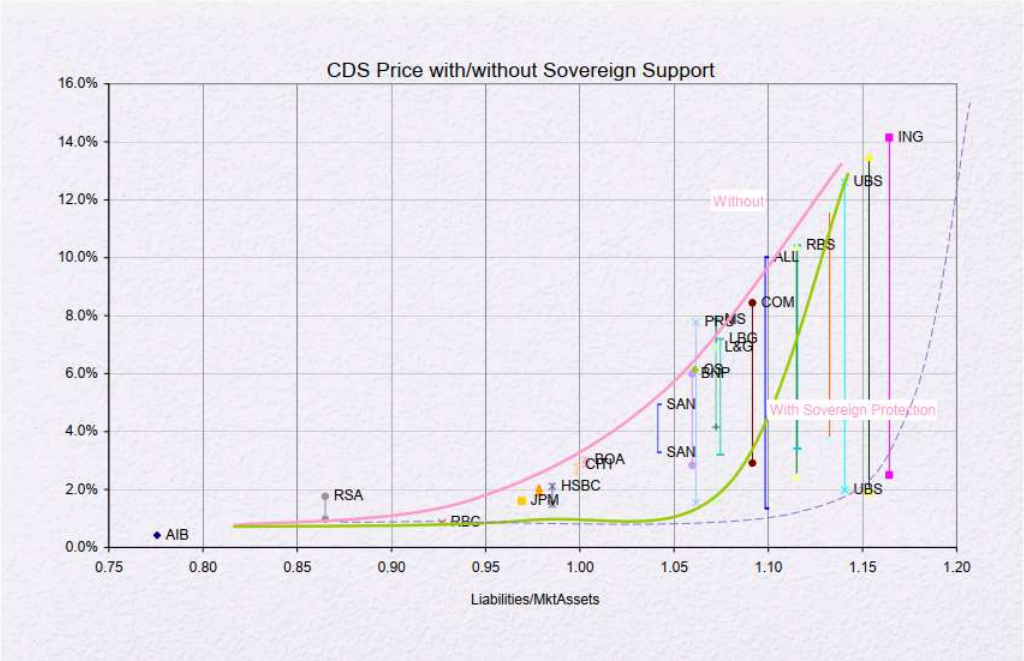
629. Mr Woolard was cross-examined at length on this alleged disclosure by Mr Kemp but, again, nothing specific was put to him as to the occasions on which it occurred and what precisely was said. Questions were put in generalised fashion (for example, that the Claimant 'would say' certain things) and were often based on hypothetical propositions.

630. We are not prepared to make a serious finding that a protected disclosure was made on such scant evidence. The Claimant has not discharged the burden on him to show that *PID 13* was made to Mr Wheatley or Mr Woolard.

PID 14 (Throughout 2014 and 2015): During conversations and by emails with Peter Andrews and Peter Lukacs, C repeated the protected disclosure set out in protected disclosure 12 and thus 13 above.

Further findings of fact

631. The only specific conversation referred to by the Claimant (in his witness statement at para 1143) was with Mr Andrews and took place on 28 August 2014. He describes standing in the office kitchen and drawing a chart by hand. This was not in the bundle, but the Claimant told us that it was a rudimentary form of the chart below:



632. The Claimant explained that the significant elements of this chart are the vertical lines, each labelled with the name of a financial institution, running between two square points: the top point showed 'the total amount of Harm'; the bottom point showed the CDS price; according to the Claimant, the two points should align because they are measuring the same risk (the extent of losses not absorbed by capital); the difference between them is what the Claimant described as 'the amount of subsidy the firm is receiving from consumers/taxpayers'.

633. The next day, Mr Andrews emailed the Claimant, thanking him for his explanation and observing that he 'had not previously grasped how closely your work follows KMV's and this has implications for what we should do'. He went on to suggest a series of questions which he thought the Claimant ought to address in his report, including what the Harm metrics added to the KMV outputs. His response was thoughtful and constructive.

634. As for emails, the Claimant relied on an email of 26 November 2014, which had several attachments, but he was unable to say with certainty what they were. They cannot have been the paper of December 2014, referred to below (which was in the bundle) because it post-dated the email. The Claimant thought one of them might be an early version of the December 2014 paper. In re-examination, the Claimant said that he had found another email (which he did not think was in the bundle) which appeared to confirm this. However, that email was not produced and, by definition, was not identified in the particularisation process which took place at the beginning of the hearing and so could not be relied on.

635. As for the paper dated December 2014, 'Regulatory failure in Basel. The FSA and BoE' (para 227), Mr Kemp told the Tribunal in the latter stages of the hearing that the Claimant no longer relied on it as a protected disclosure because there was no record it was sent.

636. Accordingly, the only element of this disclosure on which we adjudicate below is the graph reproduced above.

Conclusion

637. We are not satisfied that the Claimant made a protected disclosure to Mr Andrews on 28 August 2014. A conversation took place; that is confirmed by Mr Andrews' email. What precisely was said in that conversation is entirely unclear. Mr Andrews does not even recall the Claimant drawing a table for him, let alone what he said about it. In his witness statement witness (paragraphs 1143-1147) the Claimant does not state in terms that he disclosed information which tended to show a breach of a legal obligation. It is improbable that the Claimant could have drawn from memory a table containing the detailed information contained in the version above. In his statement he gives a commentary on the chart; he does not say that he provided the same commentary on the day; nor is there any evidence (for example, by way of a contemporaneous note) that he did so.

638. In our judgment, the Claimant has not discharged the burden on him to show with sufficient precision what information he disclosed on the day; there is insufficient evidence for us to conclude, on the balance of probabilities, that the conversation took place as he now describes it, let alone to conclude that he made a protected disclosure.

PID 15 (July/August 2015): By email to Lyndon Nelson (then Deputy CEO of the PRA), C disclosed information for the purposes of a presentation to the Prudential Regulatory Board to show the history of undercapitalisation of inancial firms and negative impact on GDP in breach of UK regulatory requirements (FSMA), EU requirements (Basel 2) and BoE mandates.

639. We deal with this briefly because we have already found (para 269) that there is no evidence that anyone within the Respondent was aware of the Claimant's communications with Mr Nelson. It was not put to Mr Nelson that he told anyone in the FCA about it; nor did the Claimant lead evidence that he did so. Consequently, the Claimant cannot have been subjected to a detriment by the Respondent because of it.

640. In any event, we find that the information was not specific enough to amount to a disclosure of information. It consisted of a broad-brush assertion of the Claimant's views and no more.

PID 16 (September/October 2015) In his application for FCA CEO to John Griffith-Jones, C summarised protected disclosures 1 to 9 above and emphasised the need to resolve the problem.

641. We can also deal with this alleged protected disclosure briefly. We have already found as a fact (para 272) that no one within the Respondent organisation saw the Claimant's application; if it did contain protected disclosures, they cannot have had a material influence on any of the alleged detriments; it is not proportionate to analyse the content of the document.

642. In cross-examination, the Claimant said that 'even if [my application] didn't make the sift, I would have expected any alert person not to bin the application, but to make sure the Chancellor and Chairman saw it for the secondary

[whistleblowing] reason'. We agree with Ms Shepherd's submission that this is fanciful and illustrative of a lack of insight on the Claimant's part.

PID 17 (10 October 2015): By letter to Barbara Frohn, C disclosed information to show the history of undercapitalisation in breach of financial firms in breach of UK regulatory requirements (FSMA) and EU requirements; C also disclosed information of the mishandling and concealment of this breach.

643. On 10 October 2015, the Claimant wrote to Ms Frohn; the context is set out above at para 274 onwards; the document is at [11442-11456]; most of it is highlighted, most of it is relied on as a protected disclosure. We cannot reproduce it all; representative extracts will suffice for these purposes, as we think the position is relatively obvious.

644. The Claimant's pleaded case is that he disclosed information which he reasonably believed tended to show a breach of several legal obligations. The first of these is a breach by firms of minimum capital requirements. The Claimant did indeed disclose information about undercapitalisation, for example at [11446]:

> 'Here are two typical tables of Harm data. The first shows the data in billions of pounds sterling for a range of typical financial firms, and the second the same amount as a percentage of each balance sheet. The second table shows that the amount of Harm is often much greater than the amount of market capital (and regulatory capital) held by the firm. I also call this Shadow Capital as a result to emphasise that consumers have as much or more at stake than normal shareholders an should have similar rights of oversight and reward. This in a nutshell is the problem in current governance.'

645. The accompanying table showed some firms undercapitalised by many billions of pounds at points between 2006 and 2014. We accept that the Claimant subjectively believed that this was the true position and that it tended to show that those firms were likely to be in breach of minimum capital requirements. For reasons we have already given (paras 531 and 544), we accept his belief was reasonable, whether or not it was correct.

646. The Claimant then asserts that he was disclosing information which tended to show a likely breach by the FCA of its consumer protection objective, by allowing the undercapitalisation to continue/failing to act. Most of this document concerned the position before the FCA came into existence; there was no pleaded reference to the FSA's legal obligations, and so that information falls away, other than as background. However, in a section from [11450] onwards, the Claimant described in detail his attempts to persuade Mr Andrews and Mr Lukacs (of the FCA) of the importance of the Harm metrics, which he described as follows:

> 'I then use them to understand and analyse how profits and losses flowing through the City and broader economy. I isolate the impact on consumers and market. It turns out to be hundreds of billions of pounds in most major economies. This process is precisely the sort of process Basel proscribes [*presumably prescribes*]: risk managers should implement advanced

models and prove that they work to capture risk and then manage that risk.'

647. He then went on to describe Mr Andrews' and Mr Lukacs' rejection of his work. We are satisfied that the Claimant subjectively believed that, by describing the rejection of the Harm metrics during the FCA period, he was disclosing information which he subjectively believed tended to show a failure by the FCA in relation to its consumer protection objective. We have concluded that his belief was reasonable: in our judgment, it follows from our conclusion that his belief in the soundness of the model was reasonable that a belief in the damaging consequences of its neglect, in particular to consumers, must also be reasonable, whether or not it was correct.

648. We reject the Claimant's contention that he believed he was disclosing information which tended to show a breach by the FCA of the duty under ss.73 and 77 of the 2012 Act to investigate and report on breaches by the FSA; we have already found (para 471) that he knew there was no such duty on the FCA.

649. However, we are satisfied that he subjectively believed that the information he was providing tended to show an ongoing failure by the FCA to investigate its own decision not to adopt the Harm metrics. It follows from the fact that he reasonably believed in the soundness and importance of the model to the FCA's regulatory function, that a failure to investigate its neglect would reasonably be regarded by him as a regulatory failure, whether or not that was correct. Although there had been some investigation into the Harm metrics by the FCA, including by seeking the input of the two academics, the Claimant believed that it had been tainted by the instructions which they had been given (which he alludes to at [11454]). In the light of our findings as to the flaws in the academic review process (para 790 onwards), we have concluded that that belief was also reasonable. This was a protected disclosure.

<u>PID 18 (2016-2018): C disclosed to Natasha Pesaro, Barbara Frohn, Fod Barnes, Chris Woolard and the Director of Authorisations either directly or through the governance processes at that time that P2P borrowers were considerably overcharged and lenders considerably overpaid in breach of the legal obligation on the FCA to ensure clear fair and not misleading product information, fair pricing, and/or fair competition and market behaviours.</u>

650. Mr Kemp invites us to treat *Disclosures 18, 19 and 24*, which all relate to P2P lending, as an 'aggregate and repetitive' disclosure. The obligation relied on for all three of them is that on the FCA (pursuant to FSMA) to follow statutory objectives, namely (1) consumer protection, (2) promoting effective competition and (3) market integrity. The breach was allowing such practices to continue/failing to act. We deal with these disclosures together in the following paragraphs.

Further findings of fact

651. We have already referred to the email of 18 March 2016 [11684] (see para 307). Attached to that email was a paper, written by Mr Barnes and the Claimant, which (Ms Frohn accepted) was similar to the paper at [11651]. It was put to Ms Frohn that, 'in principle', if the misconduct carried on, and the FCA did not act, it 'could be' in breach of its statutory objectives. Ms Frohn agreed.

652. We have already found (para 308) that, in response to these concerns a great deal of work was done by the FCA. However, in the course of that work, the Claimant and others discovered that borrowers were being overcharged. In an email of 7 January 2017 [DB 9317], he wrote:

> 'The viability of the loan books is the main area we need to apply our threshold conditions rather than the platform. On the evidence to hand my analysis [], after the foregoing costs, *the charges are 4-5 times expected losses. That is not viable in any competitive or efficient market, so on face value is in violation of our objectives and presumably threshold viability conditions*
>
> […]
>
> Our problem is that the FCA has only started to need to understand and interpret its mandate along the lines described in the second bullet point. From our work [redacted] progress on these avenues have being made with authorizations (but another team), GCD and enforcement. But that discussion never made it into 'management' let alone EXCO apart from the un-discussed lessons learned.'

653. The Claimant also relied on a joint SIWS/SRA Risk Co Summary Paper of 3 April 2017, entitled 'Authorisation and Supervision Update on Peer to Peer.' The Claimant was a lead author on this paper, although ultimately it was a joint paper with Mr Barnes, which was signed off by a senior member of the Risk and Compliance Division (not Ms Frohn) and, therefore, was put forward as the view of the Division. We were taken to highlighted passages in the document (at [12390] onwards), including the following:

> 'The overall objective should be that somewhere in the FCA a complete list of risks to the FCA's objectives (and what we are doing about them, if anything) is created and maintained.'

654. There followed a series of bullet-point summaries of matters requiring attention, the last of which was:

> 'Establishing that (within reasonable bounds) prices on both sides of the platform (lending expected interest rates, borrowing interest rate charged) are not seriously out of line with the appropriate wider market rates.'

655. The paper went on:

> 'The problem at present appears to be that current viability, threshold, disclosure, client money and other tools only scratch the surface of such issues without getting rid of the underlying harm or detriment.'

Conclusion

656. In relation to the alleged disclosures on 18 March 2016, we have concluded that the Claimant was not, at this stage, disclosing information which tended to show a likely breach of a legal obligation by the FCA. He was testing the waters, asking questions and identifying potential problems, for example:

> 'the main issue is to find out whether P2P should have the same objectives and risk levels we apply to other sectors from a consumer and market standpoint.'

657. The test is that information tends to show that a breach is 'likely'; disclosing a breach which is merely potential is not enough.

658. The position is different when it comes to the January 2017 disclosure. The Claimant referred explicitly to the statutory objectives and stated (in the second passage above) that there had been a slowness to act by the FCA. Ms Frohn accepted that the Claimant was identifying not only potential, but also actual, breaches of the FCA's statutory objectives.

659. Similarly, in the April 2017 paper (of which the Claimant was a co-author), Ms Frohn accepted, and we find, that the authors of the paper were saying that, by maintaining the *status quo*, the FCA was in breach of the statutory objective of consumer protection. The paper also disclosed information which tended to show that certain firms were in breach of their threshold conditions, but the pleaded legal obligations in *PID 18* related not to breaches by firms, but to breaches by the FCA, and so these passages are relevant only as background.

660. Taking the January and April 2017 disclosures together, we are satisfied that the Claimant subjectively believed that the information he (and others) was disclosing tended to show that the FCA was in likely or actual breach of its statutory objectives. That belief was reasonable: the Claimant was himself a specialist in this field; other specialists, including Mr Barnes, agreed with the Claimant's position; Ms Frohn herself, in an email to Mr Bailey of 7 June 2017, suggested that the regulatory regime currently in place was no longer fit for purpose and needed revisiting. This was a protected disclosure.

661. We observe that this is an example of the Claimant satisfying the test for whistleblowing by simply doing his job (identifying risk). Although by virtue of their content, these interventions can properly be analysed as public interest disclosures, there is no cogent evidence that they were perceived as such by anyone else, let alone that any adverse treatment of the Claimant occurred because of them. On the contrary, the organisation took on board the Claimant's insights; they were regarded as valuable and were taken forward. If the Claimant was blowing the whistle in the April 2017 paper, so was Mr Barnes and the senior manager who signed it off. There was no suggestion that they were subjected to any detriments.

662. Mr Kemp put to Ms Frohn in cross-examination, on the basis of later emails from her in June 2017, that Mr Bailey did not act on the recommendations in the papers as quickly as the Claimant would have liked and that this was connected with the Claimant's earlier disclosures in relation to the Harm metrics. We regard that as fanciful (not to say solipsistic). Mr Bailey responded as he did because he thought the matter required further assessment; it had nothing whatsoever to do with the Claimant or the Harm metrics.

<u>PID 19 (April 2017): C verbally disclosed to Jose Morego that P2P borrowers were considerably overcharged and lenders considerably overpaid in breach of the legal obligation on the FCA to ensure fair pricing and/or fair competition.</u>

663. The Claimant alleges that on an unspecified date in April 2017 he made a disclosure about P2P lending verbally to Mr Morago. As we have already noted (para 311), in his witness statement the Claimant identifies the occasion on which this was said to have occurred as the same occasion on which he and Mr Morago had what he described as a 'massive row' in the open plan office.

664. The pleaded issue does not identify precisely what specific information (as opposed to a generalised assertion) about P2P he asserts he disclosed, nor did the section of his witness statement on which he relied, where the focus was on the Harm metrics. The Claimant referred only the fact that he 'spun round to speak [to Mr Morago] about the peer-to-peer risks and proposed solutions'.

665. The Claimant sought to shift his ground in cross-examination, to distance himself from his witness statement and introduce additional documents. We did not permit him to do so for the reasons we have already given (para 479 onwards).

666. In cross-examination Mr Morago was merely asked whether he recalled the Claimant making 'general statements' about P2P on this occasion along the lines of the pleaded allegation. Mr Morago accepted that the Claimant probably said something along those lines (he could not remember what) but said that he took it as the Claimant simply expressing his usual strong opinions. Mr Kemp then took him to an email dated 7 January 2017 (some three months earlier), into which Mr Morago had been copied. It was put to him that what he said in that email was 'reflective of what the Claimant would have said in April 2017'. Mr Morago did not accept that.

667. We have concluded that the Claimant has not identified with sufficient specificity what information, if any, he disclosed in relation to P2P to Morago on this occasion; he has not discharged the burden on him to show that a protected disclosure was made.

668. If we are wrong about that, we have concluded that, whatever he said about P2P on that occasion, Mr Morago did not perceive him to be making a protected disclosure and there is no evidence that it had any influence on the decisions subsequently taken by Mr Morago.

<u>PID 24: C provided Nike Trost (Head of P2P policy) and Barbara Frohn with an outline, drafts and final version of an Insight Article authored by C which explained the concept and consequences of protected disclosure 18 in simple and technical detail.</u>

Further findings of fact

669. The Claimant emailed Ms Frohn on 12 July 2018 with an idea for an insight article in July 2018 about the P2P market ('Modern Finance is the ideal tool for Consumer Protection'). An insight article is published outside the FCA. The article went through a number of drafts. In the final draft [13395] the Claimant wrote this:

> 'The P2P design flaw is that P2P allocates the credit spreads to individual investors rather than using it like an insurance premium to cancel out credit losses across similar loans. The combination leads to a bias towards overcharging borrowers (evident in platform data once one knows what to look for) and prevents the system achieving the most efficient economic

> outcomes. The result is that (1) borrowers are not as well served as they should be and (2) individual P2P investors will experience losses which deviate substantially from the average so that (3) typical investors are unlikely to ever tend towards the long-run average even when the P2P portfolio as a whole converges to an average with very little deviation. In other words, the allocation is inefficient and unfair. These harms can be fixed by measuring whether the pricing is fair and redesigning the allocation of credit spreads. Finding harm and flaws is not unique to P2P.
>
> […]
>
> The fact that P2P assigns the credit spread to specific investors upfront (before knowing which ones have been paired with borrowers do not repay in full) prevents this insurance from taking effect in P2P. It turns P2P into a lottery which masks the ability of participants to know whether the nostril is fair not.'

670. Mr Kemp put to Ms Frohn that this paper described a practice which, if the FCA did not do anything to act, would tend to show a breach of the consumer protection objective. Ms Frohn objected that the focus of the paper was on breaches by the firms themselves, rather than the FCA, and that the FCA was indeed acting and intervening with every P2P lender. We agree. The pleaded legal obligations in relation to this disclosure (i.e. those which the Claimant said he had in mind at the time) are those pertaining to the FCA, not to firms. Although in *PID 18* the Claimant disclosed information which tended to show that the FCA was in breach of its statutory objectives, the focus of *PID 24* is on firms; he did not repeat his earlier suggestion that the FCA was, or was likely to be, in breach of its own legal obligations. We do not regard this as a case where the Claimant's earlier statements should be read into this document and the surrounding correspondence. This was a piece specifically crafted for external consumption; it was not a continuation of an internal discussion. In our view, he was taking a different approach in this context.

671. For these reasons, we have concluded that, in making these statements, the Claimant did not subjectively believe that they tended to show the pleaded breaches of legal obligations by the FCA.

Overview and causation in relation to the P2P disclosures

672. Although we have found that the Claimant did make *PID 18* in January/April 2017 in relation to P2P, we accept Ms Frohn's evidence that at no point, including the Claimant's initial observations in the March 2016, did it occur to her that the Claimant was blowing the whistle in relation to P2P. In her eyes, he was simply doing his job: identifying novel risks and working with others to address them.

673. We go further: we think that is what the Claimant himself thought he was doing during this period. Although that does not undermine the status of the disclosure, it does have consequences, both in terms of limitation and causation.

674. As to limitation, we regard the Claimant's reliance on these interventions as whistleblowing disclosures as self-serving. His work on the Harm metrics stopped in early 2015 and he made no disclosures about Harm for a period of

over a year, between October 2016 (*PID 17*) and December 2017 (*PID 20*), by which time he was facing the possibility of redundancy. We accept Ms Shepherd's submission that, by seeking to position himself in these proceedings as a whistleblower in relation to P2P, as well as in relation to the Harm metrics, the Claimant was seeking to bridge an inconvenient gap.

675. As to causation, if the disclosure about P2P was not perceived by anyone at the time as whistleblowing, the likelihood of his being subjected to detriments for articulating 'inconvenient truths' diminishes; we are not satisfied that his insights were regarded as inconvenient; on the contrary, they were acknowledged, acted upon and, on his own account to the Tribunal (para 308), placed front and centre in the FCA's final policies.

PID 20 (1 December 2017): By email to Jose Morego and Vivien Jarvis, C reminded them of his unresolved protected disclosures—similarly to 0 to 9 above—as well as the concealment of those disclosures and detriments, similarly to 0 to 17 below.

676. *PID 20* is said to be contained in the Claimant's email of 1 December 2017 to Mr Morago and Ms Jarvis [12920]; the context is described in our findings of fact above (para 335 onwards).

Further findings of fact

677. In his email the Claimant wrote:

> 'In our conversation I also alluded to an historic series of disclosures and detriments that I expect you to find in my file and records. Have you now located the relevant records and can you explain why this has occurred?'

678. We find that that this referred to alleged disclosures and detriments relating to the Harm metrics, not to P2P. It had been at least two years since the Claimant had worked on Harm, hence the reference to the disclosures and detriments being historic.

679. Most of the email is highlighted. The Claimant referred to what he regarded as the ongoing failure to appraise him and wrote:

> 'I await your explanation, but my guess is that the FSA (PRA/FCA) cannot recognise my work without recognising its own regulatory and conduct failure—to heed the specific and clear warnings on a firm by firm and sector by sector basis before and throughout the financial crisis revealed by the Harm metrics—and therefore has deliberately chosen on repeated occasions to keep that buried. What is your explanation? '

680. He also wrote:

> 'In sum you will find, from 2006, that is ten years before the Mission, I modified the textbook, industry and Basle approach to spot harm to consumers and markets. I called the results the Harm metrics. They provided eight to twelve months of advanced warning of which precise firms were closest to the precipice as well as the fact that entire sectors were at the precipice of losing market financing and therefore were all about to cause Harm.'

Conclusion

681. The information in the email was sufficiently specific to amount to a disclosure.

682. Mr Kemp put to Mr Morago that the first passage disclosed a failure by the FCA to investigate and report regulatory and conduct failures; Mr Morago acknowledged that that was what he understood the Claimant to be saying. However, we have concluded that, in this document, the Claimant's focus was on the alleged failure to use the Harm metrics during the FSA period. We have already found that the Claimant knew that there was no duty on the FCA to investigate and report on any regulatory failure by the FSA (para 471). Accordingly, he did not subjectively believe the information tended to show a breach of a legal obligation in this respect.

683. Mr Kemp put to Mr Morago that, in the second passage, the Claimant was disclosing historic undercapitalisation to an extent which suggested likely breaches of minimum capital requirements; again, Mr Morago acknowledged that reading. We are satisfied that the Claimant subjectively believed that the information tended to show such likely breaches, albeit in relation to the FSA period. That belief was reasonable for the reasons already given (paras 531 and 544), whether or not it was correct.

684. Finally, Mr Kemp put that the two passages together disclosed a breach by the FCA of its consumer protection objective, by not acting on the warnings provided by the Harm metrics; Mr Morago acknowledged that reading in part. As we have just explained, we consider that the passage did not relate to breaches by the FCA, but to historic breaches by the FSA. The was no reference in the pleading to the FSA's statutory objectives, and so this aspect of the alleged disclosure must fail.

685. Although we have already found (para 340) that this email was tactical - it was an attempt by the Claimant to disrupt the restructuring exercise insofar as it affected him - we reminded ourselves that motive is not relevant to the question of whether a disclosure is protected. The Respondent elected not to take the public interest point in relation to any of the disclosures.

686. Consequently, we have concluded that this email contained a public interest disclosure but solely in relation to historic undercapitalisation.

PID 21 (15 December 2017): Over coffee with Barbara Frohn, C verbally repeated the history of his unresolved protected disclosures, reminding her of the history of protected disclosures (similarly to 0 to 20) above as well as the concealment of those disclosures and detriments, as in 0 to 19 below.

687. This protected disclosure was said to have been made at a meeting with Ms Frohn on 15 December 2017, about which we have already made findings of fact (para 344 onwards). The specific disclosures are highlighted in his note [12930], made five days after the meeting, and are as follows:

> 'I asked whether Jose had spoken to her about the historic issues I had raised. She said no but in the following [*sic*] became clear she was well prepared for and unsurprised by the conversation […] She said Risk Dynamics had concluded my work was not ready. I corrected her to say they did not find any problems, suggested it was of use to the FCA and PRA, but they needed more time to assess it […] She said Andrew Bailey was aware [of] my issues because he had asked her who was affected.'

688. The Claimant suggested in cross-examination that he said more about the Harm metrics than was reflected in his note; even then his evidence as to what he said was vague. We accept Ms Shepherd's submission that nothing in the passages set out above conveyed specific information which tended to show breaches of legal obligations. There was no protected disclosure on this occasion.

PID 22 (24 February 2018): By email C wrote to the FCA EXCO and Board via Andrew Bailey, CEO, and Barbara Frohn, CRO, reminding them of the history of unresolved protected disclosures (similarly to 0 to 20) as well as the concealment of those disclosures and consequent detriments, as in 0 to 21 below.

689. On 24 February 2018, the Claimant wrote to Mr Bailey and Ms Frohn the email described above (at para 355 onwards) [12986], which he relies on as PID 22. We accept Ms Shepherd's submission that the Claimant's primary motivation in writing this email was to shore up his position in the restructuring exercise and, in the process, seek once again to achieve recognition for his work on the Harm metrics. We remind ourselves that motivation is not relevant and the Respondent has conceded public interest.

690. We accept that in the italicised block (which the Claimant expected the Respondent to adopt and issue as a public statement), the Claimant described the Harm metrics and disclosed, among other things, that, by late December 2007:

> 'According to the data the most precarious firms had a 50-50 chance of losing market financing and the largest needed billions of fresh market capital to avoid collapse (losing market funding whether through capital, LIBOR or bonds) and many others were not far behind. The top of the list was headed by all the firms that did or came perilously close to collapse starting some 10 months later.'

691. We are satisfied that the Claimant was again disclosing information which he subjectively believed tended to show that, some 11 years earlier, firms were so massively undercapitalised that they were likely to be in breach of minimum capital requirements. For the reasons we have already given, we accept that his belief was reasonable, whether or not it was correct.

692. Ms Frohn also accepted in cross-examination that the passage at [12988], which related to the RBS and HBOS reports contained information tending to show concealment of the Claimant's earlier warnings about undercapitalisation. He wrote:

> 'The specific and detailed warning in regards RBS and HBOS were fed into those reviews but left out of the reports on the basis that they were limited to reporting on whether the supervisory process was followed, not whether the FSA/FCA was aware of an alternative approach that reveal the underlying market and regulatory failure causing the financial and sovereign crises.'

693. However, the pleaded legal obligations in relation to this disclosure were confined to obligations on the FCA. Consequently, any concealment alleged in respect of the RBS report (indeed, any disclosure of breach of a legal obligation by the FSA) cannot be relevant because the report predated the FCA. The

Claimant cannot rely on ss. 73 and 77 of the 2012 Act for the reasons we have already given (para 471).

694. By contrast, the HBOS review was concluded by the FCA. However, nothing was put to any of the Respondent's witnesses, and no submissions made in closing, as to what information the Claimant provided to the HBOS review (unlike the RBS review it was not one of his allegations of detriment). We note the reference at paragraph 758 of his witness statement, in which he acknowledged that the HBOS supervisor at the time (in 2007) made use of the Harm metrics, even asked the Claimant questions based on them, but that the Claimant's warning 'was too late to make a difference to HBOS'. Even if we accepted that the Claimant subjectively believed that the statement in the email of 2018 tended to show concealment of a regulatory failure by the FCA in investigating HBOS (which that passage suggests he did not), there was no evidence on the basis of which we could conclude that his belief was reasonable. The Claimant has not discharged the burden on him to show that he made a protected disclosure in this regard.

695. Consequently, we have concluded that this email contained a public interest disclosure but solely in relation to historic undercapitalisation.

PID 23 (22 April 2018): By email C wrote to the FCA EXCO and Board via Charles Randell (Chairman), Andrew Bailey (CEO) and Barbara Frohn (CRO) described the history of unresolved protected disclosures (as in 0 to 22 above) as well as the concealment of those disclosures and consequent detriments, as in 0 to 21 below.

696. The context for the alleged disclosure in the email to Mr Randell, Mr Bailey and Ms Frohn on 22 April 2018, is set out above (at para 364). Most of the email [13079-13085] is highlighted. Again, we do not set out the highlighted text in full because the position appeared to us to be relatively straightforward.

697. The Claimant's pleaded legal obligations related to the FCA only. Many passages of this document relate to alleged breaches of legal obligations by the FSA. He cannot rely on ss. 73 and 77 of the 2012 Act for the reasons we have already given (para 471).

698. In passages on [13080] and [13081] the Claimant disclosed information about alleged concealment by the FCA (and also, irrelevantly for these purposes, by the FSA) of the continuing failure to adopt the Harm metrics. We accept that he subjectively believed that he was disclosing information which tended to show a breach of the FCA's statutory objectives. However, we have concluded that that belief was not reasonable. A reasonable person with the Claimant's knowledge of the background, would know that there had been no attempt by the FCA to *conceal* his work on the Harm metrics. On the contrary, the FCA had invested considerable resources in investigating the Harm metrics, up to and including the Risk Dynamics report which Ms Frohn had commissioned in 2016, but it had concluded that the value of the model was not sufficiently proven to be adopted by the organisation. We have already found (see for example, para 786) that there had been no attempt to silence or censor the Claimant; on the contrary, he had been encouraged several times (for example, para 178) to engage with the Respondent's whistleblowing process but had elected not to do so.

699. We find that in passages on [13080], the Claimant disclosed information which he subjectively believed tended to show that, some 11 years earlier, firms were so massively undercapitalised that they were likely to be in breach of minimum capital requirements. For the reasons we have already given, we accept that his belief was reasonable.

700. To this extent only, this document contained a protected disclosure.

PID 25 (October 2018 to March 2019): By email to Charles Randell (FCA Chairman) C provided more detail across the entire history of protected disclosures and detriments trying like here to focus on the major events like PIDS 1 to 24 above including the concealment and consequent detriments like D15, 19, 20, 21, 22 and 23 below, querying the justification for not investigating and resolving them before dismissing C.

701. *PID 25* is said to be contained primarily in the Claimant's letter appealing against his dismissal, attached to the email of 30 October 2018 [13529-13539]. Mr Kemp also put to Mr Randell the email of 14 December 2018 [13675-13085].

Further findings of fact

702. These documents are, in at least one respect, confused: they continue to refer to the FSA as if it still existed (indeed as if it were still the Claimant's employer). Their language is consistently hyperbolic, the structure rambling, the tone primarily one of outrage. If they disclose anything, it is the Claimant's anger at being dismissed. They are peppered with passages of self-aggrandisement, alongside personalised vilification of the Claimant's former colleagues.

703. Sensibly, in our view, Mr Kemp put specific passages to Mr Randell in cross-examination. Mr Randell addressed his questions patiently, acknowledging what the Claimant appeared to be saying, while declining to accept its veracity.

704. The first passage put to Mr Randell was from the covering email of the October document:

> 'Unfortunately my whistleblowing over the last ten years on the failure of the FSA to use the Harm metrics to nip the financial crisis in the bud and afterwards prevent harm are not being taken seriously by the FSA. Indeed they have just fired me. In these documents I will (1) describe the failures at length, (2) appeal against my dismissal, and (3) explain what the investigation needs to cover in my view. I also provide the TSC with our prior correspondence.
>
> I apologise for any typos and poor writing, having been fired last Thursday, I have had to write at speed under stressful conditions so as to warn you before documents go missing.'

705. It was put to Mr Randell that this disclosed historic breaches by the FSA. No such failures were pleaded and so this point cannot succeed.

706. The next two passages came from the attached letter [13534]:

> 'For the avoidance of doubt, let me recap the core revelations and failures:

> As the Harm metrics work for individual firms, it must also work for all of them at once. For example if it can predict that one firm is near collapse it can predict when entire sectors are.'

and:

> '"Everyone" at the FSA knows that the harm metrics worked to predict the crisis as soon as it was turned on in 2007, but the signals were ignored and the failure to use them in the public interest as required by FSA objectives is ongoing.'

707. Again, no failure by the FSA was relied on in the pleading. There could be no 'ongoing' breach by the FSA, a body which no longer existed. In any event, Mr Randell observed that, post-2013, the regulation of large firms had passed to the PRA, not the FCA. This passage does not contain a protected disclosure; it is incoherent.

708. Mr Kemp next took Mr Randell to a passage on [13536]:

> 'In any event Parliament should have been informed that the FSA had discovered and possessed the Harm metrics that could have nipped the financial crisis in the bud (if used immediately) or reduced its impact (if used as soon as it became apparent to everyone that the crisis had arrived). Parliament and the public have been left in the dark.'

709. The only pleaded breaches related to the firms and to the FCA. For the reasons already given, there was no obligation on the FCA to investigate/report on alleged failures by the FSA.

710. Mr Kemp then turned to the December documents. According to the covering email, the attached document was 'a description of the circumstances and reasons for my dismissal explaining how that dismissal is part and parcel of my disclosures'. Again, in our view, that statement is incoherent.

711. Mr Kemp put the following passages from the attached document [13681]:

> 'They [Ms Frohn and Mr Woolard] need to explain why they chose to victimise, frustrate and shoot the messenger rather than reveal the past and ongoing failures of their own and FSA peers. They have still not seriously and properly dealt with the significant harms to consumers and markets I have revealed, as is their obligation. '

712. In our judgment, this passage is a generalised allegation, it is not a disclosure: such information as it contains lacks the requisite degree of specificity.

713. Mr Kemp then put a passage on [13681], in the context of a section dealing with the academic referee process in 2015 (para 232 onwards).

> 'The next strongest criticism was from the second academic referee, who claimed that Modigliani-Miller does not hold. But as I have explained in prior emails to you and in detail in a December 2014 email to Peter Andrews, the referee's own papers contain a fatal hidden assumption that money grows on trees within banks. Were that possible, without causing harm, they could potentially reimburse consumers and markets for the

> harm they cause. In actuality, such arbitrage is a source of harm in violation of FSA consumer, market and competition objectives.'

714. Understandably, in our view, Mr Randell was at something of a loss to identify what the Claimant might be disclosing in this passage (he described it as 'impenetrable'), other than the Claimant's view that the academic referee was not qualified to comment on his work. In our judgment, it was mere score-settling, not a public interest disclosure.

715. Mr Kemp then put the passage at [13685]:

> 'In October I was sacked, for the reason given to me several times by Barbra, because the FSA executives want to find less and more manageable harm than revealed by me. This implies, to depersonalise it, that EXCO does not want to find harm revealed by modern finance, even though the industry uses it to construct essentially every product, service and business model to their own advantage, often at the expense of consumers and markets. EXCO blame me for revealing the harm, rather than the industry for mis-using modern finance and their SMR responsibilities when creating the harm. Rather than adjust the FSA business model to deal with this level and source of harm, as required by FSMA, they have sacked me as the more expedient solution.'

716. The only specific information disclosed by the Claimant is that he has been sacked, from which he extrapolates that there must have been wrongdoing. Mr Randell sought to articulate what he understood the Claimant to be saying: that everyone, past and present, he had dealt with - the FSA, the FCA, the PRA (where he had never worked), their successive chairs and boards, as well as the Governor of the Bank of England - were involved in a conspiracy to act against him.

717. In our judgment, this is pure allegation, not a public interest disclosure of information: it fails every limb of the test for a protected disclosure, with the possible exception of subjective belief.

<u>PID 26 (18/19 January 2019 and continuing): By email to Mark Carney, Phillip Hammond via Katherine Braddick (ex-FSA but at this point, Director General of Financial Services HM Treasury, the designated unofficial "prescribed" person within the FCA whistleblowing policy 2018 page 20 who will likely contact the FCA audit department already investigating the matter for the Chairman) C outlined the major disclosures including or similar to PIDs 0 to 18 above as well as the concealment of those disclosures and the general history of detrimental treatment up until that point.</u>

718. *PID 26* is contained in the email of 18 January 2019 [13726] to which is attached a 20-page letter [13705-13725], all of which is relied on by the Claimant.

719. Initial findings of fact are set out at para 409 onwards. The Respondent (in its table on disclosures submitted in closing) does not dispute that, if there was a disclosure, it was made to the Claimant's employer.

720. This document is a comprehensive summary of the history of the Claimant's development of the Harm metrics and the Claimant's perception as to the regulatory failures by the FSA/FCA in not acknowledging significance and placing it at the centre of its work. It is explicitly described by the Claimant as an

act of whistleblowing in the covering email (para 410). In many ways, it is an embryonic version of the Claimant's claims before this Tribunal.

721. In the course of the document, we have concluded that the Claimant disclosed specific information in relation to historic undercapitalisation by firms so extensive that we accept that the Claimant subjectively believed that it tended to show a likely breach capital requirements, for example at [13708-13709]. For the reasons we have already given (paras 531 and 544), we consider that belief to have been reasonable, whether or not it was correct.

722. Similarly, the Claimant disclosed information which we accept he subjectively believed tended to show a likely breach by the FCA of its statutory objectives of market confidence/consumer protection, by not using the Harm metrics, for example at [13711], because he believed that the Harm metrics continues to be an essential tool for the FCA, notwithstanding the fact that regulation of large firms had passed the PRA. For the reasons we have already given, we consider that belief to have been reasonable, whether or not it was correct.

723. For the reasons already given, we are not satisfied that the Claimant subjectively believed that he was disclosing information which tended to suggest a likely breach of the duty to investigate and report in relation to alleged failures by the FSA. However, he did believe that he was disclosing information which tended to suggest a likely breach by the FCA of the duty to investigate and report on its own alleged regulatory failures. For the reasons we have already given (para 649), we accept that belief was reasonable, whether or not it was correct.

DETRIMENTS

The parties agreed statement of the law to be applied

724. In *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] IRLR 374, Elias LJ reviewed the law applicable to the term 'detriment' in section 47B(1) ERA and at [27]-[28] he stated:

> **'27. In order to bring a claim under section 47B , the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the viewpoint of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law, and it has the same meaning in whistle-blowing cases. In Derbyshire v St. Helens MBC [2007] UKHL 16; [2007] ICR 841, paras. 67-68 Lord Neuberger described the position thus:**
>
> **67. … In that connection, Brightman LJ said in Ministry of Defence v Jeremiah [1980] ICR 13 at 31A that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".**
>
> **68. That observation was cited with apparent approval by Lord Hoffmann in Khan [2001] ICR 1065 , para 53. More recently it has been cited with approved in your Lordships' House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 . At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice".**

> **28. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the Claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective'.**

Burden of proof, causation and inference drawing

725. If the Claimant proves all the other ingredients of the claim on the balance of probabilities – i.e. that there were protected disclosures, there was detriment, and the Respondent subjected the Claimant to that detriment – the burden will shift to the Respondent to show the ground on which any act, or deliberate failure to act, was done (see, section 48(2) ERA 1996).

726. The Tribunal should draw inferences from a consideration of the totality of the primary facts (*Anya v University of Oxford* [2001] ICR 847, [9] of the judgment, citing with approval the guidance of Mummery J in *Qureshi v Victoria* [2001] ICR 863.

727. If the Tribunal can find no evidence to indicate the ground on which the Respondent subjected the Claimant to detriment, it does not follow that the claim succeeds by default. The Tribunal is entitled to make findings of fact and to draw its own conclusions on the matter (*Ibekwe v Sussex Partnership NHS Foundation Trust* [2014] 11 WLUK 593).

728. In *Fecitt v NHS Manchester (Public Concern at Work intervening)* [2012] ICR 372, Elias LJ accepted that the principle in *Igen Ltd v Wong* [2005] ICR 931 that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions was equally applicable where the objective is to protect whistle-blowers [43].

729. Elias LJ then summarised the approach at [45]:

> **'In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower.'**

730. The test for causation is, therefore, aligned to that which is applicable in discrimination law. The test demands a critical analysis of the mental processes (conscious or unconscious) which caused the employer so to act (*Nagarajan v. London Regional Transport* [1999] ICR 877 at [884-885]).

731. As to the quality of that critical analysis, Elias LJ stated in Fecitt at [51]:

> **'…I entirely accept that where the whistle-blower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistle-blower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer'.**

732. Further, the EAT in *Patel v Surrey County Council* UKEAT/0178/16/LA directed that ETs ([101] per Slade J):

> **'should not uncritically accept a reason advanced by a Respondent for detrimental action. That the ET may consider the reason given to be reasonable does not absolve the ET from further enquiry.'**

733. To succeed on his detriment claim (subject to time), the Claimant must therefore show that one or more of his alleged protected disclosures were a material influence or material factor in the alleged detriment treatment he has suffered. A more than minor or trivial influence is sufficient to establish the causative link.

734. Detrimental treatment for reasons related to the disclosure, but not because of the disclosure itself, is insufficient for liability to be established (*Panayiotou v Chief Constable of Hampshire Police* [2014] IRLR 500). However, the ET must take care to distinguish between the disclosure and some feature of it. There must be a proper basis for a finding of separability. For example, the authorities show that an employer's reliance on "ordinary" unreasonable behaviour in the manner of undertaking the act giving rise to statutory protection may be be sufficient to establish liability (see, e.g. *Riley v. Belmont Green Finance Ltd t/a Vida Homeloans* UKEAT/0133/19/BA at [20]-[31] per Judge Gullick sitting as a Deputy Judge of the High Court.

The detriments

D1 (July to August 2007, Lyndon Nelson and the Planet and Asteroid teams): Deliberately failing to enter the analysis/data shown by the Harm metrics into their risk logs and formally elevate the issue to ExCo and the Board and, as such, failing to recognise the Claimant's work causing him to feel isolated

735. Mr Kemp submitted that *PID 2* was likely to have been a material influence on this detriment. We have found (para 492 onwards) that it was not a protected disclosure. Thus, even if there were a detriment, it cannot have been caused by whistleblowing. We deal with it briefly. It should be noted that it relates specifically to a period ending in August 2007 (*D2*, which is similar, applies to a later period).

736. By August 2007 the Claimant had only just begun to generate information through the Harm metrics. The detriment is alleged to have occurred almost immediately and consisted of the Claimant feeling isolated because his work on Harm was not escalated to ExCo and Board level. In our judgment that would have been an unrealistic expectation, even if the Claimant had it (which we think improbable). We have already found that he did not begin to circulate it widely until December 2007 (para 86). This was, on everybody's view, a novel approach, which needed time and skilful advocacy to gain traction. There is no evidence that the Claimant felt isolated at this time. Alternatively, if he had a sense of grievance about how Harm was being dealt with, it was unjustified. There was no detriment.

D2 (July-August 2007 to 2012, Lyndon Nelson, MRGD HoDs, Firm Supervisors): Deliberately failing to enter the analysis/data shown by the Harm metrics into their risk logs and formally elevate the issue to ExCo and the Board and, as such, deliberately failing to recognise the Claimant's work causing him to feel isolated

Further findings of fact

737. The first part of this allegation is that there was a deliberate failure over a period of five years to enter Harm data into the Risk Department's risk log.

738. The starting-point is that the Claimant never suggested that the Harm data/analysis should be entered into the log. Further, we accept Ms Shepherd's submission that Mr Nelson did not do so because it would not have been appropriate for him: the log only contained risks identified relating to operational matters and matters for which the Department was responsible. The Harm data did not fall into those categories.

739. It is right that the Harm metrics were not formally incorporated into the FSA's supervisory processes. However, it was widely circulated at every level of the organisation. It was used by those, including Mr Nelson, who were convinced of its value; it was not used by others, including many supervisors.

740. We are not satisfied that the Claimant felt 'isolated' in the material period; consequently, the pleaded detriment is not made out. We have already found (para 74) that he preferred to work on his own. He had communication lines throughout the organisation (for example, para 161). We note that, in the June 2011 meeting (referred to at para 616), the Claimant was asked if he had ever tried to go above his Director to the Chief Executive. The Claimant replied:

> 'that he felt that the HARM updates were being sent to the right persons, therefore he never felt the need to do so. He emphasised that the information had always been in the hands of the right people.'

741. That is also inconsistent with the allegation that the Claimant suffered a detriment because the Harm data/analysis was not elevated to ExCO and the Board. The Claimant's updates on the Harm metrics were received daily by them.

Conclusion

742. Insofar as any individuals did not incorporate the Harm metrics into their work, there is no evidence that they did so deliberately and (even in part) because of the matters which we have found amounted to protected disclosures.

743. We remind ourselves of our findings of fact above in relation to the Claimant's own explanations nearer to the time (para 122 onwards), which we consider to be more reliable than the explanations he now advances in these proceedings.

744. We have concluded that the reason why many within the organisation did not adopt the Harm metrics were that they were unpersuaded by its value; some were sceptical because it produced results which conflicted with their own knowledge of the firms they were supervising; and some mistrusted it because they did not fully understand how it was said to work. We are not persuaded that that the fact that the Claimant had made protected disclosures was a material factor.

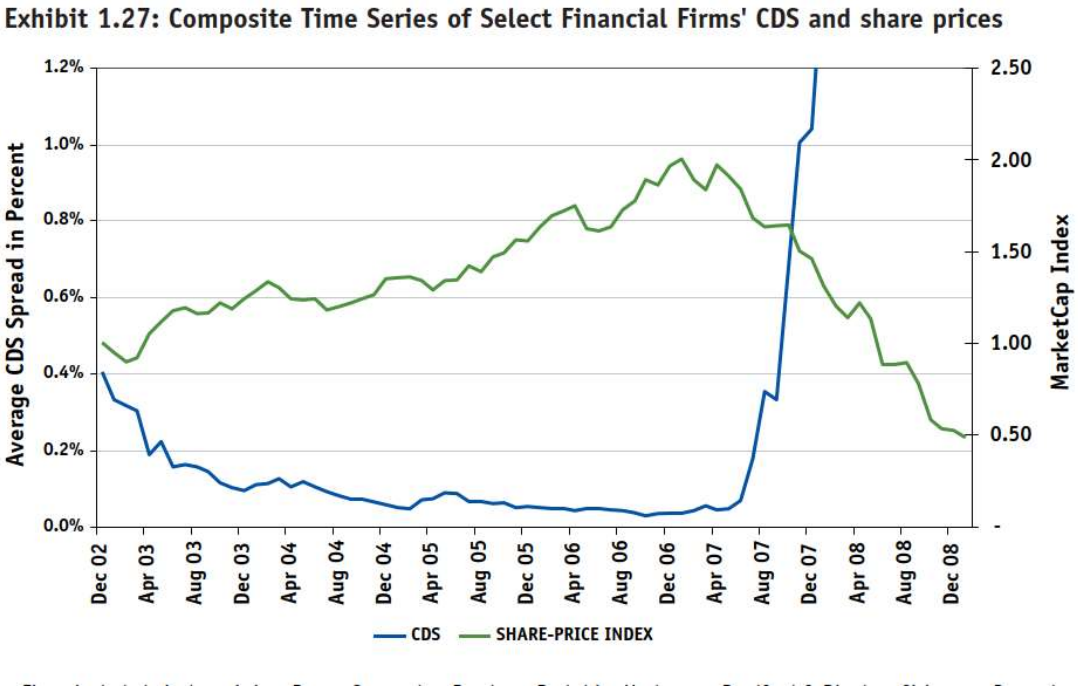
745. Accordingly, this detriment is not well-founded.

<u>D4 (December 2008 to March 2009 (initial preparation to publication of report, Lyndon Nelson and Adair Turner): Misreporting the Harm metrics, the undercapitalisation, subsidy, the behaviour of markets and the authorities' failure to act before and during the crisis in the Turner report in and around Exhibit 1.27. Deliberately failing to deal with the problem elsewhere and, as such, deliberately failing to recognise the Claimant's work causing him to feel isolated</u>

Further findings of fact

746. We have already made findings, and drawn conclusions, about the chart which the Claimant provided to Lord Turner and which he relies on as *PID 8* (para 601 onwards).

747. Lord Turner included a similar chart in his report, but omitted the Harm metrics line:



748. This table suggests that CDS prices before the crisis did not provide forewarning of the scale of the problems ahead.

Conclusions

749. The starting-point is that Lord Turner did not 'misreport' the Harm metrics; he did not report it at all. The allegation, as pleaded, fails on its facts.

750. The second point is that both graphs cover the period 2002 up to the time of the crisis in 2007; however, the Harm metrics did not exist before late 2007; the Harm data the Claimant included in his table for the time before then was created retrospectively. The Claimant accepted that it would have been inappropriate for Lord Turner to suggest in his report that there was a mechanism which forewarned of the crisis at a time when it did not exist.

751. Mr Kemp submitted that Lord Turner was 'fixed with knowledge of PIDs 5, 6a, 7 and 8'. It is right that some of those documents (*PID 8* being the Claimant's chart) were sent to him. However, there is no evidence that Lord Turner had any of them in mind, and deliberately omitted reference to the Harm metrics from his report, even in part because of any disclosures contained within them. That is mere speculation on the Claimant's part.

752. Mr Kemp invites us to draw an inference from the lack of contemporaneous documents showing Lord Turner's reasoning. We decline to do so. We have already observed (para 144) that the lack of certain documents is a likely feature of a case brought so long after the event, by which time the organisation for which he worked had long been abolished. In the circumstances, we consider that it would be unsafe to draw such an inference.

753. We think it more likely that Lord Turner omitted reference to the Harm metrics because it was not a model which had been validated, internally or externally, or adopted by the FSA. It was effectively a work in progress. We have already set out our conclusion as to why that was: not enough people had been convinced of its value, in part because of its lack of explanatory power.

754. As for the allegation relating to Lord Turner's and Mr Nelson's 'failure to deal with it elsewhere', apart from the generalised nature of the allegation, there was no onus on either of them to instigate any enquiry into the Harm metrics, especially in circumstances where the Claimant had neither suggested they do so nor initiated any formal process himself, for example by engaging the Respondent's formal whistleblowing procedure.

755. For these reasons, this claim is not well-founded.

D6 (June 2011 December 2011 and thus the review of the RBS report by Parliament published in October 2012, Ms Hilary and staff): Misrepresenting and misreporting the Harm metrics, undercapitalisation and nature of the authorities failure to act in the RBS report in and around paragraphs 492-502. Failing to deal with the problem identified by C in another forum / medium outside of the RBS report. As such, deliberately failing to recognise the Claimant's work causing him to feel isolated.

Further findings of fact

756. The context is at para 152 onwards.

757. The Claimant relies on paragraphs 492-502 of the RBS report as subjecting him to a detriment. The allegation was originally made against 'Rosemary Hilary and staff'. In the clarification process at the start of the hearing, that was amended (without objection from the Respondent) to add: '(namely Lord Adair [Turner] and Lyndon Nelson)' after 'staff'.

758. The review team did not find any evidence of breaches by RBS of the prevailing regulatory minimum capital requirements during the relevant period. However, the report went on to find that:

> 'the global regulatory capital framework in place before the crisis was severely deficient, and the reforms introduced by Basel II in retrospect added major complexity without addressing the fundamental problem of inadequate capital across entire banking systems.'

759. The report sets out that, from early 2008, information derived from the Harm metrics was circulated in the FSA which indicate that RBS's share price volatility was greater than that of its UK banking peers. At paragraph 494, the report states:

> 'The Review Team noted, however, that the HARM model was (and is) considered contentious because in more benign periods, which are often characterised by lower share price volatility (for example, the period prior to the start of the crisis), it may not have indicated that RBS required additional capital. To some extent, therefore, it may tend to be an indicator of inadequate capital only once this has already become apparent for other analytical approaches.'

760. We accept Mr Kemp's submission that the report misdescribed the Harm metrics in one respect: it overstated the input of share price volatility into the Harm metrics and omitted reference to asset price volatility.

761. That description appears to have entered the report by way of a document prepared by a member of the team, Ms Anna Thursby, dated 10 July 2011 (updated 9 August 2011), giving a 'high level explanation of the HARM model'. At paragraph 6 she wrote:

> 'HARM £Money, therefore, represents the additional amount of capital needed to be raised by a firm to help to prevent cost to the real economy in the event of failure and subsequent rescue by the UK Government. The level of equity needed is relative to the level and structure of a firm's debt through the volatility of the share price.'

762. However, earlier in the document (at paragraphs 4 and 5) she had correctly referred to the centrality of asset values to the Harm metrics.

763. On 21 July 2011 the RBS review team had a meeting with Mr Nelson to discuss the Harm metric [15578]. The note of that meeting records him commenting as follows:

> 'LN began by explaining that the HARM metric sought to take a range of market data into account. He cited past financial crises where market data had highlighted significant problems with firms prior to supervisors being aware of these. He added that a lot of market data (such as share price information) is not controversial. However, in the case of the HARM metric, WS had come up with a complex metric which therefore meant that supervisors struggled to understand and subsequently accept it.
>
> LN elaborated on this. He considered that supervisors did not 'like' the HARM metric since it lacked 'explanatory power.' In particular, the metric enabled supervisors to see that their firm was different but it does not help to explain why it is different and what supervisors are supposed to do in response. However, LN was keen to stress that this did not mean that the HARM metric was without use. LN commented that, whilst HARM did not necessarily deliver an explanation for its results for supervisors to observe, the HARM metric still provided a helpful background.
>
> LN explained that the HARM metric had enabled him to allocate resource within the Strategy and Risk (now Risk) to those firms that appeared more risky according to this, and other, metrics and measures. LN also said that he used the HARM metric to help determine who attended ARROW Panels, for example, to decide how many Panel members with prudential skills were required.'

764. Mr Nelson also offered his 'personal opinion' in the meeting that he did not consider the Harm metrics to be a 'smoking gun' and that it was just one tool to be weighed in the balance with other tools.

765. The Claimant was invited to comment on the draft report by 13 October 2011 as part of the maxwellisation process. Although he was sharply critical of the report, he confined himself to making sweeping statements ('your narrative hides any mention of this in a veil of smoke… the public deserves to know'), rather than correcting specific errors. Mr Nelson, who of course was supportive of the Harm model, also did not correct the error when given an opportunity to do so.

Conclusion

766. The origin of the misdescription was in Ms Thursby's report. There is no evidence that it was deliberate; nor is there any evidence that she wrote what she did because of the Claimant's protected disclosures.

767. Ms Hilary was leading the team but was not responsible for scrutinising the input of her team to that level of detail; she did not correct the draft. She was aware of *PID 9*, although we accept her evidence that she did not perceive it to be whistleblowing; she regarded it as one risk professional providing comments to other professionals. We accept Ms Hilary's evidence that the disclosure played no part in this omission and that the sole reason she did not correct the draft was because she believed at the time that the reference to the volatility of the share price accurately stated the position.

768. As for Lord Turner and Mr Nelson, we think it improbable that the Claimant had them in mind when he originally pleaded this allegation; 'staff' would be an unusual descriptor for the Chair and a Director of the organisation; we note that the related *PID 9* is not said to have been made to either of them but to the 'RBS Report staff'. Nonetheless we deal with the allegation as against them for completeness.

769. Mr Kemp invites us to draw an inference from the fact that Lord Turner was not called to give evidence and there was some evidence of him proposing amendments to the draft report after the Claimant saw it in draft. It was not possible to see precisely what those changes were, although it seems likely that he added the reference to the model being 'contentious'. In our judgment that accurately reflected the disagreements which surrounded the Harm model within the FSA, to which we have already referred (para 109 onwards).

770. We decline to draw an inference from Lord Turner's absence: he was not named in connection with this allegation until the end of the first week of the hearing. There is no evidence that he knew of the error, let alone was responsible for, or deliberately allowed, its inclusion.

771. As for Mr Nelson, he accepted that he had not corrected the error in the draft. Mr Kemp submitted that 'it was more convenient for him not to have to challenge Lord Turner than have to address the regulatory implications of the Harm Metric disclosures'. In our judgment, there is no evidence from which we could reasonably extrapolate that conclusion from Mr Nelson's failure to correct an error, which he freely acknowledged when Mr Kemp took him to it in cross-examination. The fact that, some eleven years after the event, he could not

remember why he did not do so at the time cannot, in our judgment, form the basis of an inference that he was improperly motivated. We are also struck by the balanced account he gave in the interview, which is consistent with his thoughtful evidence before this Tribunal.

772. Finally, the Claimant himself was equivocal in oral evidence as to the reason for the error: he said twice that he could not say why the misdescription had occurred ('It may have been deliberate, I don't know').

773. As for the allegation relating to Ms Hilary and her staff's alleged 'failure to deal with the problem identified by the Claimant in another forum / medium outside of the RBS report', as with *D4* there was no onus on Ms Hilary or her staff to instigate any further enquiry into Harm beyond that conducted in the report for which they were responsible; nor were Lord Turner or Mr Nelson required to do so, absent a request by the Claimant, which was not forthcoming.

774. For all these reasons this claim is not well-founded.

<u>D5 (2009-2012, Lyndon Nelson): Deliberately failing to properly appraise C's work in annual appraisals and thus acknowledge the Harm metrics and undercapitalisation and protected disclosures 0 to 5, 7-8 above and detriment 0 above. Everyone else was routinely annually appraised but C was not.</u>

775. Mr Nelson's evidence (in his witness statement at paragraph 70) was that 'the issue was not that the Claimant was not appraised, but rather that the Claimant would not sign off his appraisal forms'.

776. The evidence which was before us (probably incomplete) suggests that none of the annual appraisals were finally completed in any of the years when Mr Nelson was the Claimant's line manager. There are some years when there is an almost total lack of documentation. We do not infer from this that Mr Nelson did not attempt to conduct appraisals in those years. Rather, we accept Ms Shepherd's submission that whether they were initiated in any particular year is difficult to tell at this distance: proceedings were not commenced until 2019; the FSA had been abolished in 2013; the absence of documentation now does not mean it did not exist then, even if only in draft form. Mr Nelson explained in his statement (paragraph 11) that some of his email exchanges were lost when his email account was migrated over to the PRA.

777. In our judgment, the reason why appraisals were not finally concluded is clear: the Claimant had fixed views as to what those appraisals should say and refused to accept an outcome which did not accord with them. That is the clear impression given by the years in which we do have documentation. For example, see our findings in relation to 2009 (para 139), when the Claimant insisted he should be given the highest rating of 4, and in relation to 2011 (paras 147-151).

778. It is also consistent with a passage in the Claimant's email to Ms Frohn of 10 October 2015 (see para 278 for context), in which he wrote:

> 'Anyway, to cut a long story short, Lyndon always refused to complete an annual appraisal containing evidence of my work and I always refused to complete one that did not contain such evidence. This Mexican standoff was so clear to both of us that I continued to actively develop, verify and

expand the Harm metrics and he continued to gain every private insight it provided. But we never tried to complete an annual appraisal.'

779. That statement was inaccurate in two respects: they did try to complete appraisals, but without success; and in the appraisals which were available to the Tribunal, Mr Nelson did refer to the Claimant's work on Harm, but not in the terms that the Claimant wanted (see, for example, para 139 in relation to 2009 and para 149 in relation to 2011). The Claimant gave a slightly different explanation in oral evidence (see para 145 in relation to the 2010 appraisal).

780. We accept Mr Nelson's evidence (in his statement at paragraph 69.3) that the Claimant's comments in these documents were illustrative both of a lack of insight on his part, and an inability to relate to those who did not share his view of the Harm metrics or to accept constructive criticism of his work, believing that he was correct and everyone else misguided. We note the Claimant's view (para 139), expressed quite early on, that the only 'rational' grade for his work was a 4, the very highest. In our judgment, that was bound to lead to an impasse.

781. We have concluded that Mr Nelsons did not *deliberately fail* properly to appraise the Claimant's work. He struck us as an admirably straightforward witness, who at all times set out to give his honest assessment of the Claimant's work. The sole reason why the appraisals were not concluded was because that assessment was unacceptable to the Claimant. Insofar as the Claimant had made protected disclosures during this period, they did not materially influence the fact that appraisals were not concluded.

782. The claim is not well-founded.

<u>D7/1 (2014-January 2015): [Peter Andrews and Peter Lukacs] censored any mention of the history of disclosures (which was much more detailed and specific than PIDs 1 to 9 above and detriments (similar to Ds 1 to 6 above) in reports and discussions, as evidenced in their tracked changes and in emails as identified in the essential reading list.</u>

783. *D7* falls into two parts: the editing of the Claimant's draft papers (see para 218 onwards for findings of fact); and the decision to stop the Claimant's work on the Harm metrics (para 257 onwards). The second part is dealt with separately below, alongside *D9*, with which it overlaps.

784. The Claimant regarded the removal of sections of his draft papers, particularly those which referred to the FSA period, as a detriment: he thought the historical information about Harm demonstrated the significance of the model - in particular what he considered to be its predictive power - and that removing it weakened the paper. We see the logic of that view and accept that a reasonable employee might regard this as a detriment. We note that Mr Wheatley acknowledged in cross-examination the potential relevance of the historical perspective.

785. Others, including Mr Lukacs and Mr Andrews, took a different view. We have concluded that they were being supportive in giving their guidance and proposing changes. Mr Lukacs wanted the paper to be as clear and persuasive as possible. He thought this would best be achieved by focusing on how, practically, the FCA might use the Harm metrics in the future, rather than on how the Claimant believed it had been misused (or not used at all) in the past.

He was not, as the Claimant alleged, trying to mute him through micromanagement, or prevent him from blowing the whistle. Mr Lukacs did not regard the Claimant as a whistleblower; he regarded him as someone with a deep-seated personal/professional grievance, which he wanted to air in the wrong forum. He thought the Claimant's approach would be counterproductive.

786. We also note how many attempts had been made in the previous year by management to encourage the Claimant to air his concerns about the historical issues in the right forum: Mr Stewart suggested he report his concerns to Internal Audit, but he refused; Mr Andrews suggested he raise a grievance, but he refused; Ms Davies gave him information about using the Respondent's whistleblowing procedure, but he did not act on it. Against this background, Mr Kemp's submission that 'this [removing the historic material] was another means of trying to shut down these historic disclosures rather than seek to address them' was, in our view, unsustainable. The reality was that it was impossible to censor the Claimant: apart from the formal routes available to him, there was nothing to prevent him simply sending an email to Mr Woolard and/or Mr Wheatley forwarding all the information which Mr Lukacs suggested he remove.

787. We also noted the Claimant's own evidence before us. He explained to us that it had taken him many years, and thousands of hours, to understand the potential of his Harm metrics and, although he described Mr Lukacs and Mr Andrews as 'quite smart', he considered that their expectation that he could write a short executive paper that made everything clear to be 'an impossible task'. He explained that he would spend time trying to make it understandable to them but that the main hurdle was that 'they did not already have an understanding of the Black Scholes framework'. We are struck by the fact that the Claimant volunteered an explanation for Mr Lukacs' and Mr Andrews' response to his drafts which, while not especially complimentary to them, was unrelated to any alleged whistleblowing by him.

788. Finally, there is a further, and fatal, difficulty with this claim. The protected disclosure relied on by Mr Kemp in closing as the trigger for this detriment is *PID 14*. We have concluded that there is insufficient evidence that the Claimant made the alleged disclosure to Mr Andrews (paras 631-637); there is no evidence at all that he made it to Mr Lukacs.

789. For all these reasons, this claim is not well-founded.

<u>D8 (2014 to January 2015: [Peter Andrews (C's de facto line manager) and Peter Lukacs (C's technical line manager] Failing to properly appraise C's cumulative work and acknowledge his de facto role and promote C (with pay rise) for that work. By (i) Failing to acknowledge the history of disclosures at the FSA in C's draft appraisal of September 2014; (ii) Drafting biased / leading instructions to two external reviewers of C's work in January 2015; (iii) Interpreting the views of the external reviewers to justify a negative appraisal of C's cumulative work on the Harm Metric; (iv) Agreeing to score C a 2L without any proper analysis of C's cumulative work on 16 March 2015.</u>

D8(i): Failing to acknowledge the history of disclosures at the FSA

790. Relevant findings of fact are at para 211 onwards.

791. We have concluded that the sole reason why the history of the Claimant's alleged disclosures at the FSA was not addressed in the September annual appraisal was because Mr Andrews considered that it was not the right forum in which to raise issues which went back into previous years or which related to employment in a defunct, predecessor organisation. There was nothing to prevent the Claimant from raising a grievance, or engaging the whistleblowing process, if he considered that there were historic wrongs. He chose not to do so.

792. This claim is not well-founded.

D8(ii): Mr Andrews' and Mr Lukacs' instructions to the academic reviewers

793. Relevant findings of fact are at para 232 onwards.

794. We accept Kemp's submissions (at paragraph 27 onwards of his closing submissions) that the instructions to the academic reviewers were leading ('rather grand claims at odds with familiar literature… some bold and contentious claims, about which we have some reservations'). That was Mr Andrews' decision; Mr Lukacs merely implemented it. This was improper, particularly as Mr Andrews had given the Claimant an undertaking not to share his reservations with the referees.

795. We have concluded that Mr Andrews' actions were materially influenced by the protected disclosures identified by Mr Kemp in his submissions, in particular the monthly newsletters of 22 and 23 October 2014 (see *PID* 5 at para 542 onwards), although they were not the sole or even the principal reason for the conduct. We are satisfied that the principal reason why Mr Andrews sought to influence the referees was because he had decided that the time had come to draw a line under work which was costing the organisation a great deal of money, both in terms of the data subscriptions and the Claimant's time. We also accept his evidence that he was embarrassed by the quality of the Claimant's paper (para 240).

796. By this point, Mr Andrews had concluded that the work was not of sufficient interest to justify the cost. The Claimant complains that Mr Andrews had not 'found any flaws' in the Harm metrics. Mr Andrews saw it from a different perspective: that the Claimant had not persuaded him that the work had any particular value or originality. Over time Mr Andrews had also formed a negative view of the Claimant's capabilities more generally, in particular his poor written communication skills, and his ability/willingness to follow reasonable instructions.

797. However, we have concluded that Mr Andrews' negative view of the Claimant was, in part at least, influenced by the fact that the Claimant continued to raise concerns about the way that his work on the Harm metrics had been treated by the FSA, some of which we have found to be protected disclosures.

798. We emphasise that he did nothing to stop the Claimant from blowing the whistle through official channels. He was not worried about the consequences of any such investigation; he simply did not take the Claimant's disclosures seriously, in part (as Ms Davies suggested in her report (para 210)) because of the sheer volume of material the Claimant produced. He regarded the whole subject as an obsession on the Claimant's part, and a distraction for the organisation.

799. In short, Mr Andrews had become frustrated and irritated with the Claimant, in part because of what we have now concluded were protected disclosures, and he allowed this to influence his decision-making. We note that Mr Andrews made little attempt to hide his irritation with the Claimant's ideas - and the Claimant's case in these proceedings - while giving evidence in Tribunal, which he did remotely by CVP. At one point he became so frustrated with the (quite proper) questions being put to him by Mr Kemp on the Claimant's behalf that he briefly walked away from the camera.

800. Subject to the question of time limits, to which we will return, we have concluded that this part of this detriment is well-founded.

D8(iii): the interpretation of the external reviewers' views

801. Relevant findings of fact are at para 249 onwards.

802. We have concluded that the feedback which Mr Andrews gave did not fairly reflect the content of the academic reviews. As we have already found, the second review contained much that was positive (see, in particular, the passage quoted above at para 247), mixed with criticism. Mr Andrews' suggested in cross-examination that, in this passage, the reviewer was going 'rather off-piste'. We disagree. Mr Andrews acknowledged that part of the purpose of the reviews was to establish if the Harm metrics could be of use, not only to the FCA, but also potentially to the PRA or FPC. The paragraph quoted above suggests that it might.

803. We have concluded that Mr Andrews did not fairly represent the views of the second reviewer, and that this was, in part at least, because he had become impatient with the Claimant's disclosures (in particular those from 2014 under *PID 5*). We are not satisfied that this was his principal reason, for the reasons we have already given.

804. Subject to the question of time limits, this part of this detriment is well-founded.

D8(iv): Scoring the Claimant a 2L

805. Relevant findings of fact are at para 251 onwards.

806. The detriment relied on by the Claimant is arriving at an appraisal score without 'proper analysis of the Claimant's cumulative work on the Harm metrics.' Consistently with his position throughout, the Claimant considered that there was a failure every year because his managers did not go back through his work from 2007 onwards, both at the FSA and at the FCA, in relation to Harm. For the reasons we have already given, that was not a realistic expectation of an annual appraisal. Insofar as the Claimant has a sense of grievance in relation to this, we have concluded that it was unjustified and there was no detriment.

807. For that reason alone, this aspect of this claim is not well-founded.

808. The Claimant was given a 2L grade. That was a higher grade than his immediate managers thought he deserved. We have already recorded that Mr Andrews had formed a negative assessment of the Claimant's performance. Mr Lukacs considered that the Claimant had been given one principal task to do in 2014 (preparing a presentation for Mr Woolard and Mr Wheatley) and had failed in it.

They both thought that he should be given a 1 grade. They were persuaded to be more generous by Ms Oakley.

809. We accept Ms Shepherd's submission that the Claimant was given a more favourable rating than his managers believed he deserved because they wanted to facilitate a smooth transition for the Claimant back to the Risk division. We accept that Ms Oakley's reasons for doing so were those given by her in her email of 16 March 2015. They had nothing to do with the fact that the Claimant had made protected disclosures, even if (which is far from clear) she was aware of those disclosures.

810. This part of the detriment claim is not well-founded.

D9 (January 2015, Chris Woolard, Martin Wheatley, John Griffiths Jones): Failing to properly appraise C's cumulative work in order to confirm his de facto role and pay / promote C for that work, by: (i) approving and/or relying on biased / leading instructions to two external reviewers of C's work in January/early February 2015; (ii) interpreting the views of the external reviewers to justify a negative appraisal of C's cumulative work on the Harm Metric; (iii) agreeing to score C a 2L without any proper analysis of C's cumulative work on 16 March 2015. They approved of stopping the production of the Harm metrics knowing they had not resolved the cumulative history of protected disclosures and the failure of the FSA/FCA to investigate and report it including their periodic decision(s) to conceal that history and quarantine C.

D7/2 [Peter Andrews and Peter Lukacs] also stopped the production of the Harm metrics knowing they had not found any flaws in the Harm metrics or investigated and reported the cumulative failure (as identified in the more detailed account they obtained from C), in respect of which decision C also relies on (ii)-(iii) of D8.

811. None of the claims under *D9* were pursued by Mr Kemp in relation to Mr Wheatley or Mr Griffiths Jones and they fail against them.

812. *D9(i)* was abandoned by Mr Kemp in closing because it emerged in evidence that Mr Woolard did not see the instructions to the external reviewers before they went out.

The alleged failure properly to appraise the Claimant's work

813. Part of *D9* again relates to an alleged failure in January 2015 properly to appraise the Claimant's 'cumulative work'. For the reasons we have already given, there was no obligation on the Respondent to conduct a retrospective assessment of the Claimant's work going back to 2007 as part of its annual appraisal process.

814. As far as the Claimant's reference to 'my *de facto* role', we have described elsewhere in this judgment (para 846 onwards) what the Claimant meant by this: that he should be treated as if he held a much more senior role than the one he actually held and should be paid accordingly. In the light of our finding (para 340) as to the way that promotion worked within the FCA, we regard that expectation as unrealistic. Insofar as the Claimant harboured a sense of grievance that it was not met, we have concluded that it was unjustified; there was no detriment.

Mr Woolard's representation of the academic reviews

815. As for *D9(ii),* Mr Woolard accepted in oral evidence that he saw the two academic reviews. He did nothing to correct what we have found to be the unfairness in the way that they were represented by Mr Andrews. Mr Kemp reminded the Tribunal in closing of Mr Woolard's description of the daily newsletter of 7 January 2015 (part of *PID 5*) as 'the most strident way the Claimant had expressed his concerns over the two years working with me'. However, we have concluded (para 559 onwards) that this newsletter was not a protected disclosure. Nonetheless, we are satisfied that Mr Woolard was aware of the newsletters of 22 and 23 October 2014 (para 542 onwards), which were its predecessors and which we have found were protected disclosures, and that he had them in mind when he did not intervene in the way the reviews were characterised. We have concluded that they, and other communications made by the Claimant about the Harm metrics, had a material influence on his conduct.

816. For these reasons *D9(ii)* is well-founded as against Mr Woolard only, subject to considerations of time limits.

The assigning of the 2L grade

817. *D9(iii)*, which relates to the assigning of the 2L grade fails for the reasons we have already given under *D8*.

The decision to stop the Claimant's work on the Harm metrics

818. As for the decision to stop the Claimant's work on the Harm metrics (the last part of *D9* and the second part of *D7*), we have concluded that both Mr Andrews and Mr Woolard were materially influenced by the fact that the Claimant continued to raise the subject of the Harm metrics, and its treatment by the FSA and FCA, in documents (including the protected disclosures in the newsletters of 22 and 23 October 2014, of which they were aware).

819. To be clear: we do not accept Mr Kemp's submissions that Mr Woolard or Mr Andrew were motivated by 'fear of the Claimant going public or bringing an ET claim because of the information he had disclosed' or that stopping the Harm metrics was 'one way of controlling the risk.' On the contrary, we have concluded that, by this point, both of them expected the Claimant to 'go public', indeed that he was more likely to do so if they stopped his work on the Harm metrics; we infer that they were prepared to live with that; indeed it might be thought that they decided to stop work on the Harm metrics *despite* the fact that it might prompt the Claimant to make his case outside the organisation. It may have come as a surprise to them that he did not do so for several years (although that was not a matter explored in evidence).

820. We have concluded that Ms Davies was right (para 210) to suggest that Mr Woolard did not take the Claimant's disclosures seriously, because of the sheer volume and frequency of the information he had disseminated about the Harm metrics over the years. Although, as we have already observed (para 95), in the Claimant's mind the more one talks about a subject, the greater one's credibility in relation to it, for others the opposite is the case. We think Mr Woolard and Mr Andrews had come to regard him as someone obsessed with an historic grievance; his communications about that grievance, including his disclosures in the newsletters of 22 and 23 October 2014, had become an irritant. To that

extent, we have concluded that the disclosures played a part in the decision to stop the Harm metrics and the necessary causal connection is established.

821. We emphasise: we think that it was a subsidiary reason, not the principal reason, which was that neither of them was persuaded of the value of the Harm metrics, or the Claimant's estimation of his own abilities, and both had reached the point of concluding that sufficient time, energy and money had been expended by the FSA and the FCA on Harm; no one was using it and a lot of money continued to be spent on the underlying data; it was time for a line to be drawn under the subject, one way or the other.

822. Nonetheless we have concluded that the detriments in the last part of *D9* and the second part of *D7* are well-founded, subject to time limits.

D10 (13 April 2015, Martin Wheatley, CEO FCA): Martin Wheatley wrongly described the deliberate decision not to investigate, report and fix the regulatory failures revealed by the disclosures as required by statute and his core objectives, and to justify further sanctioning and isolation of C outside of all governance and HR processes as merely one of deploying managerial resources.

823. This alleged detriment relates solely to Mr Wheatley's email of 13 April 2015, the text of which is set out above (para 264). This email dealt with two subjects: the decision to stop the Harm metrics and the decision to stop the Claimant's newsletter. We have concluded that the sole reason why Mr Wheatley endorsed the decision was because he accepted the judgment of Mr Woolard that that the organisation's resources would be better used elsewhere. We are satisfied that the fact that the Claimant had made protected disclosures played no part in his endorsement.

824. The claim is not well-founded.

D3 (December 2007 to 2015, The FSA/FCA Board; CEO and Chairman): Deliberately failing to investigate and/or take any action in respect of the data shown by the Harm metrics in respect of non-compliant financial firms and, as such, deliberately failing to recognise the Claimant's work causing him to feel isolated.

825. The starting-point is that this alleged detriment is highly generalised. No specific documents were identified in support of it. There was no evidence before us that a deliberate decision of the sort described in the allegation was taken by those named in it, let alone that it was materially influenced by public interest disclosures made by the Claimant. The highest Mr Kemp was able to put it in his closing submissions is that 'the Board would have been cognisant of PID 5, 6a, 7 as likely AMRisk Recipients but nothing was done'. Mere cognisance of protected disclosures is a necessary, but not sufficient, element of causation in a claim of this sort.

826. Mr Kemp continued: 'this was deliberate. A conscious choice was taken not to do so because to do so would have been like opening Pandora's box in terms of regulatory failures for the Respondent.' No individual decision-maker was identified who made a 'conscious choice'; no date(s) identified on which the choice was made; no evidence referred to which points to any individual having a fear of 'Pandora's box' being opened (a recurrent theme in the Claimant's evidence), apart from a single, generalised reference by Emma Davies some four years later (para 210). We have concluded that this is wholly speculative.

827. For these reasons alone this claim is not well-founded.

828. Further, the factual basis of the allegation is unsound in a number of respects. We accept Ms Shepherd's submission that it is not right to say that no action was taken in respect of the data produced by the Harm metrics. Although not widely adopted, it had its adherents during the FSA period: we have already referred to Mr Nelson's use of the metrics in allocating resources (para 154); the Claimant had also successfully won round insurance supervisors by 2009 (para 139).

829. As for whether there was a deliberate failure by those against whom the allegation is made to investigate the data shown by the Harm metrics in respect of non-compliant financial firms between 2007 and 2015, that period includes the Claimant's time in the CED. The need to investigate the data is plainly contingent on its first being shown that the Harm metrics could do what the Claimant said they could. An enormous amount of time was spent during that period working with the Claimant to help him clarify the Harm metrics for presentation to the CEO and the Board; it was the Claimant's own inability to produce a report which Mr Andrews considered of sufficient quality which derailed that process (para 218 onwards).

830. There is then the fact that Mr Andrews arranged for the Harm metrics to be externally reviewed in early 2015 (para 232 onwards), following the recommendation made in the Capobianco/Davies report. Although we have been critical of Mr Andrews' conduct of that process, the Claimant was given every opportunity to present the Harm metrics for scrutiny, including the underlying data generated by the metrics, yet he did not provide the data to the reviewers (para 241); nor did he do so when Ms Frohn gave him another opportunity to present his work for review by Risk Dynamics (para 294). Although the various reviews were not without positive comment, they were also critical and/or sceptical in many respects. In circumstances where the model was never validated, in our judgment there was no duty on the FSA/FCA formally to investigate the results it generated.

831. For all these reasons, this claim is not well-founded.

D11 – 'In September/October 2015, John Griffiths-Jones failing reasonably to consider C's application to become CEO, take appropriate action in response to the undercapitalisation, conduct consequences and regulatory flaws and/or stop detriment 0 above'

832. We have already found that Mr Griffiths-Jones did not see the Claimant's application to be CEO of the FCA (para 272); for that reason alone, the claim fails.

833. In our judgment, it is probable that the Claimant's application was rejected by Zygos on the sift because he lacked the degree of seniority and leadership experience to be a credible candidate for CEO of the FCA. The Claimant himself accepted that the fact that he was a junior manager in the organisation was a 'huge hurdle' to his appointment. That is consistent with his own case elsewhere: he expressly pleads (*D15, D18, D24* and *D25*) that there was what he described as a 'black hole' in his CV, which meant that he would not be taken seriously for jobs at this level.

D12 (January/February 2016 and in risk reorg 2017-18): Stopping the FCA subscription to the KMV data set used to construct the Harm Metrics and thereby reveal the regulatory failures; on or around mid February 2016 falsely claiming that the Risk Dynamic Review justified that action; claiming without justification that C's use of Modigliani-Miller was flawed; wrongly accusing C of being out of date academically and in risk management terms.

Repeating these unjustified accusations in subsequent discussions, at the start of the risk reorganisation, to justify the elimination of C's role and the type of role offered in 2017-18, over coffee on 17 December 2017.

834. The decision to stop the FCA's subscription to the KMV data was taken by Ms Frohn. In his closing submissions Mr Kemp relied on *PID 17* as the trigger for this and the other alleged detriments under this claim (factual context at para 274 onwards; conclusions as to disclosure at para 643 onwards).

835. Mr Kemp argued that Ms Frohn's decision to involve HR within half an hour of receiving the email containing *PID 17* showed that her subsequent decisions were materially influenced by it. We reject that contention: it would have shown poor judgment not to alert HR to the email, given its content. As to the concern Ms Frohn expressed in her second email (para 285) to Ms Jarvis ('a grievance process cannot be ruled out if we don't tread carefully'), we reject Mr Kemp's submission that this showed an intention to stop the Claimant from making protected disclosures. We accept Ms Frohn's explanation that she preferred a dialogue which might have a positive outcome to a grievance which she believed should be the last resort. Ms Jarvis said something similar in an email to Ms Frohn on 14 October 2014: 'does this amount to a grievance or does he just want 'to be heard'?'

836. Far from trying to stop the Claimant raising a grievance, we have already found (para 290) that Ms Frohn asked him at the meeting of 26 October 2015 if he wanted to raise one; he said he did not.

837. Mr Kemp also relies on a single sentence in the email to HR later the same day, referring to the proposal to commission the RD report ('with this, he will become an employee like any other employee in the team'). He submitted that 'what this really meant was to stop the Claimant from making protected disclosures'. Again, we reject that submission. Looking at the rest of the email, it is plain to us that Ms Frohn meant that the Claimant would, like other employees, be required to comply with normal line management processes, including being given objectives which reflected the priorities of the Division, rather than his own interests.

838. We are satisfied that the sole reason for Ms Frohn's decision to cancel the KMV subscription was the fact that she learnt from Mr Woolard in around October 2015 that the FCA had decided not to use the Harm model many months earlier (para 283); and she had learnt from Mr Rizvi (para 276) that the Claimant was the sole user of the data. That being the case, there was no justification for continuing the subscription, the annual cost of which was some £180,000.

839. Turning to the allegation that Ms Frohn falsely claimed that that RD report justified the decision to cancel the subscription, it is probable that she did say at some stage (although the Claimant cannot identify when) that it was right to

cancel the subscription in the light of the report. That was not a false claim; we have already found (para 295 onwards) that RD did not endorse the model; on the contrary, it raised as many questions as it answered.

840. Ms Frohn accepted that she told the Claimant that one of the weaknesses of the Harm model was the Claimant's use of the Modigialiani-Miller model. We have already made findings as to why she said that (para 301). She was entitled, as a fellow professional with relevant experience (see para 277), to do so. The expression of a different intellectual position from that of another employee is not a detriment; if the Claimant was aggrieved by this, in our judgment his sense of grievance was not justified.

841. As for the allegation that Ms Frohn told the Claimant that he was 'out of date academically and in risk terms', we have found (para 301) this did not occur.

842. This claim is not well-founded.

D13 (April 2017): Having an unjustified "massive row" in the office with C in which JM failed to back BF, C and other P2P experts in respect of protected disclosure 18 and 19. This expanded the row into the cumulative failure D0 to resolve the cumulating disclosures PID0 which it was time to put an end to.

843. There was no 'massive row' with Mr Morago in April 2017 (para 310 onwards). There was no *PID 19* on that occasion (para 663 onwards). Mr Morago had been copied into part of *PID 18* (nearly a year earlier) but there is no evidence that he was motivated to treat him adversely on this occasion by the views the Claimant expressed then about P2P. We accept Mr Morago's evidence that, insofar as he was aware of the Claimant's views, he regarded them as forthright and no more.

844. We have found that, at the meeting in April 2017, Mr Morago declined to get involved when the Claimant started to raise grievances about what he called the 'legacy issues'. We conclude that the sole reason he did so was because they predated his time in the organisation and he had little knowledge of them.

845. The claim is not well-founded.

D18 (December 2017 and ongoing until C dismissed in October 2018): Given protected disclosure 20 above and detriment 17 above, [Andrew Bailey, John Griffiths-Jones and/or Barbara Frohn] deciding to never acknowledge C's accomplishments and actual role and not offer suitable alternatives. Here and below [D19-D25], this rolled up appraisal can only take place with the accord of such senior personnel, and of ExCo and the Board, as the disclosures reveal a series of regulatory failures at the heart of the authorities' objectives and across its history and governance from 2007. This recognition/appraisal is necessary to provide suitable roles during the redundancy and/or prevent the detriment of dismissing the Claimant with a Black Hole in his CV.

Overview on the issue of 'rolled-up appraisals'

846. In the course of the Claimant's oral evidence, the Tribunal tried to pin down some of the motifs which recurred in his pleaded allegations and throughout his written evidence ('*de facto* role … rolled-up appraisal … legacy issues … undetriment me … tarnished CV … a Black Hole in the CV'). They clearly had meaning for him, but they required some unpicking for us. We undertake that

exercise at this point before dealing with the detriments relating to an alleged failure in 2017/18 to conduct a 'rolled-up appraisal'.

847. Asked in his oral evidence whether, if someone had said to him 'we will assign you to a role as a Senior Adviser', that would have been satisfactory, the Claimant replied 'sort of' but said that he also wanted the 'legacy issues' sorted out. Asked what he meant, he mentioned what he called a 'rolled-up appraisal'. Asked what that would involve, he said the organisation would need to address the Harm metrics and P2P faults and realise that 'they do have a problem and Walker is the person we need'.

848. Asked whether he was seeking an apology and public acknowledgement, the Claimant confirmed that he was, so that if he applied to be, for example, the Governor of the Bank of England, he would be recognised as someone deserving of such a role. Asked whether, apart from his application to be CEO, he had ever applied for promotion within the FCA, he confirmed he had not and explained: 'there were no roles I thought were appropriate until they recognised my work'.

849. This gave rise to a situation in which, having worked for the FSA and the FCA for more than ten years, the Claimant remained in the same role to which he had been recruited. He referred to this as having 'a tarnished CV' or having a 'Black Hole' in his CV, by which he meant that, according to his CV he was a junior manager, and if he applied for roles at very senior levels, no one would believe that his accomplishments within the FCA - in particular, his work on the Harm metrics - were commensurate with such roles.

850. We concluded that the Claimant believed that career advancement to the very highest level should happen for him as of right - without the need to go through any of the usual steps, such as applying for promotion - because of his achievements with the Harm metrics. Only if this happened could he be 'undetrimented'. The corollary of this (as we have already found in the period when Mr Nelson was his manager) is that he required others to share his own exceptionally high estimation of his abilities and the importance of his work; he regarded a reluctance to do so as an intellectual failure on their part, or an injustice to him, or both.

851. The approach also compounded - and in some respects created - the difficulties the Claimant encountered. There was a disconnect between his perception of the position he felt he ought to occupy within the FCA hierarchy and the role he actually occupied.

852. We find it unsurprising that the Respondent's managers struggled year after year to agree objectives with the Claimant and to appraise him. In our view, the Claimant's beliefs, as set out above, made the process of conducting of an annual appraisal with him an almost impossible task; his approach appears to have left his managers at a loss as to how to manage him.

Conclusion

853. The crux of *D18* is the failure to carry out a 'rolled-up appraisal', essentially as a precondition to conducting a fair restructuring process.

854. Mr Kemp's submission was that *PIDs 19* and *20* were material factors in the alleged failure. We have already concluded that *PID 19* was not a protected disclosure. *PID 20* was the email sent to Ms Jarvis and Mr Morago (para 336). There is no evidence that it was seen by Mr Griffiths Jones or Mr Bailey. Mr Kemp makes no submission in relation to them in connection with this disclosure or this detriment.

855. Mr Kemp did not put *D18* to Ms Frohn, nor did he make any submission, pointing to any alleged link between her conduct of the restructuring exercise and *PID 20*.

856. For these reasons alone, the claim would fail. For completeness, we go on to consider the substance of the allegation.

857. That 'rolled-up appraisal' means what we have described above is confirmed by the way the Claimant characterises it in the pleaded allegation itself:

> 'this rolled up appraisal can only take place with the accord of such senior personnel, and of ExCo and the Board, as the disclosures reveal a series of regulatory failures at the heart of the authorities' objectives and across its history and governance from 2007'.

858. The Claimant is describing an exercise quite unlike any conventional appraisal process. In our judgment, it would have been inappropriate in the context of the redundancy/restructuring exercise; that was the sole reason it was not done. Insofar as the Claimant was aggrieved that Ms Frohn did not do it, we have concluded that his sense of grievance was unjustified; consequently, there was no detriment.

859. Nor was there a 'deliberate decision never to acknowledge the Claimant's accomplishments.' By December 2017 (the starting point for this alleged detriment), the Harm metrics were not relevant to the restructuring exercise: the Claimant was no longer doing that work and had not been doing it for several years. Moreover, the work had not been adopted by the FCA, because it was not regarded as useful work for its purposes.

860. Nor was there a deliberate decision never to acknowledge the Claimant 'actual role'. His actual role was as a Manager in the Risk Division.

861. It is wrong to say that he was not offered suitable alternative role. We are satisfied that the Technical Specialist role was a suitable alternative: it was essentially the same role as he had previously occupied, without the line management responsibilities, which he had not carried out for many years; it was on the same grade and pay; and it was not a demotion.

862. For all these reasons, the claim is not well-founded.

<u>D14 (November 2017): [Mr Morago and Ms Tennant] conducted a sham appraisal by appraising C by reference to a role that he had never accepted or performed.</u>

Further findings of fact

863. Our reading of Ms Tennant's email 14 October 2017 (para 319) was that the Claimant was only prepared to do the work he found interesting, not the work his managers considered would be useful to the Division, which he dismissed

as work which 'any graduate could do'. He characterised being asked to do this work as a 'demotion'.

864. The work he wanted to do was work which was first-line work carried out by Senior Advisers. The Claimant had never been promoted to, or even applied for, that role. It appeared that, because he had been collaborating with Mr Fod Barnes (who was a first-line Senior Adviser) in recent months, he believed he ought to be treated as if he too were a first-line Senior Adviser.

865. Whatever the Claimant believed the position ought to be, Ms Tennant was his line manager within the Risk Division. She was entitled to ask him to carry out work required by that Division, and specifically within her team. If the Claimant's interests lay elsewhere, the solution would be for him to apply for a different role. He did not do so. In the circumstances, Ms Tennant was entitled to manage him in the usual way.

866. It is right that it was difficult for Ms Tennant to appraise the Claimant in relation to the work that he had been doing with Mr Barnes on P2P; indeed there was a specific difficulty in identifying in which year that work should be appraised. We accept Mr Kemp's submission that his contribution in the area of P2P work was not fully reflected in the appraisal score of 2L which she assigned to him.

Conclusion

867. In our judgment, Ms Tennant's attempt, supported by Mr Morago, to set objectives and conduct an appraisal with the Claimant in November 2017 was not a sham; it was genuine. The fact that the Claimant regarded it as a sham reflects the disconnect between his perceived position and his actual position we have described above.

868. Insofar as the work the Claimant did on P2P was not adequately taken into account, Mr Kemp invites us to find that this was materially influenced by PID 19. We have concluded that this was not a protected disclosure (para 663 onwards). In any event, there is no evidence that either Ms Tennant or Mr Morago were influenced in any way by a view that the Claimant's work on P2P was controversial' or revealed failings on the part of the FCA, as Mr Kemp submits; we are satisfied that neither of them held those views.

869. For these reasons the claim is not well-founded.

<u>D15 (February 2017 to October 2018): Failing to undertake or cause to be undertaken an appropriate and proper rolled-up and annual appraisal of C's work to confirm his de facto role and pay for that work and thus to offer (or cause to be offered) and consider him for suitable roles in the reorganisation. This rolled up appraisal was also necessary to prevent the detriment of dismissing the Claimant with a Black Hole in his CV.</u>

870. The Claimant alleged that Mr Morago, together with Ms Jarvis, Mr Bolton and Mr Hague failed to conduct 'an appropriate and proper rolled-up and annual appraisal of the Claimant's work' between February and October 2018.

871. Ms Jarvis, Mr Bolton and Mr Hague all worked in the HR Department. They had no responsibility for carrying out appraisals for the Claimant. The claim against them is misconceived. The only person against whom this allegation might be

pursued is Mr Morago, who had some role in the Claimant's annual appraisals, albeit as the 'grandfather' manager.

872. For the reasons we have already given above (para 846 onwards), by 'a rolled-up appraisal' the Claimant means a retrospective assessment of his work throughout his time at the FSA and FCA. We have also concluded that the Claimant would only regard such process as 'appropriate and proper' if, as a result of it, the FCA accepted the value of his work, in particular on the Harm metrics, at his own very high estimation, publicly acknowledged it and promoted him to a very senior level of the organisation, without the need for him to apply for promotion.

873. We have concluded that the sole reason why no such appraisal took place was that the purpose of annual appraisals was to consider the employee's work during the previous year; they were not retrospective; and they were certainly not concerned with the employee's work with a predecessor organization.

874. A retrospective exercise might have been conducted in relation to the Claimant's work during the time of the FCA, had he chosen to raise a grievance (although it is unlikely to have led to the outcomes he was seeking). Despite encouragement from various managers over the years, he always refused to do so. The Claimant believed that there was an obligation on management to undertake the exercise of its own motion; in our judgment, that belief was wholly unrealistic.

875. Insofar as the Claimant was aggrieved that no one within the FCA carried out 'an appropriate and proper rolled-up and annual appraisal' in this sense, we are satisfied that his sense of grievance was unjustified; consequently, there was no detriment.

876. In his closing submissions, Mr Kemp narrowed the focus and invited us to conclude that Mr Morago failed to appraise the Claimant 'for the role that he had actually carried out during this period which was first-line work such as peer-to-peer' and that this failure was materially influenced by *PID 19* (which we have concluded was not a protected disclosure) and *PID 20* (which was).

877. The difficulty with this submission is that, in *PID 20* (para 676 onwards), the Claimant linked the failure to appraise him with his belief that the FSA/FCA:

> 'cannot recognise my work without recognising its own regulatory and conduct failure – to heed the specific and clear warnings on a firm by firm and sector by sector basis before and throughout the financial crisis revealed by the Harm metrics – and therefore has deliberately chosen on repeated occasions to keep that buried.'

878. Two points arise in relation to this. Firstly, the link Claimant made in *PID 20* was between a failure to appraise him and the Respondent's alleged discomfort in relation to his work on the Harm metrics; the Claimant accepted in cross-examination that he did not mention his work on P2P at any point in *PID 20*; and it was not put to Mr Morago that there was any connection between this disclosure and any failure to appraise the Claimant's work on P2P (or indeed any work for which Mr Morago was responsible).

879. Secondly, Mr Morago's evidence was that he knew very little about the Harm metrics. He joined the organisation in October 2016, long after the Claimant had stopped working on Harm. We accept that evidence.

880. We have concluded that the fact that the Claimant made further disclosures about the Harm metrics in December 2017 had no influence whatsoever on any failure by Mr Morago properly to appraise his work.

881. For all these reasons the claim is not well-founded.

D16 (15 November 2017 – 25 October 2018): On 15 November 2017 C was offered a demotion. In January 2018, R failed to offer C a role formerly occupied by Julia Tennant. Between January and October 2018, C was repeatedly offered roles that were too junior for his experience and skill set, when she was well aware that C had only performed and undertaken more senior roles.

882. We have already found that the offer of the Technical Specialist role was not a demotion (para 325). Although the Claimant had, from time to time and with the consent of his managers, collaborated with more senior colleagues (such as Mr Barnes, who was a Senior Adviser), he was not himself a Senior Adviser. The claim fails on its facts.

883. Mr Kemp submits that it was reasonable for the Claimant to perceive the offer as a demotion 'in terms of future prospects of being able to have direct reports and manage a team.' We are not satisfied that, as a matter of fact, this was the Claimant's perception. We do not think that line management was a priority of his; he never applied for existing senior roles, which might have brought with them line management responsibility.

884. The sole reason why he was not offered a more senior role was because the Respondent had concluded, correctly in our view, that the Technical Specialist role was equivalent, and suitable alternative to, his Manager role.

885. The sole reason why the Claimant was not appointed to Ms Tennant's role when she left the Respondent in February 2018 was because he did not apply when it was advertised. We accept Ms Shepherd's submission that it would not have been appropriate for the Claimant to be mapped to this role, as Mr Kemp submitted, when other Managers were at risk of redundancy in the same process.

886. Moreover, we have already found (paras 332, 339, 362, 850) that only a role at the top of the organisation, or a bespoke, senior role tailored to his skills and expectations, would have been acceptable to the Claimant. That was not Ms Tennant's role. Indeed, no such role existed, nor was the Respondent required to create one for the Claimant (or for anyone else). We accept Ms Shepherd's submission that, insofar as the Claimant was aggrieved by this, his sense of grievance was unjustified; no reasonable employee would have had those expectations. Consequently, there was no detriment.

887. Moreover, we are satisfied that the fact that the Claimant had made protected disclosures played no part in the Respondent's approach to these issues. Mr Kemp invites us to draw an inference from the fact that Mr Bailey was not called to give evidence that the Claimant's disclosures were 'a factor' (in what, precisely, he does not say). We decline to do so. We have already found (paras

351-354) that that the exercise was not targeted at the Claimant personally and that Mr Bailey was not the decision-maker; that was Ms Frohn.

888. These claims are not well-founded.

D17 (15 December 2017): Telling C that the CEO and Chairman caused her to eliminate his role in an effort to stop C from blowing the whistle, that they would never acknowledge C's actual work and would ruin him if he persisted in asking for that.

889. We have already found (para 344 onwards) that these events did not occur as alleged. The claim fails on its facts.

D22 (March-April 2018): Deliberately failing to recognise the Claimant's work by failed to inform Charles Randell upon his arrival as FCA Chairman around April 2018 of the nature of C's protected disclosures 0 to 20 and their own or their peers' cumulative failures to understand, investigate and require the identified non-compliant firms to adhere to the Basel norm and threshold conditions or address the downstream consequences on LIBOR, securitisation, shadow banking and P2P. They left that task to C and then apparently denied or denigrated C's version to the Chairman.

890. We have already found (para 363 onwards) that none of the individuals identified in the allegation (Mr Bailey, Mr Woolard, Ms Frohn and Mr Andrews, among others) informed Mr Randell on his arrival as Chair of the FCA of the matters set out in the allegation. The reason for this was threefold: firstly, insofar as there was a junior manager within the organisation (the Claimant), who had a long-running dissatisfaction with the way that his work had been treated by the organisation and its predecessor (in relation to which he had refused to raise a grievance or engage the Respondent's whistleblowing process), it is improbable that they would have regarded this as a priority for the incoming Chair; secondly, the Claimant had stopped working on the Harm metrics some two years earlier, it was not an aspect of the FCA's current work; and thirdly, none of the individuals identified in the allegation shared the analysis articulated in it, and so it would have made no sense for any of them to communicate it to Mr Randell.

891. In our judgment, the fact that the Claimant thought that his situation ought to have been a priority for Mr Randell immediately upon his arrival in the organisation indicates a lack of perspective on his part.

D23 (Feb 2018 to 29 July 2020: Conducting a sham investigation into the entire cumulative history of protected disclosures including 0 to 26 and all ensuing detriments including 0 to 22. For example failing to seek a clear and complete statement of the protected disclosures and detriments from C, failing to protect C during the process, failing to remove themselves from the process given their own conflicts, failing to appoint a truly independent person to undertake the process and failing to keep C appraised. The conclusions in the investigation report dated 29 July 2020 reflected the sham investigation.

D-AM-2 (March 2019 to 29 July 2020): Conducting a sham investigation (and appeal) into the cumulative PIDs and consequent Ds. For example failing to seek a clear and complete statement of the PIDs and Ds from C, failing to protect C during the process, failing to remove past detriments in the meantime, failing to conduct the appeal within the investigation, failing to remove themselves from the process given their own

conflicts, failing to appoint a truly independent and sufficiently qualified person(s) to undertake the process, failing to keep C appraised.

D25 (24 February 2018 – 7 March 2019 and /or ongoing from 2 April 2019 to 29 July 2020): Failing to investigate protected disclosures 22, 23, 25 and/or 26. The flip side of this failure is that it fails to assess (appraise) the Claimant's work and accomplishments at the FSA/FCA from 2006-2018, leaving the Claimant with a detrimental void or Black Hole in his CV, thus perpetuating the isolation and quarantine in the external marketplace.

892. These allegations relate to the Internal Audit investigation. Mr Kemp deals with them together, briefly, in his closing submissions. We note that he did not put to Mr Randell that the investigation was a sham. We have already found (para 415) that it was not.

893. Nor was there any cogent evidence to support Mr Kemp's submission that any alleged failings of those who carried out the report were deliberate and motivated by the fact that that the Claimant had made protected disclosures. A mere assertion that 'the subject of PID23 and PID25 was too inconvenient to investigate' - without identifying who was said to have formed that view, when, and what they then did to influence the process and/or outcome of the Internal Audit report - does not raise a *prima facie* case of whistleblowing detriment.

894. The Internal Audit investigation was an opportunity for the Claimant to have his concerns investigated, yet he did not cooperate with the process (para 374 onwards). We accept Ms Shepherd's submission that, if the Claimant was not satisfied that Internal Audit had a full understanding of the disclosures and detriments he thought should be investigated, he only had himself to blame; he effectively boycotted it.

895. We note that there was a pattern of the Claimant not engaging with/cooperating with internal processes (for example, the refusal to raise a grievance, follow the whistleblowing procedure or apply for alternative roles, as well as the lack of co-operation with the annual appraisal process and the appeal against dismissal).

896. As for the reference in *D25* to an alleged failure to carry out an appraisal in relation to the entirety of the Claimant's work for the FSA and FCA from 2006 to 2018, to avoid the Claimant being left with a Black Hole in his CV, we have already given our conclusions as to what the Claimant's expectations were in this respect and why they were unrealistic (para 846 onwards). Further, it was not Mr Randell's or Mr Bailey's role to appraise the Claimant (Mr Randell did not think he had ever met the Claimant); that fell to his line managers, who were defeated in their attempts to appraise the Claimant by his own intransigence.

897. Insofar as the Claimant had a sense of grievance in relation to the conduct and outcome of the Internal Audit investigation, in our judgment it was unjustified; there was no detriment.

D19 (End of August / early Sept 2018): At a meeting to discuss C's concerns, wrongly describing the issues that C wanted to resolve as a "grievance" rather than whistleblowing.

D20 (May 2018-present): Failed to investigate and resolve the admitted "grievance" using the ACAS process which, as they denied C had made any protected disclosures,

were applicable. They failed to provide a fair, independent, impartial and sufficiently skilled person(s) to undertake a Rapoport compliant investigation or appraisal.

898. Findings of fact in relation to both detriments are at para 370 onwards.

899. Dealing first with *D19*, there was no attempt at this meeting to mischaracterise the Claimant's concerns; the notes expressly record his statement that he considered himself to be a whistleblower. Insofar as Ms Frohn suggested that his concerns about his own employment situation might more properly be raised as a grievance, there was nothing improper in that; it was a distinction made in the Respondent's own whistleblowing policy (para 56). Ms Frohn was merely raising an additional route for him to consider; any reasonable employee would have regarded her suggestion as helpful; there was no detriment to the Claimant.

900. *D20* is misconceived. The Claimant accepted in evidence that he did not raise a formal grievance, to which the ACAS procedure could apply, despite being encouraged to do so several times by different managers.

D21 (23 October 2018): Told C a couple days before he was summarily fired on 25 October 2018 that "Everyone can see that the Harm metrics work [to predict the inability of firms to fund themselves in the market] but they will never admit to it".

901. We have found (para 384 onwards) that Ms Frohn did not say what she was alleged to have said; the Claimant misrepresented the conversation. The claim fails on its facts.

D24 (December 2018 -7 March 2019): Conducting a sham appeal into the dismissal / whistleblowing of the Claimant as requested. She apparently failed to spot the unknown role of the Claimant, lack of appraisals or link her investigation to (or justify its separation from) the whistleblowing investigation. She acted in haste. She could not establish a truly independent process given her relatively junior status, the ongoing investigation involving all C's former managers, HR, front-line directors, CEOs and Chairmen and the serious conflicts involved. Failing to identify C's actual accomplishments and role, whether there was a genuine redundancy, adequate alternatives proposed, the decision makers, their primary reasons or provide adequate reasons. This failure to perform a fair rolled up appraisal means JH could not have fairly assessed the genuineness of the redundancy, the fairness of the roles offered, and has contributed to the ongoing detrimental void or Black Hole in C's CV.

902. In his closing submissions, Mr Kemp focused on two points: the failure to address the Claimant's central ground of appeal (that he had been dismissed for blowing the whistle); and the failure to speak to Ms Frohn. We have already found (paras 405 and 408) that both those matters were factually correct.

903. Although we accept that the Claimant could reasonably perceive the failure to consider his central ground appeal to be a detriment, he sets the bar higher in relation to this claim by alleging that the appeal was a 'sham', which carries the connotation of acting in bad faith. Whether that allegation is made out is closely bound up with our conclusions as to Ms Hoggett's motivation.

904. Mr Kemp also relied on the fact that the Respondent had not called Mr Bolton (of HR). However, we remind ourselves that the allegation is made against Ms Hoggett, not Mr Bolton; it is her mental processes which we must consider.

905. Ms Hoggett accepted in cross-examination that she saw *PID 20, PID 22* and *PID 23*. It was put to her that the reason she did not address the central ground of appeal was because she was influenced by the fact that the Claimant had made those disclosures and she decided to uphold the decision to dismiss 'on a sham basis'. Mr Kemp invites us to find that these disclosures were 'material factors in this decision whether consciously or subconsciously because the nature of the information disclosed was inconvenient to deal with. It was more convenient to focus on the restructure paperwork and avoided determining the Claimant's main ground of appeal.'

906. We do not accept that submission. Although we are critical below, in the context of the unfair dismissal claim, of Ms Hoggett's decision not to consider the central ground of appeal or to speak to Ms Frohn, we do not accept that these decisions was materially influenced by those protected disclosures. We accept her explanation that the sole reason why she did not investigate the whistleblowing aspect of the Claimant's appeal was because she had been advised not to do so by HR; she was told that a separate investigation into the Claimant's whistleblowing concerns was being undertaken by Internal Audit. There is a logic to that approach: it is undesirable to have two separate investigations into similar matters running concurrently, with the potential to reach different conclusions. We have concluded that Ms Hoggett followed that advice in good faith. We also accept her evidence that, had she discovered anything untoward in the restructuring exercise, she would have consulted Internal Audit.

907. In the event, Ms Hoggett concluded that this was a genuine restructuring exercise. The Claimant had been offered the role of Technical Specialist. She had Technical Specialists working for her, who included a former MD of Goldman Sachs and former CROs investment banks; she regarded it as a role on a par with a Manager role, without the line management responsibilities. She concluded that the consultation exercise had been lengthy and exhaustive; and that the FCA had done what it reasonably could to retain the Claimant within the organisation. We accept her evidence that she genuinely believed that the position was so clear that she did not need to interview Ms Frohn, especially in circumstances where the Claimant himself had completely disengaged from the process.

908. Of course, we conclude later in this judgment that her decision to proceed as she did was procedurally unfair. Indeed, Ms Hoggett sensibly conceded a number of points in the course of cross-examination (paras 406-408). We have concluded that she conducted a flawed process, not a sham process, as the Claimant alleges.

909. Nor were we persuaded that Ms Hoggett was influenced in any way by the fact that the Claimant had made *PID 20, PID 22* and *PID 23*. We reminded ourselves that, although the relevant documents contained multiple disclosures of information, the only matters which we have concluded amounted to *protected* disclosures related to historic undercapitalisation. In our judgement, there was no cogent evidence, beyond a bare submission, that Ms Hoggett found that information 'inconvenient to deal with'. All that was put to her in cross-examination was that 'the fact that you upheld the redundancy was influenced by the disclosures you saw in the zip file', to which she replied: 'why would it be?' There was no further exploration of any alleged causal link. Of course, by

the time Ms Hoggett was conducting her appeal process in 2019, the view that large financial institutions had, historically, been undercapitalised was uncontroversial.

TIME LIMITS (THE DETRIMENT CLAIMS)

The law to be applied

910. Section 48 ERA sets out the time limits in respect of claims under section 47B. Section 48 ERA provides, so far as is relevant:

> **(3) An employment tribunal shall not consider a complaint under this Section unless it is presented –**
>
> > **(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or**
> >
> > **(b) within such further period as the Tribunal consider reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.**
>
> **(4) For the purposes of subsection (3) –**
>
> > **(a) where an act extends over a period, the "date of the act" means the last day of that period, and**
> >
> > **(b) a deliberate failure to act shall be treated as done when it was decided on;**
>
> **and in the absence of evidence establishing the contrary, an employer … shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonable have been expected to do the failed act if it was to be done.**

911. In *Flynn v Warrior Square Recoveries Ltd* UKEAT/0154/12, the EAT stressed the need for ETs to identify with precision the act or deliberate failure to act that is alleged to have caused detriment when considering whether an act/omission extended over a period of time for the purposes of section 48(4)(a). The EAT stated at [4] that: 'the time limits relate not to when the detriment was suffered but when the act, or deliberate failure to act, which gave rise to the detriment occurred'.

912. In *Arthur v London Eastern Railway Limited* [2007] ICR 193, the Court of Appeal considered the scope of whether an act could be said to be part of a series of similar acts or failures within section 48(3)(a). Giving the lead judgment, Mummery LJ stated as follows:

> **[31] 'The provision can therefore cover a case where, as here the complainant alleges a number of acts occurring in the three-month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period … there must be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them … the necessary connections were correctly identified by Judge Reid QC as (a) being part of a "series" and (b) being acts which are "similar" to one another.**
>
> **[…]**

> **[35] It is necessary to look at all the circumstances surrounding the acts. Were they all committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? It would also be relevant to inquire why they did what is alleged. I do not find "motive" a helpful departure from the legislative language according to which the determining factor is whether the act was done "on the ground" that the employee had made a protected disclosure. Depending on the facts I would not rule out the possibility of a series of apparently disparate acts being shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure'.**

913. In *Royal Mail Limited v Jhuti* UKEAT/0020/16/RN, Simler J commented at [34] that whether or not there is a relevant connection is a question of fact. All the circumstances surrounding the acts will have to be considered.

914. If complaints are brought after the end of the three-month statutory period, then the Tribunal only has jurisdiction if it was not reasonably practicable to bring proceedings within the statutory period, and they were brought within a reasonable period thereafter.

915. The Court of Appeal in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 at [34] held that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit their construction to that which is reasonably capable, physically, of being done would be too restrictive. The best approach is to read 'practicable' as the equivalent of 'feasible' and to ask: 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'

The parties' position on limitation

916. Counsel prepared an agreed note on limitation, which was submitted at the beginning of the hearing. The following was their agreed position and was approved by the Tribunal.

Background

917. The Claimant filed his ET1 on 22 January 2019. This ET1 was rejected by the ET on 24 January 2019 on the basis that the Claimant had not provided an ACAS Number.

918. The Claimant first notified ACAS of his dispute against the Respondent on 10 January 2019 and was issued a Certificate on 24 February 2019 with ACAS EC Reference Number R103444/19/10 ('the first ACAS Certificate').

919. The name of the prospective Respondent was misspelt "Fincancial Conduct Authority" on the First Certificate. All other details were correct.

920. The Claimant notified ACAS again of his dispute against the Respondent on 14 February 2019 and was issued a certificate on 5 March 2019 with ACAS EC Reference Number R118466/19/30 ('the second ACAS Certificate').

921. The Claimant filed his ET1 on 6 March 2019 by recorded delivery and it was signed as received by the ET on 7 March 2019 and date stamped accordingly [119]. The Claimant entered the Reference Number of the Second ACAS Certificate in Section 2.3 of the ET1 [120].

922. The ET accepted the Claimant's ET1 on 27 March 2019.

Primary Limitation

923. The relevant date on which primary limitation expired is 11 October 2018. This is three months less one day before the Claimant first notified ACAS of his dispute against the Respondent. The period spent in ACAS EC is not to be counted when working out when the time limit set by the relevant provisions expired (see, s.207B(3) ERA 1996). Further, the primary time limit expired one month after the Certificate was issued "Day B" (see, s.207B(4) ERA 1996). The Claimant filed his ET1 within this extended period.

924. Therefore, the dismissal claims are in time. Further, in respect of the protected disclosure detriment claim, part of D15, part of D16, part of D18, part of D20, D21, part of D23, D-AM-2, D24 and part of D25 to the extent they occurred after 11 October 2018 are also in time. Conversely, D1-11, D12, D13 – D14, part of D15, part of D16, D17, part of D18, D19, part of D20, D22, part of D23 and part of D25 are *prima facie* out of time subject to them forming part of a series of similar acts, alternatively subject to the not reasonably practicable extension of time.

Conclusions: time limits

925. We have concluded that five detriments, in part at least, are well-founded, subject to limitation issues:

    925.1. *Detriment 8(ii)* in relation to Mr Andrews' instructions to the academic reviewers in December 2014 and February 2015 (para 793 onwards);

    925.2. *Detriment 8(iii)* in relation to Mr Andrews' failure fairly to reflect the content of the second academic review in February/March 2015 (para 801 onwards);

    925.3. *Detriment 9(ii)* in relation to Mr Woolard's failure to correct that unfairness around the same time (para 815 onwards);

    925.4. *Detriment 7/2* and the last part of *Detriment 9* in relation to the decision by Mr Andrews and Mr Woolard to stop the Claimant's work on the Harm metrics in March 2015 (para 818 onwards).

926. All of these claims are long out of time (over three years). There are no successful claims which are in-time, with which they might form an act extending over a period or a series of similar acts.

927. There is no basis for a finding that it was not reasonably practicable for the Claimant to present these claims in time: at all times he was aware of his rights, and familiar with time limits and Tribunal procedure; he elected not to bring Tribunal proceedings earlier, or even to invoke the Respondent's formal whistleblowing procedure.

928. In Tribunal the Claimant explained that he made that choice because he feared that, if he did blow the whistle about the use of the Harm metrics, he would be dismissed, based on his previous experience.

929. In our judgment, his evidence that he feared dismissal if he made disclosures about the Harm metrics is irreconcilable with his evidence that his purpose in drafting the 2015 paper for Mr Woolard and Mr Wheatley was 'to blow the whistle as clearly as possible' (para 206) and his evidence that his secondary purpose in applying to be the next CEO of the FCA in September 2015, was to make public interest disclosures about his achievements with the Harm metrics to the Chairman of the FCA (Mr Griffiths-Jones) and the Chancellor of the Exchequer (Mr George Osborne) (para 272).

930. In any event, a fear of adverse consequences would not constitute circumstances rendering it not reasonably feasible to issue proceedings; it would not provide good grounds for extending time.

931. We also had regard to the overall chronology, in particular: the fact that the Claimant stopped working on the Harm metrics in March 2015 at the latest; he accepted Ms Frohn's decision that he would not be permitted to resume working on it in October 2016; and he moved on to work on other issues, in particular P2P. We think it probable that his reason for not issuing proceedings earlier was that he had decided to put his grievances behind him, having settled on other interesting work.

932. The Claimant expressly identified himself as a whistleblower for the first time on 29 August 2018 (para 370 onwards), yet he waited over four months before he first contacted ACAS (on 10 January 2019) and did not enter a valid ET1 until two months after that. There would be no basis on which we could conclude that he presented his claim within a reasonable period after overcoming his stated fear of dismissal in late August 2018. Of course, by that point, he had been at risk of dismissal for over eight months.

933. For all these reasons, the Tribunal lacks jurisdiction in relation to these claims and they are dismissed.

THE DISMISSAL CLAIMS

Automatically unfair dismissal

The law to be applied

934. To succeed in a claim under section 103A ERA, the Claimant must show that the reason (or, if more than one, the principal reason) for his dismissal was because he made protected disclosures.

935. The principal reason is the reason that operated on the employer's mind at the time of the dismissal (Lord Denning in *Abernethy v Mott, Hay and Anderson* [1974] ICR 323). If the fact that the Claimant made protected disclosures was merely a subsidiary reason to the principal reason for dismissal, then the Claimant's claim under section 103A ERA will not be made out.

936. The burden of proof is on the employer to show the reason for dismissal. Mummery LJ in *Kuzel v Roche Products Ltd* [2008] ICR 799, at [56] – [59], explained in detail the position as regards the burden of proof in dismissal claims. Mummery LJ's explanation was distilled by Simler J in *Osipov* as follows (at [116]):

(a) The employee must produce some evidence to suggest that his dismissal was for the principal reason that he made protected disclosure.

(b) The burden then shifts to the employer to show that the dismissal was for a potentially fair reason.

(c) If the employer fails to show the reason for the dismissal, then the employment tribunal may draw an inference (where such inference is appropriate) that the true reason for the dismissal was that suggested by the employee

937. In *Kuzel*, Mummery LJ stated that it may be appropriate to draw inferences from the evidence to establish a causal link between the dismissal and the protected disclosures. He stressed that in drawing the inferences, the tribunal should consider all the evidence (*Kuzel*, [60]).

938. As is well-known, this requires an enquiry into what facts and beliefs caused the decision-maker to decide to dismiss. This may require the Tribunal to do more than simply consider what was the reason for dismissal by reference to any particular protected disclosure in isolation. The Tribunal will need to consider that question against a history of protected disclosures and to ask whether, taken together in that history, the prohibited reason was the reason or principal reason for dismissal (*El-Megrisi v Azad University (IR) in Oxford* UKEAT/0448/08).

939. Further, as HHJ Taylor recently observed in *University Hospital of North Tees & Hartlepool NHS Foundation Trust v Fairhall* UKEAT/0150/20/VP at [41]:

> **'If an employer really has determined to rid themselves of a whistle blower the process may be complex and involve people who are keen to appear not to have been involved in the decision making; someone who wishes to ensure an employee is dismissed because of their whistle blowing is likely to try to keep to the shadows. Wrongdoers often wish to distance themselves from their decisions. It would be troubling if in such cases excessively complex arguments about the difficulty in determining the precise mental processes of all those involved in the process resulted in a valid claim failing. Fortunately, we can rely on the good sense of the members of employment tribunals to see through such ruses and get to grips with the reason that operated, however it got there, on the mind of the dismissing officer.'**

Conclusions

940. We take as our starting point the observations of HHJ Tayler in the *Fairhall* case (immediately above). We have concluded that this was not a case where the Respondent was 'determined to rid [itself] of a whistleblower', nor did we find evidence of a controlling figure, manipulating the process from the shadows.

941. We have concluded that this was a genuine redundancy/restructuring exercise, conducted by Ms Frohn, which she anticipated would lead to the Claimant's retention, not his dismissal. Every reasonable effort was made to encourage him to accept the role offered in the new structure, or to apply for other roles. He declined to do so.

942. In our judgment, the Respondent was entitled to regard the alternative which the Claimant proposed (appointment into/creation of a role within the organisation far senior to his own, without the need for him to apply) as unreasonable. Unfortunately, his dismissal gradually became an inevitability,

not because of any whistleblowing, but because of the Claimant's own intransigence.

943. Mr Kemp submits, in relation to *PID 22, PID 23 and PID 24*, all of which were made during the consultation period, that they 'challenged very senior management and it is more likely than not that they were the true reason or the principal reason for the dismissal. The ET is invited to draw that inference.' He did not go on identify any specific evidence of a causal link between these disclosures and the dismissal. We have concluded that *PID 24* was not a protected disclosure; in any event, there is no evidence that its content caused any adverse reaction within the organisation or had any link with the restructuring process, or the treatment of the Claimant within that process.

944. In relation to *Disclosures 22 and 23*, we decline to draw that inference. We accept Ms Shepherd's submission that there is no credible connection between these disclosures and the Claimant's dismissal: the key decisions in relation to the restructuring had already been taken; the initial position did not change because the Claimant failed to engage with the process in a constructive way.

945. We agree with Ms Shepherd that, in making these disclosures, the Claimant contrived to position himself as a whistleblower in the belief that this would protect him from redundancy. Until he was notified of the risk of redundancy he had moved on from his work on the Harm metrics and had worked on other matters without incident. The Claimant was not dismissed because he made those protected disclosures; he made those protected disclosures because he was at risk of dismissal.

Ordinary unfair dismissal

<u>The law to be applied</u>

946. Pursuant to section 98 ERA, there are two limbs to the question of whether a dismissal is fair:

946.1. the employer must show its reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2) ERA;

946.2. if the employer succeeds at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair under section 98(4) ERA, taking into account whether the employer acted reasonably in dismissing the worker for the reason given.

947. In this claim, the Respondent contends that the reason for dismissal was a fair reason under section 98(1) and (2) ERA, namely redundancy or restructure which is advanced as some other substantial reason. The Claimant contends that the reason or principal reason for his dismissal was that he had made protected disclosures, which is an automatically unfair reason for dismissal under section 103(A) ERA.

948. The Court of Appeal discussed the meaning of the word 'reason' in this context in *Abernethy* at [330C-E] per Cairns LJ:

> **" A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt**

> **evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness or because he might have difficulty in proving the facts that actually led him to dismiss; or he may describe his reasons wrongly through some mistake of language or of law. In particular in these days, when the word "redundancy" has a specific statutory meaning, it is very easy for an employer to think that the facts which have led him to dismiss constitute a redundancy situation whereas in law they do not; and in my opinion the industrial tribunal was entitled to take the view that that was what happened here: the employers honestly thought that the facts constituted redundancy, but in law they did not. So the reason for the dismissal was not redundancy but something else. The tribunal found that the principal reason for the dismissal related to the capability of the applicant for work of the kind which he was employed to do?"**

Redundancy

949. Turning to fairness under section 98(4) ERA, the seminal case on fair redundancy process is *Williams v. Compair Maxam Ltd* [1982] IRLR 83, where Browne-Wilkinson J (as he then was) set out at [19] the five guideline standards which should guide Tribunals in determining whether a dismissal for redundancy is fair under section 98(4) ERA:

> **'1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.**
>
> **2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.**
>
> **3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.**
>
> **4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.**
>
> **5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment'.**

Some other substantial reason (SOSR)

950. The employer does not have to show that restructuring or reorganisation was essential. In *Hollister v National Farmers Union* [1979] ICR 542, CA the Court of Appeal said that a 'sound, good business reason' for reorganisation was sufficient to establish SOSR for dismissing an employee who refused to accept a change in his or her terms and conditions. The reason is not one the Tribunal considers sound but one 'which management thinks on reasonable grounds is sound' (*Scott and Co v Richardson* EAT 0074/04).

951. Although tribunals will not second-guess the employer's rationale, the employer must do more than simply assert that there was a 'good business reason' for a

reorganisation involving dismissals. A tribunal must be satisfied that changes in terms and conditions were not imposed for arbitrary reasons (*Catamaran Cruisers Ltd v Williams and ors*) [1994] IRLR 386, EAT.

Additional authorities not referred to by the parties

952. It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant; if fewer employees are needed to do work of a particular kind, there is a redundancy situation (*McCrea v Cullen and Davison Ltd* [1988] IRLR 30). Thus, a redundancy situation will arise where an employer reorganises and redistributes the work so that it can be done by fewer employees.

953. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. If the dismissal falls within that band, then the dismissal is fair; if it falls outside that band, it is unfair.

954. Even if the dismissal decision falls within the band of reasonable responses, it may still be unfair, if the Respondent has not followed a fair procedure. The Tribunal must evaluate the significance of the procedural failing, because 'it will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process' (*Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW at [26]).

955. When considering whether the employer acted reasonably, the Tribunal has to look at the question in the round and without regard to a lawyer's technicalities (*Taylor v OCS Group Limited* [2006] ICR 1602 at [48]). This need for a holistic approach has been reiterated in later cases, notably *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW and *NHS 24 v Pillar* UKEATS/005/16/JW.

956. The denial of a right of appeal is capable of rendering a dismissal unfair and equally a failure to apply the appeal process fairly and fully may have the same result. If dismissal would be likely to have occurred in any event, then that will affect compensation, but not the finding of unfairness itself (*Tarbuck v Sainsbury's Supermarkets Limited* [2006] IRLR 664 at [80].

957. While the conduct of an internal appeal process is relevant to the overall question of fairness, the question (as formulated by Morritt LJ in *Westminster City Council v Cabaj* [1996] IRLR 399) is whether the procedural defect denied to the employee an opportunity of showing that the employer's reason for dismissal was insufficient.

What was the sole or principal reason for the dismissal?

958. For the reasons we have already given, we are satisfied that the restructure carried out by Ms Frohn in 2017/2018 was a genuine exercise and was in no sense targeted at the Claimant. We note that it was not put to Ms Frohn in cross-examination that it was anything other than genuine.

959. We have already rejected the Claimant's contention that the sole or principal reason for his dismissal was the fact that he had made public interest disclosures.

960. We have concluded that the reason for the Claimant's dismissal was redundancy. As a result of the restructure, there was a diminution in the number of employees required in the Division to carry out the role of Manager (from nine to two). This created a redundancy situation for Managers. The Claimant held the role of Manager; he referred to this explicitly at the time, including in his email of 17 April 2018 (at para 334). As part of the redundancy exercise Ms Frohn decided, reasonably in our view, that Managers who had no line management responsibility should be offered the role of Technical Specialist, without the need to apply.

961. If we are wrong about that, our alternative analysis is that the sole reason for the dismissal was restructuring (some other substantial reason). We accept that there were sound business reasons for the restructuring, which are those set out above at para 322. Seven of the nine Manager posts had been deleted, and a decision taken (which we regard as reasonable) that those Managers who had no line management responsibility should be offered the Technical Specialist role.

Was the dismissal fair in all the circumstances?

962. The Claimant was offered reasonable alternative employment as a Technical Specialist, a role which was on the same grade and at the same level of pay as that of Manager; he refused to accept it. He was also notified of other vacancies which were available; he did not apply for any of them.

963. The consultation period was lengthy and exhaustive: the Claimant was given every opportunity (and encouragement) to engage with the process. We reject Mr Kemp's submission that its very length gave rise to unfairness. On the contrary, Ms Frohn and Ms Jarvis acted reasonably, by extending the consultation period to allow the Claimant to consider applying for other roles. Once it became clear beyond doubt that he had no intention of doing so, Ms Frohn reasonably concluded that there was no alternative to dismissal.

964. However, there is one aspect of the dismissal which concerned us: the decision by Ms Hoggett not to engage with the Claimant's ground of appeal that his dismissal was because he had made protected disclosures. The Respondent's own policy (para 396) provided for an appeal against dismissal for redundancy. The Claimant exercised that right and identified his grounds of appeal. This was his main ground and Ms Hoggett did not investigate it, even to the extent of speaking to Ms Frohn and asking her questions directed at establishing whether the Claimant's disclosures played any part in her decision-making.

965. We have concluded that, in disregarding the central ground of appeal the Respondent acted unreasonably; to use the language of *Cabaj*, the Claimant was 'denied the opportunity of showing that the real reason for dismissal was not sufficient.' It may well have made no difference to the outcome; but the authorities are clear that that is a matter of remedy (the *Polkey* issue), not liability.

Remedy

966. The Tribunal did not hear evidence or submission on *Polkey* or contribution. To assist the parties, we express a preliminary view, which is that, had Ms Hoggett investigated the question of whether the Claimant was dismissed for whistleblowing, and had she spoken to Ms Frohn, we think it likely (at the very least) that she would have concluded that the dismissal was unrelated to any whistleblowing by the Claimant. That was our conclusion, reached after a lengthy hearing, in which the Claimant has had every opportunity to challenge the Respondent's reason for his dismissal.

967. We also consider that there may be an argument available to the Respondent that the Claimant contributed to his dismissal by his decision not to engage with the appeal process.

968. However, we emphasise that these are our preliminary views only. If the parties are unable to resolve the matter of compensation by agreement, they must notify the Tribunal within 28 days of the promulgation of this judgment. Unless they invite us to deal with the issue by further written submissions, we will list a hearing to determine the matter, and case management orders will be sent out.

Employment Judge Massarella
Date: 30 September 2022