EMPLOYMENT TRIBUNALS

Claimant: **Ms H Forbes**

Respondent: **Grosvenor Casinos (GC) Limited**

Heard at: **Leeds** **On:** **2, 3, 4, 5 & 8 May 2017**
Reserved Judgment 24 May 2017

Before: Employment Judge Rostant
Members: Mr G Appleyard
Ms H Brown

Representation
Claimant: Ms S Cakali, Solicitor
Respondent: Ms S Omeri, of Counsel

JUDGMENT

The claimant's claims all fail and are dismissed.

REASONS

1. By a claim presented on 17 October 2016, the claimant brought complaints of constructive unfair dismissal, automatic unfair dismissal because of having made protected disclosures, being subjected to detriments because of having made protected disclosures and sexual harassment. The respondent responded and the matter came before Employment Judge Lancaster on 20 January 2017. In his case management Order at paragraph 3, Judge Lancaster noted that the parties agreed that the issues were sufficiently well pleaded for them not to be further defined in the case management order and that there was no need to address each one individually.

2. At that preliminary hearing the matter was set down for four days beginning on 2 May. The hearing in fact took a further day, 8 May and judgment was reserved to 24 May.

3. In accordance with EJ Lancaster's orders, an agreed bundles for the hearing was prepared and witness statements for all witnesses exchanged At the outset of the main hearing Ms Cakali, for the claimant, helpfully produced a list of issues The Tribunal, and indeed the respondent, proceeded on the assumption that that list contained all the complaints that Ms Cakali was relying on in support of her contentions The case for the claimant was that that she had been constructively unfairly dismissed by reason of a variety of acts by the respondent which collectively amounted to a fundamental breach of the contract of employment by way of a breach of the term of mutual trust and confidence. Ms Cakali specifically asserted that this case was a 'last straw' case. For that last straw she relied upon the conduct of Ms Yolande Ross in purportedly reneging on a commitment that she had earlier given the claimant that she would not only investigate the claimant's disclosure in relation to the falsification of training records but would also investigate her grievance about her treatment at the hands of her line manager Mr Fordham and his line manager Mr Bowker.

4. The acts said to amount to a breach of the term of trust and confidence of are set out in the list of issues under the heading 'constructive unfair dismissal' in paragraphs 1(a) through to (r) and begin with feedback given to the claimant following an interview on 14 January 2014. In addition, they are:

   1(b) a failure by the respondent to appoint the claimant to the position of General Manager at the Leeds Arena site.

   1(c) a rejection in February 2015 of the claimant's application for the General Manager role at Sunderland.

   1(d) the alleged ostracism of the claimant by the claimant's fellow managers namely Mr Dodd, Mr Cusack and Mr Bottomley between August 2015 and 7 March 2016.

   1(e) that the claimant was ostracised by her manager Mr Fordham between August 2015 and August 2016 and that Mr Fordham informed the claimant that she had been brainwashed by her role and duties.

   1(f) that between November 2015 and 8 August 2016, the claimant was ostracised by Mr Bowker the Regional Manager.

   1(g) that between August and September 2015, Mr Fordham modified the claimant's appraisal form without her consent or agreement to falsely represent the fact that she was happy remaining at GSM level.

   1(h) that Mr Fordham was negative of the claimant on 4 November 2015 and failed to support her in carrying out her role.

   1(i) that in December 2015, Mr Fordham placed barriers between the claimant and her desire to discipline various managers for failing to comply with procedures and thus failed to support her in carrying out her role.

   1(j) that Mr Fordham refused the claimant's application to join the GDP4 Development Programme, thus hindering her promotion or development.

1(k) that in February 2016, Mr Fordham failed to agree to the claimant's request that Mr Bottomley be relieved from the cash desk duties.

1(l) that in 16 March 2016, Mr Fordham prevented the claimant from attending a GSM Forum, hindering her ability for promotion and/or development.

1(m) that on 20 May 2016, at a P2P meeting, Mr Bowker sexually harassed the claimant and threatened her job security without reason or cause.

1(n) that on 23 May 2016, Ms Ross told the claimant that she would deal with the claimant's disclosures and also with her complaints against Mr Fordham and Mr Bowker (that is not relied on as a separate detriment but rather is relied on in conjunction with 1(r) – see later)

1(o) that in May 2016, Mr Fordham failed to conduct an appraisal for the claimant and that she was the only Manager who had been omitted from the appraisal process.

1(p) that on 28 June, Mr Fordham conducted a return to work interview in which he blamed the claimant for investigations into the Casino, informed her that she should look for work elsewhere and that he and the other managers had lost trust and confidence in her due to the issues she had raised.

1(q) that on 29 June, Mr Salt discouraged the claimant from discussing her issues with Human Resources in the form of Miss Grant.

1(r) that on 4 July, Ms Ross contacted the claimant and told her that, contrary to her earlier promise, she would be investigating corruption allegations but that the claimant would need to contact Human Resources with regards to her complaints about Mr Fordham and Mr Bowker.

From 1(d) onwards the same acts are relied upon as detriments because the claimant made protected Public Interest Disclosures.

5. As to the alleged protected disclosures, it was not finally entirely clear until closing submissions the claimant was relying on protected disclosures in accordance with section 43B(1)(a), (b) and (d) Employment Rights Act 1996. In the issues document, the protected disclosures were set out as being that a criminal offence had been committed or was in the process of being committed, namely theft and/or fraud; that the respondent had failed or was failing to comply with a legal obligation in respect of obligations imposed on it by the Gaming Commission and that the failures in relation to the obligation to the Gaming Commission were likely or were being concealed. In closing submissions it was further clarified that the claimant was also relying on the disclosure of a breach of a legal obligation namely that obligation imposed by the Equality Act not to harass an employee in relation to her sex. The respondent clarified its position in relation to protected disclosures which was that it did not accept that the claimant had a genuine and reasonable belief

that crimes had been committed and that absent any further particularisation by the claimant in the process of preparation for this case or in the preparation of the claimant's witness statement, the claimant had wholly failed to comply with the guidelines for the pursuit of a public interest disclosure claim set out in the case of Blackbay Ventures Limited (trading as Chemistree) v Gahir 2014 ICR, 747 and, in particular, that the claimant had failed to identify the nature and source of the alleged legal obligations by reference to statute or regulations. As to the idea that the claimant had made any disclosures which showed that she believed there was likely to be concealment of crimes or breach of procedure, those disclosures themselves depended on the reasonableness of the claimant's belief that a crime or breach of obligation had indeed been committed. The respondent further contended that if, which was denied, the claimant had suffered any detriments those detriments were not caused by the fact that the claimant had made public interest disclosures. As to the constructive dismissal complaint, the respondent contended that none of the matters relied on were made out as to the facts and/or did not, taken individually or together, amount to a constructive breach of contract. Furthermore the alleged final straw was innocuous and could not and did not contribute to the other acts and so therefore did not amount to a 'last straw' - see the case of Omilaju v Walton Forrest London Borough Council 2005 ICR 481. It was the respondent's case that the claimant's case in relation to dismissal, automatically unfair or otherwise was therefore bound to fail.

6. As to the complaint of sexual harassment, although the matter was not pleaded with the requisite precision, it seemed to the Tribunal that the claimant was alleging that she had been harassed in relation to sex (Section 26(1) Equality Act 2010) rather than sexually harassed Section 26(2) although both possibilities are addressed in our judgment. The two matters upon which the claimant relied were both comments made by Mr Bowker during the meeting of 20 May, the first being the allegation that Mr Bowker had raised the possibility of promoting a female member of staff, namely Miss Conway only to reject it on the grounds that she was pregnant, the second being that Mr Bowker had made the comment that he wished the claimant to return to the Casino and "start squeezing some balls" whilst making a graphic gesture miming that action. Whilst the respondent denied that Mr Bowker had made the relevant gesture, it did accept that Mr Bowker had mentioned the squeezing of balls but denied that that could amount to unwanted treatment relating to sex or of a sexual nature. As to the matter of Miss Conway, the respondent's case was that in the context of what was actually said, there was no comment in relation to sex but merely an observation that Miss Conway could not offer extra support to the claimant due to the imminence of her maternity leave. The respondent denied that the claimant had suffered any detriment by making a complaint about Mr Bowker's statements. Finally, in defending the claim of detriment and automatic unfair dismissal the respondent contended that on its facts the alleged detriment of Ms Ross reneging on an agreement to include in her own investigations an investigation into the alleged harassing conduct by Mr Bowker and the treatment of the claimant in her return to work meeting by Mr Fordham could not possibly amount to a detriment because the claimant made a protected interest disclosure and therefore could not possibly contribute to a dismissal because of having made a protected disclosure.

7. **The Law**

7.1 As far as is relevant to this case, Section 43B(1) Employment Rights Act 1996 (ERA) provides that a qualifying disclosure is one where there is a disclosure of information which in te reasonable belief of the worker making the disclosure is made in the public interest and tends to show that a criminal offence has been, is being or is likely to be committed; that a person is failing, has failed or is likely to fail to comply with a legal obligation to which he is subject and/or that information tending to show either of those matters is likely to be concealed

7.2 Section 43C ERA provides that a qualifying may be made to the employer. **(There was no issue taken by the respondent that if disclosures were made, they were made in accordance with Section 43C).**

7.3 Section 103A ERA provides that the dismissal of an employee where the reason or principal reason is the fact that the employee made a protected disclosure is unfair.

7.4 Section 95(1)(c) ERA provides that an employee is dismissed where he terminates his contract in circumstances where he is entitled so to do , without notice, by reason of the employer's conduct.

7.5 Section 47B (1) ERA provides that a worker has the right not to suffer any detriment by any act done by his employer on the ground that the worker made a protected disclosure. S47B(1A)(a) extends that right to any act done by a fellow worker in the course of that worker's employment. **(To the extent that the claimant complained of conduct by her colleagues the respondent did not seek to argue that the conduct was not done in the course of their employment)**.

7.6 As to the burden of proof in relation to the claim of detriment Section 48(2) ERA provides that once the worker has shown the fact of a protected disclosure and the fact of detrimental treatment the burden is upon the employer to show that the two are not causally connected. The case of NHS Manchester v Fecitt & Others 2012 IRLR 64 (CA) held that the test is whether the protected disclosure has materially influenced, in the sense of being more than a trivial influence, the employer's treatment of the whistleblower.

7.7 In relation to the complaint of automatic unfair dismissal, the burden of proof is that which is set out in the decision of the Court of Appeal in the case of Kuzel v Roche Products Limited 2008 ICR 799. Where an employee has sufficient service to proceed with a claim of ordinary unfair dismissal, as in this case, in any claim of automatic unfair dismissal, the initial burden of proof rests upon the respondent to show a reason for the dismissal. A failure by the employer to establish a potentially fair reason does not however automatically result in the finding of automatic unfair dismissal under Section 103A. Where the

Tribunal rejects the proffered reason and the employee has raised a prima facie case that the reason is the protected disclosure, the Tribunal is entitled but not obliged to infer that the protected disclosure is the reason for the dismissal but it remains open for the employer to satisfy the Tribunal that the protected disclosure was not the reason or principle reason for dismissal.

7.8 In so far as is relevant for this case, Section 26(1) of the Equality Act 2010 (EQA) provides that a person harasses another person if they subject that person to unwanted conduct related to sex and that conduct has the purpose or effect of violating the person's dignity or creating a intimidating, hostile, degrading, humiliating or offensive environment for the person. In deciding whether the conduct had the prohibited effect, the Tribunal must take into account the perception of the victim, the other circumstances of the case and whether it is reasonable for the conduct to have the effect asserted.

7.9 Section 40 EQA provides that an employer must not harass an employee.

7.10 As to claims of harassment the burden of proof provisions of the Equality Act are set out in Section 134 Equality Act 2010 and essentially require the claimant to show such facts that would allow the court to decide in the absence of any other explanation that the respondent had contravened the relevant provision (in this case Section 40) If the claimant discharges that initial burden, it falls to the respondent to show that it had not contravened the provision.

8. **Procedural issues**

8.1 The tribunal heard from the following witnesses. For the claimant Ms Dibb, former colleague, and the claimant herself. For the Respondent Ms V Grant, former HR Business Partner; Mr S Fordham General manager Leeds Westgate Casino; Ms Y Ross, Head of Financial Crime and Data Protection, and Mr M A W Salt, Regional Security Manager. There was an agreed bundle of 519 pages. Submissions were made both in writing and orally and are referred to in the course of the Tribunals judgment upon the various issues. Evidence and submissions were completed by the end of the fifth day of the hearing and the Tribunal met on 24 May to deliberate on the issue of liability, a provisional date for a remedy hearing having been agreed.

8.2 At the outset of the hearing, Ms Cakali sought to adduce extra evidence from Ms Dibb and her client by inviting them to speak in general terms about what they understood about the legal obligations that had been breached by the respondent and which breach had formed the subject matter of her disclosures, Ms Omeri objected, pointing to the guidance in Blackbay and submitting that at this stage it was far too late to introduce evidence which she had not had the opportunity of taking instructions upon herself and which had not been addressed by any of her witnesses in their statements. Having heard

further from Ms Cakali, the Tribunal retired. We examined the claim form, the claimant's witness statement and the record of the Preliminary Hearing and concluded that the claimant had not specified the nature of the legal duty that she relied on, other than the reference, in paragraph 97 of her statement, which deals with the alleged covering up of the lack of training. In that paragraph the claimant alleges that she was instructed by Mr Fordham to complete the training records on behalf of missing staff, which instruction she refused to comply with "as it represented a serious breach of my own personal gaming license, the respondent's gaming license and the respondent's legal duties". Save for that reference, and the generalised evidence at paragraph 119, which is to the effect that it was the claimant's belief that the disclosure she made amounted to protected disclosures that showed that criminal offences or were being committed and that the respondent had failed or was failing to comply with legal obligations and that the failures were all likely to be deliberately concealed there was no evidence that would allow the respond to cross-examine on, or the Tribunal to assess, whether the claimant's belief in the breach of a legal obligation was reasonable. In particular there was no evidence about what provision of the Casino's gaming license might have been breached, nor yet the claimant's personal license. We were not directed to either license in the bundle and there was no reference to the legislation or other source of regulatory requirement that would give rise to the need for such a license or the nature, if any, of the legal duties it might impose.

8.3 The Tribunal took the view that it was far too late for the claimant to seek to introduce evidence and at a later stage and for the same reason prevented cross-examination of Mr Fordham based on the terms of a statutory instrument which was not even included in the bundle of documents. It had been open to the claimant to specify in the claim form or at the preliminary hearing or in the witness statement what the legal obligation was. At all stages the claimant had been professionally represented. The claimant had not even taken the basic precaution of putting the respondent on prior notice of her wish to introduce extra evidence of that nature. We accepted \Ms Omeri's submission that to permit its introduction now would be to prejudice the respondent's ability to respond to the claim and cause inevitable delay and cost, entailed in Ms Omeri obtaining further instructions and the likely amendment of witness statements. As to prejudice to the claimant, it should be observed that since the claimant also asserted that the same disclosures tended to show that a criminal act was being or had been committed the claimant was not, by our ruling, prevented from making the case that the disclosures were qualifying disclosures in accordance with S43B.

8.4 However, it did follow from the absence of that evidence that the claimant could not establish a reasonable belief in the fact of a breach of a legal obligation, at least in respect of any putative legal obligation arising from the regulation of gambling. For us to be satisfied that the claimant did have that reasonable belief we would have to be satisfied that the claimant understood at least in broad terms the nature of the legal obligation and how it arose and in what way she believed it had

been breached. Without that evidence the claimant must inevitably fail the burden resting on her to show the fact of her having made a qualifying disclosure within the terms of S47B (1)(b) save for the disclosure in relation to the alleged harassment.

9. **The structure of our judgment.**

9.1 The tribunal had a number of issues to determine. They were as follows:

a) Was the claimant dismissed? That issue in turn broke down into two separate issues which were
b) Was the claimant the victim of acts by her employer which individual or taken together amounted to a fundamental breach of her contract?
c) Did the last straw relied upon contribute to that breach?
d) Next the tribunal had to decide whether the claimant had made any disclosures which meet the definition of qualifying protected disclosures encompassed by Sections 43B and 43C ERA.
e) If so, did the claimant suffer the detriments relied upon? There is obvious overlap between this question and the issue set out at b).
f) If so, were those detriments caused by the fact of the claimant making protected interest disclosures?
g) If the answer to a) is in the affirmative was the claimant's dismissal caused by the fact of her making protected interest disclosures?

9.2 We will address those issues by setting out a neutral and uncontroversial narrative of relevant events. Each of the above issues will then be addressed in separate sections each containing the detailed findings of relevant facts and our conclusions on that issue, applying the law and addressing where relevant the rival submissions.

10. **The background facts.**

10.1 The respondent runs a number of Casinos and is part of the Rank Organisation.

10.2 The claimant joined Rank in a managerial position based at the Leeds Arena site on 9 April 2012.

10.3 In December 2013 and January 2014 the Claimant unsuccessfully applied for promoted posts as a Gaming Service Manager and a General Manager.

10.4 On 15 January the claimant was interviewed, ultimately successfully, for the post of Gaming Service Manager (a promotion) at the Leeds Arena working underneath Mr Fordham who was the General Manager of the Casino.

10.5 In the summer of 2014 Mr Fordham was moved to become the General Manager of the Westgate Casino which the respondent's had taken over from Gala and the claimant acted up in his stead in the Leeds Arena.

10.6 In February 2015 the claimant applied for two promoted posts including that of the General Manager post in Sunderland but was unsuccessful.

10.7 In August 2015 the claimant was transferred as GSM to the Leeds Westgate Casino.

10.8 The claimant was specifically moved because of her technical expertise and the intention was that she would oversee a tightening up of procedural aspects of the operation at Westgate bringing procedures in line with the Rank procedures and moving staff away from the Gala procedures.

10.9 From soon after her appointment the claimant identified a number of procedural deficiencies and began to make changes in the procedural approach adopted the layer of managers immediately below her and staff below them.

10.10 Over the ensuing months the claimant raised concerns both with Mr Fordham and his line manager Mr Bowker, in respect of procedural failures on the part of management. From October onwards the claimant was advised that there were likely to be significant staffing changes with the intention of moving almost an entire layer of management below the claimant out of the Leeds Westgate site and into other Casinos to be replaced by new managers.

10.11 On 5 November the claimant contacted Mr Graham, Head of Table Gaming for Rank Organisation to request a peer to peer review for the Westgate site. This is a process by which managers from other Casinos would visit, observe operations, identify weaknesses and in collaboration with the management on the site under inspection create a series of improvement targets to be implemented by the management at that site.

10.12 That peer to peer visit took place on 20 & 21 November.

10.13 Between 26 December 2015 and 8 January 2016 the Westgate Casino was closed due to flooding.

10.14 From 8 January the Casino reopened although with a limited operation.

10.15 On 7 March three managers from the Westgate site were moved on and the new team put in place.

10.16 In March 2016 the respondent put in place a requirement that a number of members of staff at the Westgate site be trained in anti money laundering, that training to extend down to the level of Cashiers. The internal date for the completion of that training was 8 April 2016.

10.17 On 9 May Ms Dibb told the claimant that she believed that despite the fact that she, Ms Dibb, had not received the anti money laundering training as yet her training records had been marked to show that she had.

10.18 On 12 May the claimant contacted Ms Yolanda Ross, Head of Financial Crime and Data Protection, about that matter.

10.19 On 20 May the claimant attended a P2P review meeting in company with her Manager, Mr Fordham, and held by the Regional Manager Mr Bowker, also present was the respondent's Table Gaming Performance Manager, Mr Allen, who had carried out the P2P review.

10.20 In that P2P meeting Mr Bowker was extremely critical of the claimant's performance in taking forward the improvements required by the P2P report.

10.21 The claimant met Ms Ross and her colleague Mr Salt on 23 May to discuss her concerns in particular about the impropriety in relation to the training records, at that meeting she handed over documentary evidence.

10.22 The claimant commenced a period of sick leave on 25 May 2016.

10.23 On 3 June and 5 June the claimant sent long and detailed emails to Ms Ross and Mr Salt.

10.24 On 8 June 2016 an audit team led by Mr Graham visited the Westgate site.

10.25 The claimant returned to work on 28 June and met with Mr Fordham.

10.26 On 4 May following that return to work meeting the claimant was once again signed off work with work related stress.

10.27 On 4 July the claimant spoke to Ms Ross about the issues that Ms Ross was now dealing with.

10.28 On 8 August the claimant resigned by letter.

11. **The Tribunal's conclusions (including disputed fact) on whether there was a breach of the term of mutual trust and confidence in the claimant's contract**.

11.1 The claimant relies upon no fewer than 19 acts on the part of the respondent or on the part of colleagues said to amount to a breach of the term of trust and confidence. Of those the Tribunal finds that she cannot rely upon complaint 1(d). Although there is specific provision making the respondent liable for the conduct of employees in the context of claims under the Equality Act and in claims of detriment for making Public Interest Disclosures, the common law concept of

constructive dismissal relies upon the existence of repudiatory breaches by the *employer* and does not in our understanding extend to conduct of peers or subordinates of the employee.

11.2 Another group of complaints relate to the claimant's view that Mr Fordham did not support her adequately in her attempts to improve the performance of Casino managers. These are complaints 1h), 1i) and 1k). In essence these amount to evidence of a professional disagreement between the claimant and Mr Fordham her line manager. On the whole, the claimant was disposed to take a tougher line with underperforming or non-compliant staff than Mr Forham. Although he denies the specifics of the allegation contained in 1h) we prefer the claimant's version of that incident since the rest of Mr Fordham's evidence about Mr Taylor's visit was extremely dismissive about its value. The other two complaints were admitted as to their facts in that Mr Forham accepted that he was not prepared to discipline staff or to remove Mr Bottomley from his cash desk duties.

11.3 The Tribunal's view is that Mr Fordham was entitled to disagree with the claimant. By December it was understood that the relevant managers were to move on in any case and they did so in early March. There is no evidence that Mr Fordham was deliberately setting out to make the claimant's task of improving performance impossible, which might contribute to a breach of the term. We find that the claimant cannot rely upon these matters to found a complaint of constructive dismissal.

11.4 There is another group of complaints which relate to a thwarting of the claimant's personal development. These are 1a), 1b), 1c) 1g), 1l) and 1o). The first of those relate to feed back that the claimant received from Mr Beattie after interview for the post of General Manager at Stockton-on-Tees. We did not hear from Mr Beattie and we accept that the claimant was told that she had been "too Davina McCall" in the interview. This was, as feedback, unhelpful and the claimant was entitled to be upset by it. On its own however it is a relatively trivial matter.

11.5 As to 1b) merely being rejected for a promoted post, even when acting up in that role, cannot possibly without more contribute to a breach of the term of mutual trust and confidence. Disappointment in seeking promotion is a normal part of the employment experience and unless the promotion has been denied for reasons other than merit and the claimant could advance no evidence on that score.

11.6 The same would apply to complaint 1c), were it not for the fact that the claimant's application had been unsuccessful only because the respondent had lost it in the internal post. That is a matter which could contribute to, but not found on its own, a breach of the term since proper care over matters as such significance as job applications, on the part of the employer, is a reasonable expectation of any employee.

11.7 The evidence in relation to complaint 1g) is confused. The burden rests upon the claimant to show that Mr Fordham deliberately tampered with her appraisal form. It seems inherently improbable that he would do something so obviously discoverable and we conclude that this complaint is not made out.

11.8 As to complaint 1l) Mr Fordham has given a good reason for preventing the claimant from attending the forum and that was the importance of her presence during athe post flood table installation. Whilst the claimant understandably felt that her attendance at the relevant forum would greatly aid her in her job Mr Fordham as her manager was entitled to take a different view of the best use of her time and the claimant has not adduced evidence that Mr Fordham was acting out of spite or caprice.

11.9 Finally in this category, there is complaint 1o). Regular appraisals. Particularly when as in this case they are regarded as developmental tools for staff are important. We could see no logic behind Mr Forham's explanation that an appraisal during the progress of the P2P process was pointless and we conclude that the claimant has legitimate grounds for complaint in this regard albeit that on its own it does not found a breach of contract.

11.10 Complaints 1e) and 1f) were vague. The claimant's evidence certainly does not support the suggestion that she was being ostracised in any systematic manner by Mr Fordham or Mr Bowker. Indeed much of the evidence relied upon by the claimant to support this allegation does not amount to anything more than the fact that she and Mr Fordham did not always see eye to eye or that Mr Fordha or that she disagreed with his management performance over some issues. (For example see paragraphs 73, and 88). The evidence in relation to Mr Bowker is even harder to discern. The Tribunal find that these complaints are not made out.

11.11 In relation to complaint 1m) there are two aspects. It is certainly the case that Mr Bowker was extremely critical of the claimant's performance in making progress over the P2P. Mr Fordham's evidence both as to her lack of preparedness for the meeting and the lack of progress in the P2P was compelling. The meeting was on 20 may, the new team had been in place since 7 March and full gaming had been in operation for several weeks and partial gaming before then. We accept that Mr Bowker was entitled to be concerned. He evidently took the view that the claimant must bear primary responsibility for the lack of progress and although Mr Fordham clearly took some measure of responsibility it did not seems to be seriously challenged that the claimant was the principal manager overseeing the improvements required.

11.12 However, it does seem to us that Mr Bowker's handling of the meeting went beyond what was required to make his points. His graphic metaphor for applying pressure was crude and unnecessary. He departed from a structured approach and we find, losing his temper.

He also warned the claimant of the need to improve of face more formal procedures. Whether that was an appropriate warning is difficult to know but certainly the manner of its delivery after an emotional and highly critical meeting was not. Mr Bowker's conduct of this meeting could certainly be said to contribute to a breach of the term if not, quite, suffice on its own.

11.13 In relation to 1p) there is really only one available finding. It is uncontroversial evidence that in a return to work meeting Mr Fordham told the claimant that he had lost confidence in her. Mr Fordham's explanation for having made that comment (relating to unsubstantiated allegations that the claimant had been disingenuous about her illness) was deeply unconvincing and we reject it. In any event it was not ever proffered to the claimant at the time. There can be little more calculated to destroy the relationship of mutual trust for a manager to tell a subordinate that he had lost trust in her and that their working relationship was over. Had the claimant resigned there and then we do not doubt that she could have established the fact of a constructive dismissal.

11.14 Our conclusion therefore is that on its own, and taken together with the other matters detailed above, the meeting of 28 June did amount to a breach of the relationship of trust and confidence. The conduct meets the test of conduct calculated and likely to destroy or seriously damage the relationship of trust and confidence (Malik v Bank of Credit and Commerce International SA and anor 1997 ICR 606).A breach of the term is always a fundamental breach of the contract (see Morrow v Safeways Stores Plc 2002 IRLR 9)

12. **The Tribunal's findings of fact on the question of the last straw**

12.1 The Tribunal finds that the claimant resigned because of her belief that Ms Ross had reneged on a promise to her that she, Ms Ross, and her colleague Mr Salt would undertake and investigate all of the claimant's anxieties and concerns raised with her in the meeting of 23 May.

12.2 Those concerns comprised the whistle blowing allegation that the Respondent's Casino had deliberately falsified training records in relation to money laundering; that there had been a large number of breaches of cash handling and other security procedures in the casino and thirdly that the claimant had been discriminated against in a meeting of 20 May by Mr Bowker.

12.3 The claimant's resignation was prompted by her feeling that Ms Ross had "abandoned her" by making it clear in their phone call of 4 July that she, Ms Ross, would not be investigating matters that were not related to whistle blowing but that any grievance issues about the claimant's treatment, which by that stage included her treatment in the meeting on 28 June at the hands of Mr Fordham, would have to be dealt with by human resources.

12.4 The claimant first contacted Ms Ross by telephone. Ms Ross, as the claimant knew, was the head of financial crime and data protection for the Rank organisation. She has a background in policing. At the point

when the claimant contacted Ms Ross she was primarily concerned to discuss her anxieties about the possibility that training records had been falsified.

12.5 Ms Ross and Mr Salt met the claimant by arrangement confidentially on 23 May 2016. The Tribunal finds as a fact that that meeting was, on the part of the claimant, chaotic and disjointed.

12.6 Although the claimant says that her concerns as articulated in that meeting were entirely clear, the Tribunal prefers the evidence of Ms Ross and Mr Salt as to the nature of that meeting. In particular, we note the contemporaneous evidence to suggest that the claimant was in a distressed state emotionally. It is a fact that the following day the claimant took a period of sick leave because of stress and we note that immediately following the meeting Ms Ross texted the claimant in the following terms "thanks for everything today. It was obviously emotional for you". On 25 May, the claimant texted Ms Ross to say that she was taking some time off and could not stop crying.

12.7 The Tribunal finds as a fact that the claimant was not assured in terms by Ms Ross or Mr Salt that Ms Ross and Mr Salt would investigate all the claimant's concerns including those matters which would ordinarily be in the province of human resources.

12.8 The claimant's case is that she received a firm promise by Ms Ross that she and Mr Salt would investigate all her concerns. Tribunal concluded on the balance of probabilities that that promise was not given although the claimant may have believed that she had been given it. If Ms Ross and Mr Salt believed that the matters revealed to them included matters which were properly the province of human resources it is inherently unlikely that they would have promised that they would investigate those matters too. Neither of them have a background in human resources and both of them understood that their involvement was to deal with concerns that the claimant was raising that might affect the security of the respondent's resources. Furthermore, the claimant's assertion that she was specifically discouraged from contacting human resources in that meeting and subsequently does not square, not only with the evidence of Ms Ross and Mr Salt, but with the email that Mr Salt sent to Ms Ross on 29 June (see page 337 of the Tribunal's bundle). The relevant part of that email reads as follows:

12.9 "Hilary *(the claimant)* has today also received a call from Vicky Grant *(of human resources)* who left voicemail asking Hilary to ring her back to discuss the return to work meeting (yesterday – as below). *(This was a reference to the meeting that the claimant had had with Mr Fordham on 28 June which she had emailed Ms Ross about)*. Hilary wanted some advice as to what to do – so I advised her to ring Vicky back and speak to her, giving her a bit of conversational advice as to how to respond if she got asked questions she did not want to answer etc".

12.10 That email is entirely consistent with the evidence that Ms Ross and Mr Salt gave that they were extremely concerned to ensure that any matters raised with human resources did not reveal the claimant as

having made a whistle blowing complaint. That, of course, is entirely different to discouraging the claimant from contacting human resources altogether or indeed from asserting that they would investigate matters which were properly the province of human resources. There is further corroboration for the respondent's case to be found in the follow up email from Ms Ross to Mr Salt the subject of which was "return to work meeting Tuesday 28 June 2016 14:00 to 15:30". In that email Ms Ross starts by saying:

"I think this area of concern highlighted now needs to be forwarded and dealt with by HR".

She goes on to say:

"Unfortunately the areas highlighted by source (as discussed previously) *(a reference to the whistle blowing allegation)* have not been corroborated thus far hence the necessity for HR to lead now. They are best placed and have the correct skill set".

12.11 That email reveals Ms Ross' understanding of where her responsibility started and stopped and it seems to the Tribunal unlikely that she would have given the claimant the understanding that her areas of competence extended to investigating matters that were HR matters. The Tribunal finds that if the claimant gained an incorrect impression it was probably because of her emotional state in the meeting and her understandable desire to feel that somebody in the organisation had agreed to look at all of her concerns in the round and that she need look no further for the help that she was seeking.

12.12 It is agreed between the parties that on 4 July Ms Ross and the claimant had a telephone conversation during which the claimant was told that concerns about the return to work meeting would now have to be dealt with by human resources.

12.13 Although the claimant did not resign immediately in response to that phone call she did write a letter of resignation on 8 August. In that letter (see 353) the claimant wrote as follows:

"all of these issues *(the claimant's lengthy concerns about whistle blowing and her treatment by her managers)* have been reported internally, and at a sufficiently senior level, and despite being told everything will be dealt with and being actively discouraged from having contacted with HR, nothing has been done. I have been left in utter turmoil. I'm suffering from stress and depression and feel demoralised".

12.14 The claimant confirmed in cross-examination that it was that feeling of abandonment that had finally prompted her resignation and that she had sought legal advice immediately following her discussion with Ms Ross.

13. The Tribunal's conclusions on the issue of the last straw

13.1 The Tribunal directed itself to the law on this matter. It is helpfully summarised in the Judgment of Lord Justice Dyson on Omilaju v Waltham Forest LBC [2005] ICR 481. At paragraph 14 on page 487,

Lord Dyson sets out the basic position in law. It is a relatively lengthy passage but can accurately be summarised as follows:

13.2 A constructive dismissal occurs where a respondent's actions amounts to a repudiatory breach of the contract of employment. In any contract of employment there is implied term of mutual trust and confidence the breach of which will always amount to a fundamental breach of the contract of employment. Whether or not there has been a breach of the implied term of trust and confidence is an objective question. A breach may comprise one act so serious as of itself to breach the term or of a series of acts which taken together amount to a fundamental breach. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if that act is the last straw in a series of incidents. The last straw may be relatively insignificant but it must not be utterly trivial.

13.3 The appeal in Omilaju is concerned principally with what qualities must be displayed by the act relied on as prompting resignation for it to constitute a last straw. At paragraph 22 on page 489 Dyson LJ said as follows:

"If the final straw is not capable of contributing to a series of earlier acts which cumulatively amounted to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect".

13.4 At paragraph 22 Lord Justice Dyson goes on to say as follows:

"Moreover, an entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely, but mistakenly, interprets the acts as hurtful and destructive of his trust and confidence in his employer. The test is whether the employee's trust and confidence has been undermined is objective".

13.5 With that background, the Tribunal has examined the last straw relied on in this case. In the first place it is important to point out that the claimant never flinched from describing this as a last straw case. This is despite the fact that the conduct of Mr Fordham on 28 June would have, on its own, founded a complaint of constructive dismissal. The evidence as set out above and indeed the way in which the case was put by the claimant points to the fact that the claimant was tipped into resignation by the conversation on 4 July by Ms Ross. The claimant's understanding had been that Ms Ross would take from her the burden that she was carrying in relation not just to her anxieties about the respondent's procedures but also the way in which she was being treated by her management. The conversation with Ms Ross on 4 July, in which Ms Ross made it clear that certain matters and in particular the claimant's treatment at the hands of Mr Fordham on 28 June, were outside her area of responsibility and were a matter for HR, was treated by the claimant as evidence of being "abandoned" by Ms Ross. As our findings of fact show, the Tribunal had little doubt that that is genuinely how the claimant felt. Objectively however, was she entitled so to feel? If she was, the Tribunal has no doubt that that is a matter that could have contributed to a fundamental breach, taken

together with the conduct of Mr Fordham on 28 June and the other matters set out above.

13.6 However, the Tribunal concludes that the claimant's understanding of the position was mistaken and that she was not reasonably entitled to the belief that she had been the victim of a broken promise on the part of the senior manager. Our findings of fact above show what we believed the true position to have been. We do not find that Ms Ross or Mr Salt said anything in that meeting that could reasonably have been taken to amounting to a promise that the claimant need not look no further than them for a total investigation and resolution of all her concerns. It is perhaps understandable why the claimant felt otherwise. No doubt she went into that meeting believing Ms Ross to be an extremely senior person in the Rank organisation as indeed she was. The claimant has pointed to the wording of the whistle blowing policy which indicates at least in the version that the claimant had that whistle blowing investigations could proceed "with reference to HR as necessary". Furthermore, the claimant was for a variety of reasons very emotional. Three days earlier she had had a bruising meeting with Mr Bowker during which she had been criticised for her supposed failures in relation to the P2P audit, some of that criticism being in extremely robust terms. In addition she believed that she had been subjected to discriminatory conduct relating to her sex, by Mr Bowker. The claimant also went into that meeting troubled by what she perceived to be a lengthy history of attempting to resolve a culture of procedural slackness at the Casino to no avail and with lack of support from management both morally and materially. Finally, there were, as is evident from the subsequent text exchanges, matters in the claimant's personal matter which will have added to her stress. Nevertheless, the Tribunal's conclusion is that all that the claimant was told in that meeting was that Ms Ross and Mr Salt would conduct an investigation into the matters that she had given to them. They did not expressly state that theirs would be the only investigation. Nor did they expressly state that they would undertake an investigation into matters which were not part of the claimant's whistle blowing allegations. In fact, it is apparent to the Tribunal that Ms Ross and Mr Salt played matters entirely by the book. The evidence shows that they took great care to ensure that the claimant's anonymity was preserved when commissioning investigations into her whistle blowing allegations and that they displayed considerable sympathy and compassion to the claimant both in the meeting of 23 May and in subsequent correspondence. Their understanding of what "the book" required is evidenced by the email correspondence referred to in our findings of fact and the Tribunal takes the view that the conversation with the claimant on 4 July was doing no more than confirming to the claimant what the position now was in relation to Ms Ross' continued involvement. Furthermore, even if the claimant was told that Ms Ross was not to conduct any further investigation into the human resources matters that is a very long way from the claimant being entitled to feel that she was abandoned by Ms Ross. To the contrary, Ms Ross was setting out what needed to happen next and who needed to take up the baton from that point.

13.7 It will be apparent from our findings above that the Tribunal has concluded that the conduct of Ms Ross in relation to the claimant falls within the category of entirely innocuous conduct which cannot contribute to the fundamental breach of the claimant's contract of employment. In short, Ms Ross and Mr Salt but in particular Ms Ross, did nothing that could have contributed to a breach of the claimant's confidence or trust in the respondent. Thus the last straw relied on is no straw and it follows that the claimant cannot make out her complaint of constructive dismissal and that it fails.

13.8 That finding must encompass both the complaint under Section 98 and the complaint under Section 103A.

14. **The Tribunal's findings of fact on the question of whether or not the claimant made protected interest disclosures**

14.1 The respondent took over the Leeds Westgate Casino from Gala Casinos in 2013. Up to that point that Casino had been run successfully by Gala. In so doing, the respondent acquired a tier of management which had been there for a number of years.

14.2 The general manager of the Casino appointed by the respondent was Mr Fordham.

14.3 In August of 2015, the claimant, who had been operating as gaming services manager at the respondent's Leeds Arena Casino was transferred to the Westgate Casino. One reason for her transfer was the desire by the respondent to utilise her technical strengths.

14.4 The respondent had identified that, despite the fact that the Casino had been in the hands of Grosvenor for some two years, the managers below Mr Fordham were still operating Gala procedures in relation to the handling of cash security and the like. Mr Bowker, the regional manager, took the view the time had come to bring this to an end and the appointment of the claimant was at least in part to spearhead that effort.

14.5 Upon arrival, the claimant found a number of procedural irregularities. Those irregularities were not that the managers were not even following the old Gala procedures but were that the managers were not complying with the Grosvenor procedures.

14.6 The fact that the claimant uncovered this came as no surprise to the respondent. On 21 August Mr Bowker the regional operational manager wrote to Mr Benton Managing Director of Rank in the following terms:

"Just spoken with Hilary now at Westgage as GSM – just to bring you up to speed. Part of why she is there is to spot issues with procedures which are not Grosvenor standard (we knew of shortcomings as you are aware) – as it stands she has spotted issues with the count, transfer of chips and cash between the tables and cash desk (both ways), the clickers being too good to be true *potentially* on their accuracy, CCTV coverage and management shift patterns not being irregular enough to raise questions in the team. All looks alarming at

first glance and could be from a team that had worked under their own steam for a long time with little change – change has now come".

14.7 Later on in the same email Mr Bowker said as follows:

"This is only the start of probably an operation to either catch serious wrong doing or eliminate any fears – the large turnover in the Club may have disguised problems".

14.8 By the time that the claimant resigned almost exactly a year after her appointment, the claimant had at no point uncovered evidence which was sufficient to take to the police as evidence of criminal wrongdoing, present or past, on the part of any of her colleagues.

14.9 All of the procedural irregularities with which the claimant was concerned were to do with procedures put in place to safeguard the respondent from the risks of dishonesty by the staff or customers or staff and customers in collusion.

14.10 The claimant was not slow to raise the suspicion that the breach of procedures on the part of her colleagues was evidence of dishonesty and raised that suspicion with Mr Fordham.

14.11 Mr Fordham did not share the claimant's view and indeed was made rather anxious by her willingness to make allegations of theft where, in his view, there was little or no evidence to support it.

14.12 The claimant's colleagues also came to understand that she suspected them of dishonesty.

14.13 When, in June of 2016, the claimant emailed Ms Yolanda Ross with the details setting out her concerns about the running of the Casino she concluded her email with the following:

"I have not been successful in attaining any definite evidence of wrong doing due to the extreme set of circumstances pertaining in the Casino, its lack of systems and lack of resources. I cannot state with any certainty that the security or the honesty of any team member including management is without question".

14.14 In the Spring of 2016, the respondent embarked on a process of training staff in anti- money laundering. The claimant came to believe that at least two members of staff (cashiers) including Ms Dibb had been marked on the training records as having completed that training when they had not been.

14.15 The claimant raised this concern as a whistle blowing complaint to Yolanda Ross first in a phone call of 12 May 2016 and then during a meeting on 23 May 2016.

14.16 Ms Ross was at that time head of financial crime and data protection for the respondent.

14.17 As part of her disclosure the claimant handed over records which she believed supported the contention that at least two staff were being described as having been trained when they were not in fact so trained.

14.18 The claimant also told Ms Ross about the meeting of 20nmay and what Mt Bowker said in that meeting.

15. **Has the claimant made protected interest disclosures?**

15.1 For the purposes of this part of our consideration it is important to distinguish between two different sorts of disclosure. First there are the very many disclosures relied on by the claimant which pertain to the failure by the respondent's managers to comply with procedures. They are set out at paragraph 37a) through to j) of the claimant's representative's written submissions to the Tribunal. The respondent did not challenge the fact that the claimant had made any of the communications relied on by the claimant as amounting to protected interest disclosures but did assert that none of the communications amounted to protected interest disclosures. At the outset, Ms Omeri put the case on behalf of the respondent on the basis that the respondent did not accept that the claimant had a belief at all in the fact of the disclosures and that in no case did she reasonably believe that the disclosures she made showed or tended to show any of the circumstances set out in section 43B a) to h). The claimant, on the other hand, contended that the disclosures met the definition and that the claimant had a reasonable belief that the disclosures tended to show "statutory failures under section 43B(1)(b) and (b)" or (in other words) that a criminal offence has been committed or was being committed, those events as being theft and/or fraud and/or that the respondent had failed to was failing to comply with its legal obligation (in respect of obligations imposed on them by the Gaming Commission or by statute law). Later, and in closing, the claimant added to those a third type of disclosures, that encompassed by S43B(1)(h).

15.2 In her closing submission Ms Omeri submitted that the claimant had wholly failed to comply with the requirements for making out a claim of protected interest disclosure detriment set out by the EAT in its decision in Blackbay. In particular, Ms Omeri complained that insofar as the claimant was relying upon a breach of a legal obligation, the claimant had failed entirely to identify the source of the obligation so that it was capable of verification by reference for example to a statute or a regulation. In her closing submissions Mrs Cakali relied on two legal obligations. One was an obligation imposed on the respondent by the Gaming Commission and the other was an obligation imposed by the respondent not to discriminate on the grounds of sex posed by the Equality Act 2010.

15.3 That latter matter related only to a complaint that the claimant made to Ms Ross about her treatment by Mr Bowker which treatment forms the basis of her separate complaint of harassment related to sex and which occurred in the P2P meeting on 20 May 2016. It had not featured as a disclosure in the list of issues supplied at the start of the hearing.

15.4 In relation to the obligation said to be owed to the Gaming Commission, the claimant appeared to be relying on an obligation owed by the respondent generally to prevent the Casino from being a

site or an opportunity for dishonesty and, more specifically, an obligation owed, as condition of its license, to prevent the Casino being used as an opportunity for the laundering of money. Unfortunately for the claimant, at no point in the claim form, at the Preliminary Hearing or in her witness statement did the claimant ever set out the source and precise nature of the alleged legal obligation to the Gaming Commission. There were vague references to a threat to the respondent's license but it was evident that the claimant was not herself able to identify with any precision what the true situation was in relation to any of the procedural breaches that she was complaining of, including the allegation that the respondent had covered up the lack of training of certain cashiers in respect of anti- money laundering. We find, therefore, that we cannot be satisfied that the claimant reasonably believed that any of her disclosures of procedural failings showed or tended to show a breach of a legal obligation by the respondent to anybody, but to the Gaming Commission in particular.

15.5 In relation to a breach of a legal duty, that leaves the alleged breach of duty arising in the context of the complaint of sexual harassment. Strictly speaking, since it was not raised as a disclosure amongst the issues supplied by the claimant, the Tribunal could simply disregard that matter but we deal with it here for completeness and since we find that nothing turns on it in any case.

15.6 That "disclosure" is set out at page 295 of our bundle and was in the email that the claimant sent to Ms Ross detailing all of her concerns at Ms Ross' instigation. The email sets out, without comment, the claimant's version of the meeting including the allegation that Mr Bowker had said that a colleague Miss Craven deserved a promotion except that she was pregnant and the comment that the claimant should go back to the Casino and squeeze some balls, which comment was accompanied by a graphic gesture. The email does not however assert the claimant believed that she had thereby been discriminated against or harassed because of or in relation to her sex.

15.7 That allegation first appears to have been made in the claimant's letter of resignation on 8 August 2016 (see page 253) in the following terms:

"I have also suffered discrimination on the grounds of my sex both at the hands of Stewart Bowker and John Fordham".

15.8 In the email the claimant went on to complain of the conduct of Mr Fordham in the return to work meeting, which conduct is not relied on in these proceedings as an instance of discrimination because of sex. In the circumstances, it is difficult to see how the email, which is merely a relaying of an account of events, can disclose a reasonable belief in the breach of an obligation under the Equality Act. The claimant may have come to form that view later but it does not appear to have been part of her thinking at the time.

15.9 Even if it was, as a matter of causation, it is difficult to see how it could have been perceived as such by Ms Ross and Mr Salt, the managers to whom that disclosure was made. The email contains no assertion that that treatment was particularly distressing because of its

relationship to sex. Furthermore, the only detriment to which Ms Ross and Mr Salt are attached is the alleged failure by Ms Ross to live up to her promise to investigate all of the matters raised by the claimant. Since we have dismissed that as a detriment (see above), even if there was a public interest disclosure there is no evidence of a causational relationship with any detriment.

15.10 This leaves us with the many disclosures relied on by the claimant purporting to show criminal activity. The claimant's evidence, and the way in which the case was advanced in the list of issues, rested on the belief that criminal activity *was* taking place or *had* taken place. The claimant's difficulty in advancing her case in that way is the lack of any evidence at all that a crime had taken place and indeed the claimant accepted as much in her lengthy email to Ms Ross which details all of the matters that she was troubled about.

15.11 The highest that the claimant could put her case by way of cross-examination to Mr Fordham was that the procedural breaches raised the possibility of theft or of criminal activity. The claimant must demonstrate a reasonable belief that a crime has taken place. The claimant has in the view of the Tribunal failed to establish that if she did harbour that belief, it was a reasonable one. The claimant's revelations to the respondent amounted to disclosures of breaches of procedure. As Mr Bowker in his August 2015 email conceded, that might disclose serious dishonesty or it might simply amount to a team that had been stuck in their ways without being challenged for too long. The claimant's own suspicions that criminal activity was taking place in the Club, suspicions which she was never slow to voice to Mr Fordham and which her colleagues came to hear about, never amounted to any more than that. Indeed, the installation of a covert CCTV failed to disclose any wrong doing as did a number of investigations of various matters in the main brought about by the claimant including a full Club audit. The Tribunal's view is that merely suspecting or considering the possibility of criminal activity is not sufficient to establish a reasonable belief that a crime has in fact taken place.

15.12 That leave us with the final possibility which is that the claimant was in fact disclosing her reasonable belief in the likelihood that a crime might take place. That is to say that the failure by the staff to adhere to procedures was laying the Club open to the possibility of criminal activity. Ms Cakali did not advance this on the part of the claimant but we deal with it here for completeness.

15.13 The meaning of "likely" in this context was considered in the case of Kraus v Penna Plc and Another [2004] IRLR 260. In the finding of the Employment Appeal Tribunal in that case, the word likely should be construed as "requiring more than a possibility, or a risk, that an employer (or other person) might fail to comply with a relevant obligation". The EAT went on to find that the information disclosed should in the reasonable belief of the worker at the time tend to show that it was "probable or more probable than not" that the employer would fail to comply with the relevant legal obligation. It is fair to observe that the House of Lords took a differing view of the meaning

of the word likely in the case of SCA Packaging Limited v Boyle [2009] ICR 1056 although then in the context of the Disability Discrimination Act 1995. In the view of the House of Lords, likely means "could well happen" rather than more likely than not.

15.14 The Tribunal would observe that that is a decision made in the context of a different statute and that there is no reason why the word likely should be construed in identical terms as between two different statutes. Furthermore, Kraus case albeit only of EAT authority was not specifically disapproved in SCA Packaging case. We consider ourselves bound by the definition in Kraus.

15.15 Set against that standard, the Tribunal takes the view the claimant falls far short of showing that the information she disclosed amounted to information which she reasonably believed showed that a crime was likely to be committed.

15.16 Since the Tribunal takes the view that the claimant cannot establish any of the conditions set out in section 43B for any of the disclosures that she relies upon, any complaints which rely upon there having been public interest disclosures must fail. That of course must encompass the complaint under section 103A which already fails for reasons previously set out, and the complaint of detriment.

16. Detriments and causation

16.1 Although the claimant alleges that Mr Fordham may, in general terms, have been aware of the fact of her discussions with Ms Ross she has absolutely no evidence to support that contention other than Mr Fordham's behaviour on 28 June. Ms Ross and Mr Salt gave evidence, well supported by the documents, that they were, on the contrary at extreme pains to maintain the claimant's confidentiality and to prevent any suggestion that the claimant had made a protected interest disclosure to them. It follows that any claim related to a public interest disclosure in those terms must fail for all of those reasons.

17. The findings of the fact of the Tribunal on the issue of sexual harassment

17.1 On 20 May 2016 the claimant was called to a meeting with Mr Bowker. Also present was the claimant's line manager Mr Fordham and one other manager.

17.2 The purpose of the meeting was to discuss the progress of the Westgate Club in complying with the requirements of a P2P report. A P2P report is a process by which managers visit another club, identify any weaknesses, set out matters that will address those weaknesses and there is then expected be regular review of progress towards implementing those improvements.

17.3 During the course of the meeting, Mr Bowkerg instead of adopting the usual practice of going through the P2P report point by point, abandoned that process and instead embarked upon a general criticism of the lack of progress of the Club towards meeting the P2P

requirements and a discussion as to how matters could be moved forward.

17.4 It is common ground that the Club had not made sufficient progress and further that the claimant was not particularly well prepared for the meeting.

17.5 However, at that point the parties depart considerably since the claimant contends that lack of progress was not her fault or at least not solely her fault.

17.6 Nevertheless it is again common ground that Mr Bowker was extremely critical of the claimant and moreover displayed his irritation by raising his voice.

17.7 On the balance of probabilities, the Tribunal does not find that Mr Bowker raised the possibility of promoting Ms Conway to a manager's position only to dismiss it on the grounds that Ms Conway was pregnant. On the balance of probabilities the Tribunal prefer the evidence of Mr Fordham on this point. The Tribunal finds that although Ms Conway's name was mentioned it was not in the context of a promotion but in the context of the possibility that she might offer the claimant enhanced support in moving towards the P2P improvements.

17.8 There is no evidence to support either of the two rival versions of this conversation and the Tribunal must therefore decide which is most likely. In this context, the claimant's evidence suffers from her inability to explain why Mr Bowker raised Ms Conway and the prospect of a promotion to a management post at all. It was common ground that there was no vacancy into which Ms Conway could be promoted and the claimant did not accept that what was being suggested that Ms Conway should be promoted in order to offer her more support.

17.9 Mr Fordham's explanation of how Ms Conway came into the conversation seems to us therefore to be more logical and convincing. It is common ground that there was a discussion about unsupportive management and that the claimant needed more help in order to move forward and Mr Fordham's evidence was that Ms Conway's name was raised in that context only then to be almost immediately dismissed as being unlikely to be much help given the fact that she was about to go on maternity leave.

17.10 The Tribunal therefore find that Mr Bowker did not raise the possibility of promoting Ms Conway only then to dismiss it.

17.11 It is conceded however that Mr Bowker did instruct the claimant to return to the Club and to "squeeze some balls". The parties do not agree however as to whether or not that statement was accompanied by a miming of that action.

17.12 The Tribunal finds as a matter of fact that the mime did take place. Mr Fordham's evidence on this point was not convincing. When he drafted his witness statement he could not recall whether or not Mr Bowker had made any reference to squeezing balls although he then conceded during cross-examination that that was a possibility. Since the respondent has never doubted that statement was made that

inconsistency was somewhat surprising. Furthermore, the only contemporaneous record of that meeting (or rather, near contemporaneous record) is the claimant's email to Ms Ross of early June and there the claimant sets out with precision what was alleged to have happened and what was alleged to have been said. Finally, we did not hear from Mr Bowker and Mr Fordham's certainty that no gesture was made did not strike us as particularly convincing given his lack of certainty as to other matters in the meeting. For all of those reasons we preferred the claimant's evidence and concluded that not only the instruction to squeeze balls was made verbally but it was accompanied by the gesture.

18. **Has the claimant suffered harassment related to sex or sexual harassment**

18.1 In relation to the allegation about Ms Conway that allegation must fail. Despite the fact that there is some contemporaneous support for Mr Bowker having raised Ms Conway's name in that way in the form of the email by the claimant to Ms Ross, the Tribunal has, for the reasons already given, concluded that at best the claimant misunderstood what was being said about Ms Conway.

18.2 There was, however, no misunderstanding the blunt instruction to go back to the Casino and squeeze some balls. The Tribunal has considered the definition of harassment set out in section 26(1) and (2) of the Equality Act. The conduct complained of here is the instruction accompanied by the gesture to squeeze some balls. The Tribunal are satisfied that that conduct was unwanted complained about it fairly soon after the event in her email to Ms Ross. We are also satisfied that it had the effect of creating a hostile or intimidating atmosphere or at least contributing to a hostile intimidating atmosphere for the claimant. In the context of that meeting, that statement would have sounded aggressive and added to the strong criticism in raised tones on the part of Mr Bowker of the claimant's performance, did contribute we find to the claimant feeling undermined, upset and intimidated as her evidence says.

18.3 However, the requirement in the section is that the conduct be related to the protected characteristic of sex or be of a sexual nature. The only relation the conduct has to sex is the reference to male genitals. The claimant well understood, as she conceded in evidence, that she was not expected to literally sexually assault her colleagues on return to work. She well understood that she was being invited to treat the comment metaphorically as an instruction to apply pressure. Whilst it is a comment that makes reference to male genitals the Tribunal does not believe that that is sufficient for it to relate to sex still less of a sexual nature. We considered what the case would have been had the claimant complained of this as direct discrimination. We thought it likely that we would have concluded that the statement would just as likely to have been made to a man in the same circumstances as the claimant. That of course is only enough to say that a complaint of direct discrimination where the causation is "because of" would fail. We note that section 26 does not require that the comment be related to the person's own protected characteristic but merely that it be

related to a protected characteristic. We take the view that a comment that would undoubtedly pass the test would have been something like "stop being such a girl" or "don't be an old woman". This comment does not have the character of any of those. This comment almost accidentally relies upon a rather graphic metaphor for applying pressure which happens to be related to the male genitalia but does not in the sense intended by the section of being "related to" sex. Still less is it of conduct of a sexual nature where the conduct must have the quality of being connected to gender in a sexual rather than biological sense.

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Employment Judge Rostant

Date 04 July 2017