EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100274/2016

Heard in Glasgow on 22, 23, 24 and 25 November 2016 and 18, 19, 20 and 21 April 2017 (with a members meeting on 19 June 2017)

Employment Judge: Lucy Wiseman
Members: Hugh Boyd
John Kerr

Mr Terence Balfour	**Claimant** **Represented by:-** **Mr R O'Dair - Barrister**
The University Court of The University of Glasgow	**Respondent** **Represented by:-** **Ms G MacLellan - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 18 January 2016 alleging that he had been unfairly dismissed in terms of section 98 Employment Rights Act; that he had been automatically unfairly dismissed for making a protected disclosure in terms of section 103A Employment Rights Act; that he had been subjected to detriments for making a protected disclosure in terms of section 47B Employment Rights Act and that he was victimised in terms of section 27 Equality Act.

2. The respondent accepted the claimant had been dismissed and asserted the reason for dismissal was gross misconduct. The respondent denied the dismissal was unfair and denied the other allegations.

3. The representatives produced an Agreed List of Issues to be determined by the Tribunal and it is helpful to set these out:-

(1) Was the claimant subjected to a detriment because of having carried out protected acts under section 27 of the Equality Act 2010 (the respondent conceded the claimant had carried out a protected act when (a) he stated, during Ms Loveman's grievance, that her allegation of race discrimination by fellow workers was true; (b) he supported Ms Loveman by attending the grievance hearing with her and (c) he sent the email of the 14 July 2015 alleging racism in the workplace and that management were not addressing the situation)

(2) Did the claimant's email of 14 July 2015 to the respondent constitute a protected disclosure under sections 43A-C Employment Rights Act;

(3) In particular, did the claimant make a "disclosure of information" in his email to the respondent of 14 July 2015;

(4) If so, did the claimant reasonably believe that his disclosure demonstrated a "relevant failure" under section 43B of the Employment Rights Act (the respondent accepted that if the email of 14 July 2015 was a protected disclosure, then the claimant reasonably believed the disclosure demonstrated a relevant failure);

(5) If so, was the disclosure in the public interest;

(6) Were the institution of disciplinary proceedings and the subsequent dismissal of the claimant by the respondent, detriments imposed because of a protected disclosure;

(7) Was the claimant's sending of the email on 14 July 2015 to the respondent – (a) an exercise of his right to freedom of expression under Article 10 of the ECHR and/or (b) an exercise of his right to freedom of association under Article 11 of the ECHR;

(8) What was the reason for the claimant's dismissal;

(9) Was the claimant unfairly dismissed by the respondent and

(10) If so, should any award of compensation be reduced on the basis that the claimant's disclosure was made in bad faith and/or the claimant caused/contributed to his own dismissal.

4. A number of preliminary issues arose at the commencement of the Hearing. Firstly, the respondent's representative noted a joint bundle of documents had been prepared and submitted to the Tribunal. The claimant had also produced a disputed bundle of documents and whilst the respondent had now agreed the majority of the documents could be included in the joint bundle, there remained a dispute regarding the claimant's desire to include documents relating to Ms Loveman's grievance.

5. Mr O'Dair wished to have the documents produced because the claimant's case was that his hearing had been unfair because he had been encouraged to believe he could not refer to the Loveman documents. Mr O'Dair submitted that if the claimant's case was made out, the dismissal may be held to have been unfair. The Tribunal will have to consider Polkey with regard to what would have happened if the claimant had been allowed to include these matters. Mr O'Dair submitted it would facilitate the Tribunal's task by referring to these documents.

6. Ms McLellan objected to the documents being introduced because she had a concern that reference to these documents would elongate this Hearing. The respondent had made certain concessions to ensure evidence was not required regarding these matters. Ms McLellan further submitted the

Tribunal would hear from the claimant who would be able to speak to these matters without the need for the documents.

7. Mr O'Dair shared the respondent's concerns regarding elongating the Hearing, but he submitted the documents would assist the claimant in giving his evidence, and would assist the Tribunal should the claimant's evidence be disputed.

8. Ms MacLellan noted all witnesses were in the same position regarding the passage of time and their memory of events. She submitted the legal tests to be applied by the Tribunal to determine the issues did not require us to examine these documents.

9. The Tribunal decided to hear some evidence before making a decision regarding this matter. We revisited the issue after the evidence of two witnesses and some further submissions. We decided not to allow the documents to be produced because the claimant would have an opportunity during his evidence to tell us about Ms Loveman's grievance, and be cross examined about it. We did not believe, in the circumstances, that we required to have the documents produced.

10. We considered that if the documents were produced, there was a risk the focus of this case would become Ms Loveman's grievance. Further, the issue regarding confidentiality in respect of the grievance, was not yet entirely clear to the Tribunal.

11. Secondly, the claimant had, in his supplementary bundle of documents, produced documents said to be a "transcript" of various meetings with the respondent. The documents were not agreed because the claimant had covertly recorded the meetings and the respondent had not been provided with the recording prior to the Hearing.

12. Thirdly, it was agreed this Hearing would be limited to determining liability only.

13. We heard evidence from:-

- Ms Anne McGregor, Operations Manager in Accommodation Services, who carried out the investigation;
- Ms Annie Porter, HR Advisor (who gave her evidence by way of a witness statement and video conference in circumstances where she now lives in Australia);
- Ms Aileen McInnes, Director of Hospitality;
- Mr Gordon MacKenzie, Head of Security Services, who took the decision to dismiss the claimant;
- Ms Margaret Thomson, HR Advisor, who spoke to the appeal process;
- Ms Emmi Sipponen, former employee and friend of the claimant and
- the claimant.

14. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

15. The claimant commenced employment with the respondent on 21 January 2011. He was employed as a Catering Assistant in the Hospitality department.

16. The claimant was employed on a zero hours contract and his Statement of Employment Particulars was produced at page 39.

17. The claimant's partner, Ms Louise Loveman, was employed by the respondent in the same capacity as the claimant. Ms Loveman lodged a grievance in February 2015 (during her probationary period) alleging that bullying and racism were endemic within the catering department and that management did not deal with complaints raised by zero hours staff. Ms Loveman also made reference to a manager known as "the pit bull" whom it was alleged made racist comments.

18. Ms Loveman's grievance was investigated by Ms Aileen McInnes, Director of Hospitality.

19. Ms McInnes interviewed a number of people during her investigation of the grievance, and one person interviewed was the claimant. The claimant provided evidence as a witness in relation to the grievance raised by Ms Loveman. The claimant raised concerns regarding bullying and harassment in Hospitality and stated that he had witnessed some issues. The claimant was asked by Ms McInnes to provide examples and the names of those involved and any witnesses, but he declined to do so.

20. Ms McInnes also interviewed other zero hours contract staff to ascertain whether they had witnessed any bullying or racism; and she interviewed managers and supervisors regarding whether they were aware of bullying and harassment within the department. Ms McInnes found nothing to substantiate what had been said by Ms Loveman and the claimant.

21. One of the complaints raised in Ms Loveman's grievance related to zero hours contract staff feeling vulnerable because shifts were allocated at management's discretion and it was alleged that if staff complained their shifts were reduced. Ms McInnes investigated this and noted the allocation of shifts was based on the availability of the members of staff and managers endeavoured to divide hours fairly between staff.

22. Ms McInnes investigated whether, and if so why, Ms Loveman's shifts had been reduced. Ms McInnes interviewed staff regarding this matter and

investigated Ms Loveman's availability. Ms McInnes was satisfied there had been no change in the pattern or number of shifts offered to Ms Loveman following the raising of the grievance.

23. Ms Loveman's grievance was not upheld, and she appealed against this outcome. The claimant attended the grievance appeal hearing as Ms Loveman's companion, and he supported the allegations of racism made by Ms Loveman.

24. Ms Loveman's grievance appeal was dismissed.

25. Ms McInnes was aware, at that time, of another grievance and disciplinary procedure involving a member of staff, Mr Aka Anyiam. Mr Anyiam had raised a grievance regarding allegations that another member of staff had made comments about the music he listened to, and he had been aggrieved by this. The grievance was not upheld because there was nothing more to rely upon than the allegation of Mr Anyiam and the response of the other member of staff.

26. Mr Anyiam faced a disciplinary investigation for aggressive behaviour during the incident regarding the music. The investigation found that he had displayed aggressive behaviour but no disciplinary action was taken because of the length of time it had taken to conclude the procedure (due to Mr Anyiam's absence from work) and other issues were involved.

27. The claimant was not satisfied with the outcome of Ms Loveman's grievance. This dissatisfaction was compounded by the fact he was told by Ms Sipponen, a colleague, that she was having problems with "the pit bull" and Mr Anyiam told him he was experiencing racial abuse. (The claimant did not put a timeframe on when he was told of these matters).

28. The claimant also believed the Director of HR, Ms Christine Barr, had made a comment at the select committee that there were no zero hours contracts in the Catering department.

29. The issue of zero hours contracts was topical at that time and the respondent was in discussion with the trade unions regarding moving away from zero hours contracts to contracts which would guarantee a minimum number of hours.

30. Ms Maureen Hood, General Manager, Hospitality Services, circulated an email on 13 July at 4.48pm (page 45/46) to the zero hours contract staff inviting them to attend a meeting with Ms McInnes to discuss the changes which were being proposed regarding zero hours contracts. The respondent intended to do away with zero hours contracts and offer staff a guaranteed minimum number of hours and paid annual leave.

31. The email stated "*As you know there has been a lot of press recently regarding the zero hours contracts and as a result the University is preparing to make some changes to all the zero hours contracts that are on the University books. With this in mind Ms McInnes would like to meet with you all face to face to explain what it means to you."*

32. The claimant responded to this email on 14 July at 22.20 (page 45). He sent the email to Ms Hood and Ms McInnes, and he copied it to at least 15 zero hours contact staff. The email was in the following terms:

> *"Hi*
>
> *due to the extent that management are prepared to lie to zero hours staff, as has been exposed in a recent succession of sham grievance procedures which I have been witness to, will this meeting be a further continuation of lies and disinformation?*
>
> *How can we be confident as employees, that anything said by a less than honourable management team will in fact be the truth?*

I myself am not at all trusting of managements methods, so I suggest that we should have union or legal representation to mediate these meetings, so as to better inform us of our employment rights.

Key management figures have shown to use unscrupulous methods when dealing with employees, to white wash and discredit them rather than listen to their concerns.

You have enabled a culture of bullying and racism in the workplace, and seek to take a prejudicial stance against those who challenge your lack of concern.

And I am in no doubt that further concerns will arise at these meetings regarding the status of our contracts.

A What do you propose are the imminent changes taking place?

B I think it would be wise to clue in staff as to the nature of these recent press items concerning zero hours contracts.

I have cc'd everybody concerned into this email as I feel these are very important points. If anybody has any further points they would like to raise by all means you can contact me via (email address)

I would also raise the point that management should have sent a letter out to staff in addition to emails which are often missed. I am not the only one who has heard of this meeting 3rd hand, this is not acceptable."

33. Ms McInnes was surprised to receive the claimant's email and surprised at the tone of it. Ms McInnes contacted HR and spoke to Ms Annie Porter for guidance regarding the email, the meetings which had been arranged and the fact that some zero hours contract staff had contacted her (page 47,

47A, 48, 49, 50 and 51) to state they were worried about the content of the claimant's email and its impact on them.

34. Ms McInnes and Ms Porter agreed the claimant should be invited to attend a disciplinary investigation meeting and be given the opportunity to explain why the email had been sent. Ms McInnes intended to lead the investigation because she was head of the department and the email had been sent to her.

35. Ms McInnes and Ms Porter drafted a letter inviting the claimant to a disciplinary investigation (page 52). The issues to be investigated were:-

1. That you have made serious, potentially defamatory, and currently unsubstantiated statements, namely –

    (a) "key management figures have been shown to use unscrupulous methods when dealing with employees, to white wash and discredit them rather than listen to their concerns"

    (b) "you (management) have enabled a culture of bullying and racism in the work place, and seek to take a prejudicial stance against those who challenge your lack of concern"

    (c) "management are prepared to lie to zero hours staff, as has been exposed in a recent succession of sham grievances which I have been witness to"

2. That you have shared, and therefore published, these potentially defamatory statements by copying other members of University staff into your email.

3. That you have committed a serious breach of confidentiality by referring to recent confidential grievance procedures.

4. That you have failed to follow the appropriate University procedures in relation to complaints to do with matters relating to your employment with the University.

36. Ms McInnes hand delivered the letter to the claimant in accordance with the normal practice where the member of staff is on duty. Ms McInnes explained to the claimant the content of the letter and left it for him to read.

37. Ms McInnes returned to her office. The claimant, approximately 50 minutes later, appeared in Ms McInnes' office unannounced, with a cup of tea in one hand and the letter in the other. The claimant closed the office door over and approached Ms McInnes' desk. The claimant asked Ms McInnes if this was the way she wished to proceed. Ms McInnes responded that she had no choice and that he would have an opportunity at the meeting to explain his actions.

38. The claimant asked Ms McInnes if she felt threatened and exposed (by the email he had sent). Ms McInnes did not like the way the conversation was going and so she asked him to leave her office. The claimant did so and stated "you've answered my question".

39. Ms McInnes spoke to Ms Porter again to inform her what had happened, and, acting on her advice, Ms McInnes wrote down her account of what had happened (page 72).

40. Ms Porter informed Ms McInnes that it was no longer appropriate for her to carry out the investigation, and that another manager would be appointed.

41. Ms Anne McGregor, Operations Manager was asked to conduct the investigation into the email dated 14 July, sent by the claimant.

42. A letter dated 27 July (page 56) was sent to the claimant inviting him to attend an investigation meeting on 30 July. The letter also informed the claimant that a fifth issue had been added to the matters to be investigated and that issue related to the manner and content of the claimant's conversation with Ms McInnes on 16 July 2015 in her office.

43. The investigation meeting in fact took place on 6 August 2015. Ms McGregor was present with Ms Porter and Ms Clifford was present to take notes. The claimant was also in attendance. A note of the meeting was produced at pages 73 – 85.

44. The claimant asked if he could record the meeting as he did not have a witness present. The claimant was informed that he would not be able to record the meeting, but that he would be provided with a copy of the minutes of the meeting and would have an opportunity to review the minutes and comment on their accuracy. The claimant was also free to take his own notes.

45. The claimant told Ms Porter that he wanted to record the meeting because he felt that in previous meetings facts had been distorted and minutes of meetings had not been a truthful representation. Ms Porter reiterated there would be opportunity to review and suggest amendments to the minutes of the meeting. Ms Porter also noted the claimant could have asked to have a witness present but he had not done so.

46. The claimant agreed to proceed with the meeting. The claimant, unbeknown to Ms McGregor and Ms Porter, recorded the meeting.

47. Ms McGregor wanted to ascertain if the claimant had sent the email dated 14 July and if so, why he had written it. Ms McGregor took each of the allegations and asked the claimant to explain why the comments in the email had been made and to give examples of what he alleged. The allegations made by the claimant in the email of 14 July were extremely serious and the integrity and honesty of the management team had been

challenged. The purpose of the investigation was to understand why the claimant had made these allegations and what evidence or belief the claimant had to support these allegations.

48. Ms McGregor found the meeting very difficult because the claimant would not give straight answers to her questions and often gave unclear, circular, vague and at times contradictory responses. The claimant failed to provide specific examples to support what he had stated in the email. The claimant also repeatedly refused to provide the names of witnesses because he wished to speak to them first.

49. Ms McGregor wished to ascertain what the term "sham grievance procedures" referred to. The claimant, during the investigation meeting, referred to Ms Loveman's grievance and the issues raised as part of that grievance, and Ms McGregor sought to clarify whether this was the "sham" grievance procedure, or whether the claimant was referring to other grievance procedures. The claimant would not give a clear answer to this question and went on to suggest that his use of the term "grievances" meant things staff were not happy with.

50. The claimant did refer on a number of occasions to an alleged situation involving Mr Aka Anyiam. Ms Porter was aware that a disciplinary investigation had been carried out into an allegation that Mr Anyiam had acted aggressively towards another member of staff. The investigation found that Mr Anyiam had acted aggressively, but that here had been provocation by the other member of staff.

51. Ms McGregor suggested an adjournment to allow the claimant time to have a break. The claimant did not return to the meeting after the adjournment. The claimant spoke to Ms McGregor some time later and informed her he did not want to continue with the meeting.

52. The investigation meeting re-convened on 13 August. The meeting was scheduled for 11am, but the claimant did not appear. He contacted Ms

McGregor to state he had just received the notes of the meeting on the 6th August and wanted to re-arrange the continued meeting.

53. Ms McGregor took advice from Ms Porter and informed the claimant the meeting would proceed at 12 noon. The claimant attended at 12 noon, with Ms Christina Lama, a work colleague as his witness.

54. The minute of the meeting held on 13 August was produced at pages 89 – 101.

55. The claimant wished, for the benefit of Ms Lama, to recap on what had been said on 6 August. Ms Porter agreed to allow time for Ms Lama to read the allegations and the email dated 14 July from the claimant.

56. The claimant, prior to discussing allegations 4 and 5, asked for the allegation regarding breach of confidentiality to be explained. Ms Porter informed the claimant that his email was potentially a breach of confidentiality because he had referred to "a sham grievance procedure". Ms McGregor stated she understood, when she had read the email, that the claimant was referring to a sham grievance procedure he had knowledge of. Ms McGregor asked if it was a formal grievance procedure the claimant had been referring to and he answered "no, of course not".

57. Ms McGregor repeatedly asked the claimant to explain what he meant by "sham grievance procedure" and the claimant gave a variety of responses which shed no light on this. The claimant did refer to having witnessed racist comments being made to Mr Aka Anyiam but there was a complete lack of clarity whether the claimant had reported this and if so, to whom.

58. The claimant was more forceful in the meeting on 13 August, and challenged the respondent regarding a lack of justification for the allegations which he described as proof of management's unscrupulous methods.

59. Ms McGregor noted there was a dispute regarding events when the claimant visited Ms McInnes' office. The claimant maintained that he had felt threatened by receiving the letter, and had gone to Ms McInnes' office to "give her constructive criticism".

60. Ms Lama informed Ms McGregor that zero hours staff were reluctant to come forward with issues such as bullying, because they believed it may affect their job. The claimant added to this the assertion Ms Loveman had had her hours reduced after she had raised concerns.

61. The claimant also informed Ms McGregor that during a formal grievance the existence of a member of staff (Marion) had been denied. He felt this was biased and disturbing.

62. Ms Porter sent the claimant copies of the minutes of the meetings on 6 and 13 August for him to review, sign and return. The claimant was sent two reminders regarding this, but did not ever return the minutes to the respondent or forward any comments.

63. Ms McGregor interviewed Ms McInnes regarding the occasion when the claimant had visited her office on 16 July. A note of this interview was produced at page 102. Ms McInnes confirmed she had been taken aback when the claimant entered her office and closed over the door. She reiterated the content of her earlier statement, and confirmed that although she had not felt intimidated someone else could have felt that way.

64. Ms McInnes confirmed the claimant had raised concerns regarding bullying and harassment as part of an investigation with another member of staff. Ms McInnes noted the claimant had been a witness as part of this and had raised concerns at that point. Ms McInnes recalled that she had asked the claimant to provide examples and that he had not done so and appeared to simply be making general statements with nothing to substantiate them. Ms McInnes confirmed she had interviewed other zero hours staff to seek their comments, but nothing was found to substantiate what had been said.

65. Ms McGregor informed Ms McInnes that the claimant had stated that he had raised concerns regarding racism towards Mr Anyiam during another grievance procedure. Ms McInnes did not recall the claimant referring to anyone by name and confirmed there was an on-going issue which had been dealt with separately by another member of staff.

66. Ms McGregor also viewed footage of Ms Barr at the Select Committee. The claimant alleged Ms Barr had lied regarding zero hours contracts. Ms McGregor noted Ms Barr had been speaking about tutors, but was asked a question about catering staff, janitors and cleaners on zero hours contracts. Ms Barr had stated there may be some in Banqueting. Ms McGregor concluded Ms Barr had not lied but may have misinterpreted the questions she had been asked.

67. Ms McGregor prepared a Disciplinary Investigation Report dated 11 September 2015 (page 107 – 115). Ms McGregor noted how she had carried out the investigation and a summary of the key findings/evidence and her conclusions regarding each allegation.

68. Ms McGregor, in relation to allegation 1, concluded the claimant agreed he had written and sent the email of 14 July. She concluded the three main statements lifted from the email were very disparaging towards management, and no clear specific examples were provided by the claimant to back up these statements. The claimant had acknowledged the email could have been better worded, he maintained the statements made were appropriate and true even though he was unable to substantiate them. Ms McGregor upheld the first allegation.

69. Ms McGregor noted the claimant accepted he had intentionally written and copied the email to zero hours colleagues, and she concluded the content of the email was entirely inappropriate and that it was not the correct manner in which to raise his concerns. Ms McGregor upheld the second allegation.

70. Ms McGregor, in relation to allegation 3, noted that it appeared the claimant was referring to grievance procedures that he had knowledge of, but he did not provide specific information about these grievances. She further noted that the claimant had repeatedly referred to a previous grievance procedure that he was witness to, whilst at the same time stating that his statement regarding "sham grievance procedures" did not relate to any formal process. Ms McGregor concluded that any reasonable person would have taken the claimant's statement to be referring to formal grievance procedures, although she acknowledged the claimant had not shared any specific information in relation to this.

71. Ms McGregor decided that in light of the fact the claimant did not share specific information in relation to a confidential grievance procedure, but did insinuate that he had been privy to this, to partially uphold the allegation.

72. In relation to allegation 4, Ms McGregor concluded it was reasonable to believe the claimant had knowledge of the respondent's grievance procedure and that sending the email was not an appropriate way to raise any concerns he may have had. Ms McGregor upheld the fourth allegation.

73. Ms McGregor noted, with regard to allegation 5, the aspects of the two versions which were agreed. Ms McGregor concluded it was not appropriate for the claimant to visit Ms McInnes' office to discuss the letter and ask her "if she felt threatened" and she upheld the allegation.

74. Ms McGregor noted the claimant had raised the issue of information provided by the Director of HR to the Scottish Parliament in 2014, and that this had made him feel distrust. Ms McGregor acknowledged, in light of this, that the email from Ms Hood may have caused some concern to the claimant.

75. Ms McGregor recommended that the matter be progressed to a disciplinary hearing.

76. Mr Gordon MacKenzie, Head of Security Services, was approached by his line manager and asked to chair the disciplinary hearing in this case because he had had no involvement in this matter, or in the department and he did not know the claimant.

77. The claimant was invited, by letter of 22 September (page 149) to attend a disciplinary hearing on 1 October. The letter set out the five allegations against the claimant and advised that depending on the facts established at the hearing, the outcome could be disciplinary action up to and including dismissal. The letter enclosed copies of the respondent's disciplinary procedure, the Investigation Report, the claimant's email of 14 July, the minutes of the investigation meetings on 6 and 13 August, the minutes of the meeting with Ms McInnes on 18 August, the statement from the claimant and the statement from Ms McInnes.

78. The claimant did not attend for the disciplinary hearing. Mr MacKenzie subsequently found an email from the claimant dated 30 September, sent at 9.36pm (page 153). The claimant referred to the minutes of the meetings on 6 and 13 August and described that they included distortions and omission of substantial details. The claimant expressed distress that the disciplinary hearing was to be chaired by the Head of Security Services, who had 30 years experience of working with the Police, whereas he performed a non skilled menial role.

79. The claimant stated in the email that he had made a protected disclosure in terms of relaying information which is in the wider public interest regarding the legitimacy and use of these contracts across the catering sector, yet he was being forced to attend a disciplinary interrogation. The claimant reiterated his belief there was "an ulterior motive at play, which is to whitewash and discredit my concerns rather than listen to them". The claimant described the allegation concerning Ms McInnes as "spurious" and believed this matter had been escalated simply to "smear" him.

80. The claimant referred to "2 Directors both lying or obfuscating facts" to divert investigations into managerial failings; a whitewashing of his evidence; a culture of victimisation of staff who have valid concerns and the continued denial of any incidents of bullying and victimisation.

81. The claimant reported for work on 1 October notwithstanding the fact he did not attend the disciplinary hearing.

82. The claimant was advised by letter of 1 October (page 157) that he had been suspended on full pay pending consideration of his failure to follow a reasonable management instruction to attend a disciplinary hearing.

83. The claimant was also advised by letter of 1 October (page 159) that he was required to attend a disciplinary hearing on 8 October and that a further allegation of failure to comply with a reasonable management instruction would be addressed at this hearing.

84. A note of the disciplinary hearing was produced at pages 166 – 174. Mr MacKenzie was accompanied by an HR Officer, Mr Henery and Ms Jill Stewart, an HR Assistant was present to take notes. The claimant was accompanied by Ms Emmi Sipponen, a work colleague.

85. The claimant informed Mr MacKenzie that he wished to record the meeting because he had no faith in the process and a recording would provide a fair representation of what had been said. Mr MacKenzie confirmed he would not give authority for the meeting to be recorded. The claimant thereafter confirmed he was not recording the meeting.

86. Mr MacKenzie explained to the claimant that he wished to understand why the email had been sent and that he intended to go through each allegation and ask the claimant for examples to illustrate why the comments in the email had been made.

87. Mr MacKenzie found the claimant was not an easy person to get information from because there was a lack of clarity and the claimant repeatedly made assertions and when asked further about them he backtracked on what he had said.

88. The claimant, in relation to allegation 1a (unscrupulous methods when dealing with employees, to whitewash and discredit them) told Mr MacKenzie that when informal channels are used to address incidents, managers tended to reduce shifts for the individual involved. The claimant made reference to a person who had been "hassling" him and suggested supervisors had been aware of this for months. He believed there had not been any point informing management because he did not want his hours to be reduced and that he had managed to resolve the incident himself. Mr MacKenzie asked the claimant to provide some more information regarding this matter to enable him to follow it up, but the claimant was unwilling to identify the person.

89. The claimant, in relation to allegation 1b (enabled a culture of bullying and racism in the workplace and seek to take a prejudicial stance against those who challenge your lack of concern) referred to racist attitudes towards a Nigerian member of staff. The claimant suggested that what was happening was widely known but nothing was done about it. Mr MacKenzie ascertained the claimant was unaware whether any complaint had been made about it and if so what the outcome of it had been.

90. The claimant, in relation to allegation 1c (management are prepared to lie to zero hours staff, as has been exposed in a recent succession of sham grievance procedures which I have been witness to) told Mr MacKenzie that racist issues were avoided and that there was a refusal to see the impact of bullying on colleagues. Mr MacKenzie questioned the claimant regarding "sham grievance procedures" and the claimant stated that when using informal channels to resolve issues nothing seemed to get done. The claimant could not give an exact number of the grievances in which he had been involved, and when Mr MacKenzie asked him to specify the number of

formal grievances in which he had been involved, the claimant responded that the "severity of the issue would be serious enough for something to be done and this is why the process is a sham".

91. The claimant accepted, in relation to allegation 2, that he had sent the email dated 14 July, and although the claimant acknowledged the wording used in the email was "strong and self expressive". The claimant confirmed he would, in the same circumstances, send the email again but would tidy up the language used.

92. The claimant wholly rejected the suggestion in allegation 3 that he had breached confidentiality.

93. The claimant accepted he knew of the respondent's grievance procedure, but he argued that if a complaint was made it should be investigated.

94. The claimant also denied allegation 5 regarding his encounter with Ms McInnes. The claimant believed the allegation inferred he had threatened Ms McInnes but she had confirmed in her statement that she had not felt threatened.

95. The claimant suggested, in relation to allegation 6, that he had not received the notes of the meetings on 6 and 13 August until 24 September and he had accordingly thought the case against him had been dropped. He had not been sufficiently prepared to attend the disciplinary hearing arranged for 1 October.

96. Mr MacKenzie wrote to the claimant on 14 October (page 161) to inform him of his decision to summarily dismiss him with effect from 8 October 2015. Mr MacKenzie, in his letter, set out each of the allegations against the claimant and explained his conclusions. Mr MacKenzie repeatedly concluded that the claimant had been asked to provide specific examples to support the statements made in the email of 14 July, and that he had been unable to do so beyond making some general statements: accordingly, he concluded the

claimant had been unable to substantiate the serious statements he had made.

97. Mr MacKenzie, in relation to allegation 3, noted the email had referred to recent confidential grievance procedures and the claimant had, in the disciplinary hearing, referred generally to informal and formal grievance procedures. Mr MacKenzie concluded there had not been a serious breach of confidentiality in circumstances where the claimant had not referred to any specific grievance case or disclosed the identity of any party. Mr MacKenzie accordingly did not uphold this allegation.

98. Mr MacKenzie also noted that the claimant had been asked whether he regretted sending the email of 14 July and whether having reflected on the matter, he would do the same again. The claimant failed to provide a definitive response and accordingly Mr MacKenzie concluded he had no confidence the claimant would not act in the same way again. He considered the claimant did not accept he had done anything wrong and did not accept responsibility for his actions.

99. Mr MacKenzie was not familiar with the term “protected disclosure” and this had meant nothing to him when he read the claimant’s email of 30 September. There had not been reference to “whistle-blowing” during the hearing.

100. The claimant was accompanied by Ms Sipponen during the disciplinary hearing. Ms Sipponen had an opportunity to tell Mr MacKenzie about any incidents of bullying and racism of which she was aware. Ms Sipponen told Mr Mackenzie about the member of staff called “the pit bull” (Ms Pat Brown). Ms Sipponen accepted that her complaint about “the pit bull” had been investigated, but she had not been aware that Ms Brown had been issued with a warning in respect of the incident Ms Sipponen had raised.

101. The claimant exercised the right to appeal against the decision to dismiss (page 176) and submitted his grounds of appeal by email on 2 November (page 178 – 187).

102. The claimant was advised, by letter of 10 November (page 190) that his appeal would be heard by a panel comprising Mr Neil Campbell, Director of Campus Services and Mr Jack Aitken, Head of Senate Office on 16 November.

103. The claimant queried whether he could have a legal representative present at the appeal, and was advised that he could be accompanied by a work colleague or trade union representative.

104. The claimant's request for the appeal hearing to be re-arranged to enable him to take legal advice was granted, and the appeal hearing was re-arranged for 23 November.

105. The claimant's representative, Mr O'Dair, submitted revised grounds of appeal by email of 20 November (page 194). The revised grounds of appeal noted the claimant believed his dismissal was a breach of section 43 Employment Rights Act, the Equality Act and Articles 10 and 11 of the ECHR. The revised grounds of appeal further noted that at the disciplinary hearing the claimant had not been able to fully present the basis for the complaints made in the email of 14 July because management encouraged him to believe that he could not refer to matters arising in a previous grievance. Accordingly, what the claimant was saying in his email had to be read very much in the light of what was said and done in Louise Loveman's grievance. Further, the basis for what the claimant said was not just what was said during Ms Loveman's grievance, it was the fact (learned from Ms Sipponen after the dismissal of Ms Loveman's grievance) that the sort of things Ms Loveman had complained about (specifically the bullying by "the pit bull") continued. Ms Sipponen complained about these things on 21 September 2015 but they had been going on well before she wrote her

email and after Ms Loveman's grievance. Therefore what the claimant said was not simply based on a historic grievance.

106. The revised grounds of appeal stated the email of 14 July was a protected disclosure and that it had been unlawful to dismiss him because he could not prove the disclosure to be true. Mr O'Dair referred to Ms McInnes denying the existence of a witness supportive to Ms Loveman during her grievance. It was said that by doing so Ms McInnes discredited Ms Loveman and acted unscrupulously. Further evidence of Ms McInnes discrediting Ms Loveman, and acting unscrupulously, came from the fact she interviewed a very small selection of those working in Hospitality. Ms Lama substantiated the concerns regarding the complaint by Mr Anyiam and she had had her shifts reduced. The claimant had made this point during the disciplinary but it had not been followed up.

107. The revised grounds of appeal also referred to Ms Maureen Hood reducing Ms Loveman to tears by shouting at her in a public place on or about the 17 July 2014. The claimant believed Ms Loveman's account and believed this was bullying. The claimant also heard "the pit bull" make racist comments and told Ms McInnes about it. Ms Lama had heard similar comments and Ms Sipponen had complained about racist bullying. It was said that management enabled this culture by failing to take sufficient steps to tackle it and by reducing the shifts of those who complain.

108. Mr O'Dair confirmed that in making the statement that management were prepared to lie to zero hours staff, the lie being referred to was the willingness (professed during Ms Loveman's grievance) to tackle equal opportunities and bullying issues. This, given the experience of Ms Sipponen, was a sham.

109. Mr O'Dair clarified that the claimant, in copying the email to the majority of zero hours staff, was seeking to formulate a collective response from zero hours staff to management behaviour, and in doing so he was exercising his

right to freedom of association (article 11 Human Rights Act). Further, he was exercising his right to freedom of expression (article 10).

110. The appeal hearing took place on 23 November and a note of the meeting was produced at page 201. Mr Campbell noted Mr O'Dair's revised grounds of appeal had been received that morning. The claimant confirmed the revised grounds of appeal superseded the earlier appeal document.

111. The appeal hearing was adjourned to allow time for the revised grounds of appeal to be considered.

112. Ms Thomson, HR Officer, emailed the claimant on 11 December (page 203) to apologise for the delay in contacting him regarding the date for the re-arranged appeal hearing. She explained the delay had been due to the difficulties in trying to find a suitable date for the re-arranged appeal. It had proved difficult to get availability for Mr Campbell and Mr Aitken, and accordingly a decision had been taken to have Ms Morton, Head of Residential and Cleaning Services and Mr Morton Assistant Director, Estates and Buildings hear the appeal on 22 December.

113. The claimant responded to Ms Thomson by email of 16 December (page 204). The claimant took issue with the delay and maintained the minutes of the appeal hearing on 23 November were false. The claimant concluded by stating that due to the distortions in these meeting notes, combined with time delays, he had lost all faith in the process and no longer considered it a tenable channel for resolution. The claimant indicated he intended to pursue an alternative route for resolution.

114. Ms Thomson sought clarification from the claimant whether he was withdrawing the appeal, or whether he wished the appeal hearing to go ahead in his absence. The claimant responded only to state he believed he had made his position clear. Ms Thomson confirmed she took the claimant's position as being a withdrawal of the appeal.

Credibility and notes on the evidence

115. The claimant told this Tribunal that Ms Loveman's grievance had raised issues regarding the failure of management to deal with complaints raised by zero hours staff; racism, bullying and "the pit bull". The claimant had given evidence in support of Ms Loveman and had said he knew of "the pit bull" and that she had made racist comments. Ms Lama had also given evidence in Ms Loveman's grievance and had stated that if zero hours staff complained their shifts tended to be reduced.

116. Ms Loveman's grievance had been largely rejected by Ms McInnes, who had preferred the version of events given by the management team. The claimant felt the grievance had not been dealt with fairly.

117. The claimant told us that he heard from Ms Sipponen that she was having problems with "the pit bull"; and, Mr Anyiam told him that he had experienced racial abuse. The claimant also learned that the Director of HR had told the Select Committee that there were no zero hours contracts in the Catering department. This all led to the claimant sending the email of 14 July. He copied it to the zero hours staff because he felt the issues he raised were very important and should be discussed.

118. The claimant stated the reference to "sham grievance procedures" had been a reference to the grievance itself and Ms Loveman's actual grievance. The "key management figures" referred to Ms McInnes. The "unscrupulous methods" referred to Ms Loveman's grievance where Ms McInnes stated that a member of staff requested to attend the grievance hearing could not be identified and where zero hours staff had their shifts reduced after they complained. The claimant believed management avoided looking at evidence and did nothing to tackle bullying and racism identified by Ms Loveman, Ms Lama and himself.

119. The claimant recorded the investigation and disciplinary meetings because he considered the minutes of meetings in Ms Loveman's grievance had

been incorrect in order to discredit her, and he wanted to ensure he had an accurate account of what was said. The claimant recorded the meetings on his phone and then transcribed it: he believed his transcript of those meetings was a totally accurate verbatim report.

120. The claimant maintained there had been a discussion at the start of the disciplinary hearing when Mr MacKenzie asked if he was recording the meeting. The claimant and Ms Sipponen stated that there had been a stand-off because they had said the meeting could not go ahead unless the claimant was able to record, and the meeting had then proceeded on that basis.

121. The claimant invited the Tribunal to believe he was unable to refer to issues to support the statements in the email of 14 July because those matters had been raised by Ms Loveman in her grievance. The claimant considered that by stating there would be a record of Ms Loveman's grievance this should have been sufficient to alert the respondent to the fact they could discover the information they required by searching these records.

122. The claimant considered it clear that the alleged breach of confidentiality referred to the Loveman grievance because it was the only grievance he had been involved with. He considered he had tried to explain to Ms Porter why he felt the Loveman grievance had not been dealt with properly, and he asked Ms McGregor and Ms Porter to review the Loveman grievance outcome report.

123. The claimant felt he had tried to give examples and referred to Mr Anyiam. The claimant also felt Ms Sipponen had had examples of her experiences, but Mr MacKenzie had not been prepared to listen to her. Similarly, Ms Lama had provided examples, but the respondent had not responded well to this.

124. We found there was a marked difference between the way in which the claimant gave his evidence to this Tribunal, and the way in which he

responded to questions during the disciplinary process. The claimant was clear in his answers to the questions asked by Mr O'Dair in examination in chief. He was, for example, clear that the "sham grievance procedures" referred to Ms Loveman's actual grievance and that "key management figures" referred to Ms McInnes. This was in complete contrast to the responses he gave during the investigation and disciplinary hearings, where he appeared unwilling, or unable, to provide examples to support or explain why he had made the statements in the email of 14 July; and, where his responses were not only unclear and confused, but were frequently inconsistent. The claimant, for example, when asked to whom the term "management" referred, told Ms McGregor that this referred to "Hospitality management as a whole, and not solely to Ms McInnes. The claimant was also wholly inconsistent in his answers regarding whether the sham grievance procedures referred to Ms Loveman's grievance, his own disciplinary procedure or other unidentified informal complaints.

125. We concluded the claimant's evidence was not wholly reliable. The claimant told this Tribunal that he had been unable to fully explain the basis for sending the email of 14 July because he was constrained by allegation 3. We did not (for the reasons set out below) accept this. It appeared to this Tribunal that the claimant was prepared to make very serious allegations in circumstances where he was unwilling or unable to support those allegations.

126. Mr O'Dair cautioned the Tribunal against adopting the approach that because the claimant had lied about recording the meetings, his entire evidence should be found to be unreliable. We accepted this would not be the correct approach, however the claimant's actions did raise issues regarding his trustworthiness. The claimant was told he was not permitted to record the investigatory and disciplinary meetings; he ignored this instruction, proceeded to record the meetings covertly and was not truthful when asked if he was recording. These actions raised a question mark in the minds of the Tribunal regarding the lengths to which the claimant would go to be successful with his case.

127. There were two major issues upon which the parties fundamentally disagreed. The first issue related to the recordings of the investigation and disciplinary hearings taken by the claimant. The claimant produced transcripts for this Hearing and during his evidence, and cross examination of the respondent's witnesses, the claimant referred to and relied upon his transcript. The claimant essentially invited the Tribunal to accept his transcript as an accurate verbatim record of the investigation and disciplinary hearings in preference to the minutes of those meetings produced by the respondent.

128. We, in considering this matter, noted there appeared to be no dispute regarding the fact the claimant made covert recordings of these meetings. The respondent was not aware the claimant was recording the meetings.

129. We also noted the claimant did not have permission to record the meetings. In fact, he had been specifically told he was not permitted to record the meetings. The claimant, relying on his transcript and supported by Ms Sipponen's evidence, invited the Tribunal to believe there had been a stand-off at the disciplinary hearing when he and Ms Sipponen had insisted the hearing could not proceed unless the claimant was allowed to record the meeting. Mr MacKenzie rejected this suggestion.

130. We could not accept the claimant's evidence regarding this matter for two reasons. Firstly we preferred Mr MacKenzie's version of events. Secondly, Ms Sipponen's evidence regarding this matter was wholly unsatisfactory. Ms Sipponen told the Tribunal in her evidence in chief that the issue of recording the meeting had been discussed for about half an hour and she had said "either he's recording it or we're not continuing the meeting". Ms Sipponen was then asked in cross examination if she knew the claimant was recording the meeting, and said "no". She was also asked if she had issued Mr MacKenzie with an ultimatum, and she said "no". Ms Sipponen then stated she had not been part of the discussion.

131. Mr O'Dair asked each of the respondent's witnesses if the transcripts accurately reflected the discussions at the investigation and disciplinary hearings. Ms McGregor and Ms Porter each noted the considerable passage of time which had elapsed between the investigation hearings in August 2015 and seeing the transcript. Ms Porter noted a large part of a circular discussion had been omitted and she considered the tone and context of parts was not accurately reflected. Ms Porter observed some words in the transcript were in capital letters, yet no-one had raised their voice during the meeting.

132. Mr MacKenzie's position was that he could not recall if exact words or phrases had been used as noted in the transcript.

133. We, in addition to the above points, had regard to the fact the respondent's minutes had been shared with the claimant shortly after each meeting, and he had been given an opportunity to review the minutes and note comments or amendments. The claimant did not take up this opportunity and did not ever, prior to this Hearing, suggest to the respondent that the minutes were in any way inaccurate.

134. We concluded the transcripts produced by the claimant had to be treated with caution. They were recorded on a mobile phone secreted in a folder and no-one else has had an opportunity to listen to the recording. In addition to this, Ms Porter's point regarding the claimant using capital letters to stress words in the transcript was well made. The claimant had an opportunity, when producing the transcript, to ensure context and emphasis were captured: in effect he had an opportunity to put a gloss on what was transcribed, and how it was transcribed, to ensure his points were clear and supportive of the case he now seeks to bring.

135. The claimant suggested the minutes of the meetings as produced by the respondent were inaccurate, and he went beyond this to suggest they were deliberately inaccurate. This Tribunal would, if it wanted to accept this suggestion, have had to accept that a large number of the respondent's

employees, from different departments, were involved in a conspiracy. There was no basis upon which this Tribunal could reach that conclusion.

136. We decided, for these reasons, not to attach weight to the transcripts produced by the claimant. We preferred the notes of the meetings produced by the respondent, which had been produced in accordance with their usual practice. The claimant had an opportunity to review those minutes shortly after they were produced, and had an opportunity to provide comments or amendments. The claimant did not take up that opportunity. We saw no reason to set aside these notes, and we relied on these notes in preference to those of the claimant.

137. The second major issue which was fundamentally in dispute related to the effect of allegation 3, that the claimant had committed a serious breach of confidentiality by referring to recent confidential grievance procedures. The claimant's position was that he had been unable to fully present the basis for his complaints because he was prevented, or led to believe he was prevented, from referring to matters arising in a previous grievance. We decided, given the importance of this issue, to examine what was said about this during the investigation and disciplinary hearings and in evidence by the various witnesses.

138. In the investigation meeting of 6 August, the following references were made (this is not an exhaustive list):

- page 76, paragraph 23 Ms Porter told the claimant they wanted to understand what he had been referring to in the email when he stated "unscrupulous methods". The claimant made reference to snippets of conversation being lifted and used in malice. The claimant was asked to give specific examples and he referred to being called into a meeting and information then being relayed differently. The claimant, when asked what meeting he was referring to, when this had taken place and who had relayed the information, stated that he may not be at liberty

to divulge this information as it was part of a grievance procedure.

- Ms McGregor told the claimant she wanted to focus on him and what had happened to him. The claimant told her he had been called as part of another process as a witness to bullying and harassment. He also referred to attending other meetings in relation to this and to false accounts of these meetings coming back to him. The claimant confirmed he was referring to a grievance process.

- Ms McGregor told the claimant she did not need to know confidential information regarding the grievance, but she would like to know if the claimant had experienced bullying and harassment. The claimant confirmed he had and referred to the current disciplinary process.

- The claimant told Ms McGregor that he had witnessed racism in the workplace and had reported this when called as a witness to the grievance investigation. (The claimant later, in paragraph 35, confirmed he was referring to Mr Anyiam) The claimant was unaware of the outcome of any action taken following this.

- Page 77 paragraph 28 the claimant stated he had provided testimony (regarding management enabling a culture of bullying and racism in the workplace) to Ms McInnes at the grievance, but this had not been taken forward. He also referred to having raised concerns in other meetings subsequent to this.

- Paragraph 29 Ms McGregor asked the claimant what he was referring to when he stated management were prepared to lie to zero hours staff. The claimant responded that it was a question of which facts to pick. Ms McGregor stated that there were elements of confidentiality in the statement he had made in his

email, and added that he had potentially referred to confidential grievance procedure in an email to a group of people.

- Paragraph 36 the claimant confirmed that he had referred to racist comments made by people working at the tills during the grievance investigation, but he had not raised it at the time it occurred.

- Paragraph 52 Ms McGregor noted the claimant's email indicated he was privy to information regarding a grievance as he was a witness to this. Ms McGregor noted that most of what the claimant had stated was related to a grievance procedure. The claimant stated he had wanted to tell others about the concerns he had. Ms McGregor stated the claimant had not provided specific examples of his concerns. She stated that she understood that some information regarding the grievance he could not provide as it was part of a confidential grievance, but in the claimant's email he had referred to a sham grievance. Ms McGregor asked the claimant to provide examples of issues he wished to raise, and the claimant referred to racism towards a Nigerian member of staff. The claimant did not answer when asked if he witnessed this incident, but he did confirm he had not raised it with management except during the grievance.

- Paragraph 53 Ms Porter asked the claimant if he understood the grievance procedure is a confidential process which should not be discussed outwith those people involved in the process. The claimant agreed he was aware of this and reiterated that he had not given any confidential information. Ms McGregor clarified that the claimant's email had made people aware a grievance procedure had taken place, that the claimant was aware of this and that he believed it was a sham. Ms McGregor commented that the only issues which the claimant had raised that day were about the grievance procedure. The claimant responded that he

was not alluding to this in his email, and the words "grievance procedure" were not bound by confidentiality and he was referring to a grievance in the same way he would refer to a complaint being raised.

- Paragraph 54 Ms McGregor asked the claimant if he felt it was appropriate to raise concerns about confidential grievance procedures. The claimant responded that he had not done this as he had not breached confidentiality or raised any information about the grievance process.

- Paragraph 55 the claimant stated that he had not intended the email to be interpreted as relating to a grievance procedure. He stated that he would understand a grievance as being not happy with something. Ms McGregor asked the claimant to clarify that his email had not been referring to a formal grievance procedure, and the claimant clarified that he was using examples of unscrupulous behaviour.

- 13 August paragraph 15 Ms McGregor asked the claimant if the email had been referring to a formal grievance procedure, and the claimant responded "no, of course not".

- Paragraph 17 the claimant stated he felt Ms McGregor was trying to get him to refer to a confidential grievance procedure. Ms McGregor clarified that she was not. She stated that if the claimant could not talk about this, because it was in relation to a confidential grievance procedure and was not comfortable telling her, then this was fine, but she wanted to understand if this had been raised in a meeting about another matter and she needed to know when this meeting had been held.

139. Ms McGregor, at the time of the investigation, had no knowledge of Ms Loveman's grievance. She rejected the suggestion the claimant had been

constrained in his defence by an actual or perceived inability to refer to things in the grievance. Ms McGregor stated she had not "warned the claimant off" from referring to these things because she did not know what he was talking about. In fact, it was the claimant who told Ms McGregor that he could not divulge confidential information. Ms McGregor described that the claimant was reluctant to tell her things, but she was not sure why. She confirmed there would have been no difficulty with the claimant raising these matters: the concern was the manner in which he had done so.

140. Ms Porter, who had in conjunction with Ms McInnes, drafted the allegations, confirmed the claimant's email read as if he had been involved with or witnessed grievance procedures, and the purpose of allegation 3 was to investigate which grievance procedures were being referred to. Ms Porter denied that she knew it was Ms Loveman's grievance.

141. Ms Porter confirmed that the grievance process is a confidential procedure and this is for the benefit of the parties. Ms Porter further confirmed there was no bar to the claimant raising the same issues as had been raised in a previous grievance, but the respondent may not investigate the issues again unless there was new information.

142. Ms Porter rejected the suggestion that she and Ms McGregor had made it clear to the claimant that he could not refer to matters which were part of a confidential grievance. She stated she did not recall ever saying that and that it was the claimant who was uncertain about disclosing confidential matters: it was the claimant who restricted himself regarding what to disclose.

143. Mr MacKenzie did not know of Ms Loveman's grievance and considered this brought impartiality to the hearing. Mr MacKenzie rejected the suggestion that if the claimant had examples of bullying and racism which had arisen during Ms Loveman's grievance, he would have been prevented from raising this at the disciplinary hearing because of allegation 3. Mr MacKenzie confirmed that he had made it clear he wanted examples, and that if the

claimant had examples he could have brought them forward. Mr MacKenzie had not prevented the claimant from raising issues and would have been prepared to provide clarification had the claimant asked for it.

144. Mr MacKenzie was referred to a number of statements in the claimant's transcript and asked if he agreed Ms McGregor and/or Ms Porter were trying to close the claimant down. Mr MacKenzie agreed that if they had been trying to close the claimant down, it would have been inappropriate: however, the statements were open to interpretation. Mr MacKenzie stated that he did not read the statements to mean that the claimant was precluded from giving evidence from the Loveman grievance. He read it as a request not to re-run the Loveman case because it had already been dealt with. Mr Mackenzie confirmed it would have been perfectly acceptable for the claimant to have raised his concerns.

145. Ms Sipponen told the Tribunal, in relation to allegation 3, that the claimant was "really shy to talk about any incidents because he didn't want to break anyone's confidentiality". Ms Sipponen was asked whether the claimant's concern was that he did not want to breach his colleagues' confidentiality, and that this had nothing to do with allegation 3, and she responded "yes". She was asked if the reason the claimant was shy was because he did not want to breach colleagues' confidentiality, and she responded "yes".

146. The claimant, in support of his position, relied on a statement in his transcript where Ms Porter had asked if there was anything else he would like to add to try to substantiate why he had made the first statement. The claimant referred to it being mostly the reports of these meetings the truthful accounts of these meetings have not been sent back, and things being twisted out of context. Ms Porter asked whether that was the grievance procedure the claimant was referring to again, and he replied yes, that that was one of the main ones. Ms Porter was then alleged to have said: "And obviously your bound by confidentiality there so your struggling to give further details."

147. Ms Porter, when asked generally about the claimant's transcript, told the Tribunal that she could not remember word for word what had been said on 6 and 13 August; but, she was of the opinion the transcript did not add any additional information which was not captured by the respondent's notes. Ms Porter, when asked if she and Ms McGregor made it clear to the claimant, that he could not refer to matters which were part of a confidential grievance, responded "no, I don't recall ever saying that to him – he was uncertain about disclosing confidential matters". Further, when asked about the particular comment attributed to her in the transcript, Ms Porter responded "I wouldn't say this reflects correctly because I was asking a question".

148. The above points capture the fundamental dispute regarding this point: the claimant believed he was prevented from raising issues from a previous confidential grievance, whereas the respondent believed the claimant was uncertain about/did not want to disclose issues from a previous confidential grievance. Ms Porter's recollection was that she was not telling the claimant he was bound by confidentiality and therefore struggling to give further details, but rather she was asking him a question, based on her understanding that he believed he was bound by confidentiality, and whether that was the reason he was struggling to give further details.

149. We preferred Ms Porter's oral evidence and recollection of events to that of the claimant and his transcript. We considered Ms Porter's position was supported by the fact there is no bar on employees raising issues which have been raised previously: the only limitation is that the respondent may not re-investigate these matters unless some new information has come to light. Further, the grievance procedure is a confidential process to be shared between those who are a party to it. Allegation 3 related to the fact the claimant had copied the email of 14 July to a number of zero hours colleagues and had referred to sham grievance procedures. Allegation 3 did not prevent the claimant raising issues from an earlier grievance. We considered the claimant was aware of this because he defended himself against allegation 3 by arguing he had not, in the email of 14 July, disclosed

any confidential information and mere reference to there having been a grievance, or grievances, was not sufficient to breach confidentiality.

150. We, having considered the minutes of the meetings and the evidence of the witnesses, preferred the evidence of the respondent's witnesses to that of the claimant. We concluded the claimant was not prevented from raising issues from a previous grievance, and was not led to believe he was prevented from doing so. We reached that conclusion because (i) it was clear the claimant did raise issues from the previous grievance when it suited him to do so (for example, Mr Anyiam); (ii) the claimant did not ever seek clarification from the respondent regarding his ability to refer to these matters; he did not ever state, for example, that he could support what he had said in the email but in order to provide that information to the respondent he would require to disclose information from a previous grievance. He did not ever seek permission to provide this information in the context of the disciplinary process; and in fact did not ever make it clear to the respondent, until the revised grounds of appeal were provided, that he believed allegation 3 restricted his ability to refer to previous grievances; (iii) the claimant was very cautious about witnesses and referring to things without having asked people – he would not, for example, give the names of witnesses without having spoken to them first; (iv) the claimant created complete and utter confusion about whose grievance procedure was being referred to and (v) the respondent's position was consistent and straightforward.

151. We, for these reasons, did not accept the claimant's evidence that he was prevented, or led to believe he was prevented, from raising issues from a previous grievance.

152. We did not find the claimant's witness, Ms Sipponen, to be an entirely reliable witness. Ms Sipponen had an outstanding grievance against the respondent and accepted she did not appear as an impartial witness: her evidence had to be viewed in that light. Furthermore, Ms Sipponen was prepared to make assertions which favoured the claimant's case, but which,

upon examination, proved to be incorrect. For example, the issue regarding recording the disciplinary hearing (referred to above); and, the assertion that Mr MacKenzie had not been prepared to listen to her evidence of incidents of bullying when in fact Mr MacKenzie had given Ms Sipponen an opportunity to provide the information she wished to give.

153. We did find the respondent's witnesses to be credible and reliable. They gave their evidence in an honest and straightforward manner. We found the respondent's witnesses were prepared to state when they could not recall particular things, but they each had a very good grasp of why they had taken certain decisions. Ms McGregor was very nervous when giving evidence, but this did not detract from the weight to be attached to her evidence.

154. The claimant, during his evidence, and Mr O'Dair in his written grounds of appeal, made a suggestion that Ms McInnes had denied the existence of a witness whom Ms Loveman had wanted to call to her grievance hearing. This, it was said, was unscrupulous behaviour. Ms McInnes rejected this suggestion and told the Tribunal that Ms Loveman had never raised this with her during the grievance, and that Ms Loveman had wanted to call Marion O'Donnell as a witness. It appeared to this Tribunal that there had been confusion regarding the name of the witness. We accepted Ms McInnes' evidence to the effect she had not deliberately denied the existence of a witness in order to undermine Ms Loveman's grievance.

Claimant's submissions

155. Mr O'Dair provided a written submission which the Tribunal had an opportunity to read, and he then made oral submissions regarding particular aspects of the case.

156. Mr O'Dair's submissions started with the key issue of the claimant having recorded the meetings on 6 and 13 August and 8 October. He submitted the claimant had done so because of his previous experience of management note taking during the Loveman grievance which had led him to be mistrustful of management note taking. Mr O'Dair acknowledged the

claimant had not had management's explicit consent to record the meeting, but on the other hand he had not gone against an explicit management instruction not to do so. Mr O'Dair referred to the transcript where Ms McGregor had said it was not management practice to tape; and to the stand off at the disciplinary hearing.

157. Mr O'Dair submitted the transcripts should be accepted as accurate where they differed from the respondent's minutes of the meetings. The claimant is a musician who knows about sound recording and he had taken great care to produce the transcript. Mr O'Dair noted the respondent had not ever sought to procure a joint transcript

158. The respondent's witnesses had been asked to comment on the transcripts and Ms McGregor and Ms Porter had not indicated the transcripts were substantially inaccurate. Ms Porter had no reservations about the transcript of the 6th August and this was crucial because in that transcript the claimant was noted as stating "I might not be at liberty to divulge some of that information because there's been past grievances, all the evidence will be archived for you to kind of check through yourselves."

159. Mr MacKenzie's position was that he could not comment on the accuracy of the transcript 13 months after the event. Mr O'Dair invited the Tribunal to reject this evidence because Mr MacKenzie adopted a stance which he mechanically deployed; this was in stark contrast to Ms McGregor and Ms Porter who had no difficulty making comment; it was also in stark contrast to Mr MacKenzie being able to recall in detail how he learned of the claimant's non-attendance on 1 October. Mr O'Dair submitted Mr MacKenzie's memory problems were highly selective: he claimed, for example, to recall with no difficulty that Ms Sipponen had not said that the meeting would not proceed if not recorded.

160. Mr O'Dair noted that it had not been put to the claimant that the text of the transcripts was fraudulent (ie deliberately misleading). Accordingly, even though the claimant may have made some mistakes, the crucial evidence

regarding the inhibiting effect of allegation 3, was so widespread that the view that this was mistaken was implausible.

Victimisation

161. Mr O'Dair noted that it had been agreed between the parties that the claimant did the protected acts – (i) supporting allegations of alleged racism made by Ms Loveman in the course of a grievance process against the respondent; (ii) supporting Ms Loveman by attending a grievance hearing with her as her companion and (c) making allegations of race discrimination against the respondent in the claimant's email of 14 July. It was further noted the respondent did not allege the claimant was in bad faith in relation to victimisation.

162. Mr O'Dair submitted the Tribunal has to determine why the alleged detrimental treatment/dismissal occurred bearing in mind the difficulties of proof facing claimants. The Tribunal has to look at the whole picture both before and after the alleged discrimination/victimisation to ascertain what inferences should be drawn (**Anya v University of Oxford**). The burden of proof will transfer to the respondent if the claimant shows facts such that a Tribunal might conclude that a breach of the Equality Act has occurred. If the burden does transfer then the respondent will lose unless it can show that the dismissal/detriment was in no way whatsoever connected with the protected act. The respondent will lose if its conduct was influenced in any material way by the protected act.

163. Mr O'Dair referred the Tribunal to the case of **Martin v Devonshire Solicitors EAT 2010** paragraphs 22 and 23 which set the bar for escaping liability very high. This case was also the leading authority in protected disclosure claims.

164. The claimant complained of being subjected to the detriment of being subjected to stressful disciplinary proceedings and dismissal. The issue for

the Tribunal to determine is whether there is the required connection between either or both of these two complaints and the protected act.

165. Mr O'Dair noted it was the decision of Ms McInnes, albeit after seeking advice from HR (Ms Porter) to commence a disciplinary investigation. Ms McInnes admitted in evidence that she knew the claimant's email was referring to the Loveman grievance when he referred to "sham grievance procedures"; she had conducted that grievance investigation and she was the head of the management team the email alleged to be continuing to enable a culture of racism.

166. It was submitted that the burden of proof passes to the respondent to show that Ms McInnes was not in any way influenced by the protected act and that that burden has not been satisfied.

167. It was further submitted, in respect of the dismissal, that the burden passed to the respondent because of the nature of the charges (allegation 1B was making unsubstantiated allegations of racism) and the terms of Mr MacKenzie's letter of decision where he found the claimant had made allegations of racism but not substantiated them. Mr O'Dair submitted that it was thus open to the Tribunal to find that at least in part, the claimant was dismissed because he had alleged racism but not made it out. The Equality Act however did not exclude from protection allegations which are unsubstantiated, only those which are not in good faith.

168. Mr O'Dair anticipated the respondent would argue that it was not the protected act which caused the dismissal but rather the manner in which the allegations were expressed. Mr O'Dair invited the Tribunal not to accept this argument because this was not what Mr MacKenzie's letter said. Further, the claimant was willing to accept his letter was not well expressed. The Tribunal was invited to find dismissal was an act of victimisation.

Protected disclosure

169. It was the claimant's case that he made a protected disclosure in his email of 14 July. The claimant had stated in cross examination that the protected disclosure was that he had "tried to complain about racism"; "management were not adhering to their obligation to investigate"; "racism and bullying were occurring"; "examples of how they were discrediting bullying"; and the "stress Aka and other staff were going through."

170. Mr O'Dair referred to the case of **Cavendish Munro v Geldud 2010 ICR 325** where the EAT distinguished an allegation of wrongdoing which was not within section 43 Employment Rights Act and a disclosure of information which is what the statute requires. The EAT had, however, in the more recent case of **Kilraine LB Wandworth 2016** emphasised that provided there is information, the claim does not fail because there may also be an allegation.

171. The EAT had also, in the case of **National Laboratories v Shaw 201 ICR 450** held that there may be sufficient disclosure of information when the particular communication on which the claimant relies is read in the light of earlier communications between the parties (which can be oral). Mr O'Dair referred the Tribunal to paragraph 22 E – F of the Judgment.

172. Mr O'Dair acknowledged that when taken alone, the email of 14 July, might be seen as no more than allegations. However, he submitted, it could not be taken alone. The claimant stated in evidence that he was referring to the Loveman grievance procedure to which he had been witness. Ms McInnes admitted she knew full well that what was being referred to was the Loveman grievance. The email therefore communicated to her much more than the words on the page taken without regard to context would suggest.

173. It was submitted that the statement in the email that "management have enabled a culture of bullying and racism" was itself a disclosure of information. However, if this was not correct, the claimant, in his evidence, stated he had given evidence to the Loveman inquiry that management were allowing a campaign of bullying by an employee known as the pit bull

and racially derogatory remarks had been made about students by catering staff.

174. Mr O'Dair invited the Tribunal to accept this evidence and find that together with the email of 14 July there was a disclosure of information. This was particularly so when management had available to it, a store of information from the grievance procedure. It was submitted that such a construction was needed if section 43 was to achieve its goal of protecting article 10 Freedom of Expression Rights **(Heinsch v Germany)**.

175. The claimant reasonably believed there had been a breach of legal obligation within section 43B(1)(d). In particular the claimant relied on the duty of care owed by management to their employee and which they breached by failing to properly investigate the Loveman grievance and by permitting a culture of bullying. It was submitted the claimant's belief was reasonable, for example in relation to the pit bull. His evidence to the Tribunal was that Ms Brown's title of "pit bull" was known to management (Aileen Jackson) and tolerated by Ms McInnes who found in her report that there was no bullying in the department. It was also reasonable to believe that the Loveman investigation was a sham given that it was carried out by Ms McInnes whose management was being complained of.

176. Mr O'Dair submitted that if the claimant believed bullying and racism were occurring within hospitality management, it was clearly in the public interest for this to be exposed.

177. The Tribunal required to determine whether the claimant was subjected to detriment and/or dismissal on the grounds of making a protected disclosure.

178. The claimant's case is that Ms McInnes subjected him to detriment by subjecting him to disciplinary procedures contrary to section 48 Employment Rights Act. He says this was a detriment because it happened by reason of the protected disclosure. The burden is on the respondent because detriment was presumed to be due to the protected disclosure unless the

respondent showed the decision to impose a detriment was not in any way influenced by the protected disclosure.

179. The claimant relied on the primary same facts which he relied upon in relation to the claim that the institution of proceedings was victimisation. Mr O'Dair invited the Tribunal to draw the inference that the institution of proceedings was influenced by the protected disclosure.

180. Mr O'Dair submitted the protected disclosure was the principal reason for the dismissal. The burden was on the respondent to prove the reason for dismissal (**Kuzel v Roche Products)**. Mr O'Dair invited the Tribunal to carefully scrutinise the reason offered by the respondent and to consider what inferences should be drawn from looking at the whole picture. In particular the Tribunal would need to consider what inferences should be drawn from the horrible dilemma in which the claimant was placed by the requirement implicit in the disciplinary charge that he substantiate his claims (allegation 1) and that he would be putting himself in breach of allegation 3 (the grievance confidentiality) when he referred to the Loveman material which he needed to rely upon in order to substantiate his claims.

181. Mr O'Dair invited the Tribunal to consider whether this was an accident: he submitted it was not and this led to an inference that the reason for the dismissal was the protected disclosure. Mr O'Dair accepted that if Mr MacKenzie did not know about the matters referred to in the disclosure, then the claim would fail. He submitted that if Mr MacKenzie had no knowledge of the Loveman grievance, then he could not competently hear the claimant's disciplinary case because he was not properly briefed. Mr O'Dair invited the Tribunal to find Mr MacKenzie did know what "recent confidential grievance procedures" in the charges actually meant. Ms McInnes and Ms Porter knew full well, and Mr MacKenzie commented that he thought the claimant was angry about the rejection of the Loveman grievance and this implied that he knew of it.

182. Mr O'Dair invited the Tribunal to have regard to the following matters which would lead to the inference that the principal reason for the dismissal was the protected disclosure. (i) Mr MacKenzie's implausible denial of any knowledge that the "recent confidential grievance procedures" referred to the Loveman grievance; (ii) the decision to view as gross misconduct any allegation of bullying or racism unless the claimant was able to substantiate it; (iii) the use of allegation 3 to render it impossible for the claimant to defend himself against the other allegations; (iv) the failure to follow up on the claimant's invitation to look at the Loveman grievance; (v) the willingness to add allegations at every opportunity; (vi) Mr MacKenzie's failure to follow up on any of the instances of bullying cited to him. Mr MacKenzie stated that he thought the allegations raised by Ms Lama had been dealt with in Ms McInnes' investigation, but there was no basis for this whatsoever and (vii) the decision to dismiss notwithstanding the fact the claimant acknowledged his email had not been well worded.

Unfair Dismissal

183. Mr O'Dair noted the law would be very familiar to the Tribunal in terms of the band of reasonable responses test; the no substitution principle and, importantly in this case, the need to make its judgment on unfair dismissal on the facts which were, or ought to have been, before the decision make. Mr O'Dair submitted the qualification to the standard analysis came from the application of the Human Rights Act section 3 and 6. Mr O'Dair referred to the case of **X v Y** as support for his submission.

184. It was submitted that the real reason for the dismissal was because management resented the fact the claimant would not let go of the complaints about bullying and grievance which he had raised previously and which had not been properly investigated. Mr O'Dair submitted that even if the claimant's email was not a protected disclosure, the respondent had not

shown a reason for dismissal which was potentially fair, and accordingly the claimant's case was entitled to succeed.

185. It was submitted that the real reason for dismissal was conceded by Mr MacKenzie when he was cross examined regarding sanction. Mr MacKenzie said that the claimant had conceded his choice of words was unfortunate, but the claimant would have to have agreed not to raise bullying and racism again in order to avoid dismissal. Mr MacKenzie sought to resile from this position in re-examination when he said that in order to avoid dismissal the claimant would have had to agree to use proper procedures. Mr O'Dair invited the Tribunal not to accept the amended evidence.

186. Mr O'Dair submitted the fact Mr MacKenzie's position in cross examination accurately reflected the position was supported by the following inferences: (i) the disingenuous denial by Mr MacKenzie of his knowledge of Loveman's grievance; (ii) his disinterest in following up on the examples of bullying and harassment provided by the claimant, Ms Lama and Ms Sipponen; (iii) the use of allegation 3 which left the claimant unable to defend himself. HR appeared aware of this yet did nothing about it and (iv) the willingness to add allegations at every opportunity.

187. Mr O'Dair submitted the real reason for dismissal was that management were fed up with the kitchen hand who kept on raising issues of bullying and racism even after they had been swept under the carpet. The reason for dismissal was not the claimant's choice of language or a failure to use proper procedures.

188. Mr O'Dair further submitted the cumulative procedural failings, and in particular the use and effect of allegation 3, were such as to render the process outside the range of reasonable responses. The investigation of Ms McGregor and Ms Porter was inadequate because their approach had been oppressive; they failed to listen to the claimant; the effect of allegation 3; they failed to provide the claimant with full and accurate notes; they wilfully failed to take up the claimant's invitation to read the Loveman grievance

papers and when an example of bullying was provided (Mr Anyiam) they failed to investigate it.

189. The disciplinary hearing was also flawed because the claimant was prevented from putting forward the evidence he wished to rely on because of the effect of allegation 3; Mr MacKenzie was not sufficiently trained for the job and he had no understanding what a protected disclosure was. The Tribunal was referred to the case of **Thomson v Imperial 2015** for the proposition that a dismissal may fall outside the band of reasonable responses because the Chair of the Hearing was not properly trained. Mr MacKenzie also failed to follow up the examples of racism provided by the claimant and there was unacceptable delay in arranging the appeal and the claimant was denied legal representation.

190. It was submitted that it could not be gross misconduct to fail to prove complaints of misconduct by management, yet this is what the claimant was required to do. All that could be required of the claimant was to act in good faith and have reasonable grounds for his belief. The dismissal was therefore unfair because the reason for dismissal could not be said to be gross misconduct.

191. The claimant provided evidence of reasonable grounds for making allegations 1 and 2:-

- he told Ms McGregor that Ms Lama had had her shifts reduced when she complained about bullying;
- he told her that another zero hours member of staff had left because her complaints of bullying had not been listened to;
- he told her about the racist mistreatment of Mr Anyiam;
- Ms Sipponen said she had been the victim of bullying;

- Ms McInnes investigated complaints about a management culture when she was the head of the department concerned;

- Management knew of the existence of the pit bull, yet found there was no bullying in the workplace.

192. It was submitted that without further investigation there were no reasonable grounds for Mr MacKenzie to conclude the claimant's allegations were unsubstantiated.

193. The claimant had, clearly, copied the email to zero hours colleagues: he was seeking to join with his colleagues to protect what he perceived to be their common interest as zero hours contractors and as the victims of bullying and racism in the workplace. His rights to freedom of expression and association were interfered with by the respondent's disciplining him for sending the email. It was submitted that unless the respondent could justify the interference with articles 10 and 11, the dismissal must be held unfair. Mr O'Dair submitted the respondent could not justify the interference because any interference must be proportionate to some legitimate aim and on any view, the respondent's response to the email and the sanction imposed were disproportionate.

194. With regard to allegation 4, it was submitted the claimant was following the informal stage of the grievance policy and that it was not reasonable to dismiss without first assessing whether there was any substance to the claimant's position that he had lost faith in the grievance process.

195. Mr O'Dair submitted there was no reasonable basis for regarding the claimant's conduct in going to speak to Ms McInnes as the basis for dismissal. Ms McInnes was very clear that she had not felt threatened.

196. Mr O'Dair submitted Mr MacKenzie's reasoning regarding allegation 6 referred to the claimant claiming late delivery of 16 August notes (on 24 September) as a reason for non attendance, when they had been sent to

him on 27 August. It was submitted the issue was not when the notes were sent, but when they were received. The respondent's practice of emailing important documents had not been followed. It was not reasonable to blame the claimant.

197. It was submitted that once the language used in the email was discounted as a reason for dismissal, no reasonable employer would have dismissed for any of the alleged acts of misconduct. Mr O'Dair acknowledged the Tribunal would wish to have regard to **Polkey** but also invited us to take into account **Software 2000 v Andrews** and **Thomson.**

198. Mr O'Dair submitted that if the claimant was correct and he had been dismissed because of his complaints of bullying and racism, contributory fault was likely to be negligible or nil.

199. Mr O'Dair acknowledged this was a complex case in terms of the facts and the law. He suggested the Tribunal could cut through it all by addressing three issues, which were (i) the notes; (ii) confidentiality and the catch 22 and (iii) Ms Sipponen; and, asking in respect of each issue (a) mistake; (b) concoction or (c) truth.

200. Mr O'Dair took the Tribunal to extracts of the claimant's transcripts where Ms McGregor wanted the claimant to provide information to support or explain the allegations and the claimant stated he could not divulge because there had been past grievances, but all the evidence was archived and could be checked and where Ms Porter stated "obviously your bound by confidentiality so struggling to give further details". Mr O'Dair invited the Tribunal to ask whether the claimant had made a mistake in the transcript, or concocted what had been written or whether it was the truth.

201. If the notes were accepted as accurate on these key points, then this was significant in relation to allegation 3. The respondent's position was that the only thing prohibited by allegation 3 was writing emails to colleagues, and it did not stop the claimant referring to Loveman's grievance. Mr O'Dair invited

the Tribunal not to accept that position because if it was correct, one would expect to see Ms McGregor and Ms Porter re-assuring the claimant that it was acceptable to mention these matters, and there was not a shred of evidence to this effect. Mr O'Dair submitted the claimant was inhibited from substantiating his position because the email referred back to Loveman: if he could not refer to Loveman because of allegation 3, then he was in a catch 22 situation.

202. The effect of allegation 3 explained why the claimant had been vague during the investigation and unable to present his case. Allegation 3 had been deliberately used by the respondent to stop the claimant being able to refer to these matters again.

203. Mr O'Dair took the Tribunal to pages 106 and 123 of the supplementary bundle and to the statements made by Ms Sipponen. He submitted that given what Ms Sipponen had said, how could Mr MacKenzie find the allegation of a culture of bullying unsubstantiated. Mr O'Dair answered that question by submitting Mr MacKenzie had not been interested to discover if the claimant's allegations had any basis. There was a pattern.

Respondent's submissions

204. Ms McLellan agreed with Mr O'Dair regarding the fact this case involved complex facts and law. However, she noted the respondent's position was relatively simple:

- The email contained serious, potentially defamatory and unsubstantiated allegations about management within the respondent;
- It was copied to 17 other zero hours employees of the respondent who worked with the claimant in the Hospitality department;

- The claimant knew the respondent had procedures for raising concerns yet chose not to use them;

- The email was not a protected disclosure because it was a serious of opinions of the claimant, accompanied by no information and did not identify clearly which legal obligations were being breached;

- In the event the Tribunal finds the email was a protected disclosure, this was not the reason for the institution of disciplinary proceedings and was not the reason or principal reason for dismissal;

- The claimant was dismissed for gross misconduct in sending the email and his subsequent behaviour;

- Gross misconduct is a potentially fair reason for dismissal;

- The respondent followed a fair disciplinary procedure, including a full investigation;

- In all the circumstances, dismissal was fair;

- The institution of disciplinary proceedings and the claimant's dismissal did not amount to victimisation under the Equality Act and a key factor is the level of knowledge of the protected acts by the decision makers;

- The respondent did not breach the claimant's rights under Articles 10 and 11 ECHR – neither are absolute rights and to the extent they were engaged, the respondent's actions were not an unjustified interference with those rights: as such this had no impact on the fairness of the dismissal.

205. Ms McLellan submitted the credibility of witnesses in this case was extremely important. Ms McLellan, in relation to the transcripts produced by the claimant, noted the respondent did not accept the accuracy of the documents. The transcripts were based on covert recordings of the various meetings and neither the respondent nor the Tribunal had been provided with the actual recordings of the relevant meetings in order to check the accuracy of the transcripts. It was submitted the transcripts were not verbatim, but were edited minutes created without input from any of the respondent's witnesses who had been present at the meetings. The transcripts had been produced by the claimant who was not impartial and Ms Porter had noted the transcript sought to change the language and tone slightly.

206. The claimant described the transcripts as 100% accurate because the recording function on his mobile phone had picked up every word. Ms McLellan submitted this was not credible. Ms McLellan invited the Tribunal not to treat the transcripts as a reliable record of the meetings.

207. The respondent had had a member of HR present at meetings specifically to take minutes. Those in attendance were given an opportunity to review and comment on the content of the minutes, and they did so with the exception of the claimant. This drafting and review process took place shortly after the meeting when matters were fresh in the mind, and as a result the respondent's witnesses were comfortable that the minutes accurately reflected the discussions at the various meetings. It was submitted the content of the respondent's minutes should be preferred over the claimant's purported transcript, as a reliable account of the meetings.

208. Ms McLellan submitted the respondent could not be criticised for not having requested the claimant's tape recording of the meetings in circumstances where they only learned, during cross examination of the claimant, that such tapes existed. In any event, the respondent has in place a formal process for taking and reviewing minutes, and would not wish to be seen to be legitimising the practice of covertly recording meetings.

209. Ms McLellan submitted, that if the respondent's position regarding the minutes was accepted, then it impacted on elements of the evidence Mr O'Dair sought to elicit from the respondent's witnesses. It was submitted that huge focus was placed at points during cross examination of the respondent's witnesses on whether specific words or phrases, as shown in the claimant's transcript, were said by the witness. The respondent's witnesses did not see the transcripts until they were preparing for the Tribunal hearing in August 2016, some 10 months after the respective meetings. Ms McLellan submitted it was therefore entirely unreasonable to expect accurate recollection on such detail from the respondent's witnesses.

210. The respondent's witnesses were challenged on what the transcripts demonstrated in terms of their own behaviour: for example, Mr O'Dair suggested to Ms McGregor that her words demonstrated she had tried to warn the claimant off mentioning certain matters. Another example was when Mr O'Dair suggested Ms McGregor and Ms Porter had been aggressive in their approach towards the claimant. This was unfair and the weight to be attached to the evidence derived from these sections of cross examination should be reduced.

211. The respondent submitted the claimant's actions in covertly recording the meetings goes directly to his credibility and the weight to be attached to his evidence before this Tribunal. The respondent's witnesses each confirmed they had not given permission for the claimant to record the meeting; that they had advised the claimant he was not permitted, under the terms of the respondent's disciplinary procedure, to do so, yet he nonetheless proceeded to record the meeting. Further, the claimant was dishonest when he confirmed to Mr MacKenzie that he was not recording the meeting, and this demonstrates the claimant is prepared to lie.

212. The claimant suggested he had recorded the meeting because he had not had a witness present. Ms McLellan invited the Tribunal to disregard this explanation because the claimant recorded meetings where he did have a

representative present. Further, the claimant had been evasive in cross examination and refused to answer directly whether he did or did not have consent to record. He reluctantly conceded he did not have "express consent" to record the investigation meetings. The claimant had also been evasive regarding the disciplinary hearing although ultimately he appeared to accept he did not have consent. Ms McLellan invited the Tribunal to find the claimant did not have consent to record the meetings; he knew this but proceeded to record in any event.

213. The claimant told the Tribunal that if he had proceeded with the appeal he would have produced the transcripts. Ms McLellan invited the Tribunal to find this position simply was not credible because he had the opportunity to submit the transcripts at the appeal hearing on 23 November, but did not do so. Furthermore, if the transcripts purported to show the minutes of the investigation misrepresented the real discussions at these meetings, why did he not produce them to Mr MacKenzie?

214. Ms McLellan submitted the claimant's actions showed a fundamental disrespect for his colleagues. The claimant appeared to accept his actions in covertly recording the meetings had not been right, yet much of his case was founded on his integrity and his desire to do the right thing. It was submitted that the covert recordings called the very foundations of his argument into question.

215. Ms McLellan invited the Tribunal to find the evidence of the claimant and Ms Sipponen lacked credibility. Ms Sipponen admitted she did not appear at the Tribunal as an impartial witness. She is a friend of the claimant and she clearly held a material grudge against many of those in management within the hospitality department: she admitted she had an outstanding grievance against the respondent. It was submitted Ms Sipponen's lack of impartiality was demonstrated by the way she was prepared to make sweeping statements, yet when challenged in cross examination she had to admit the statements were not true. For example, she alleged Mr MacKenzie had not been interested in what she had to say at the disciplinary hearing and had

ignored her; however, when referred to the minutes of the meeting, she accepted that in fact he had given her the opportunity on a number of occasions to contribute and provide information which he could follow up on, but she had not done so.

216. Ms McLellan submitted the claimant was not a credible witness. His evidence in chief had, on the whole, been clear and succinct, but it was not supported by reference to documents. Ms McLellan suggested this was because the documents did not support the evidence he had given to the Tribunal because the clear and articulate position he represented at this hearing, was materially different from what he presented to the respondent during the investigation and disciplinary hearing. It was submitted the claimant's responses during cross examination had been vague and evasive, and this more accurately reflected his evidence during the disciplinary process. The claimant did not answer the questions put to him but instead restated information he wanted to give in order to avoid answering the question. This had happened repeatedly despite clarification being offered and intervention by the Employment Judge. These matters go to the credibility of the claimant and add weight to the respondent's position that during the disciplinary process Ms McGregor, Ms Porter and Mr MacKenzie were unable to understand the claimant's position due to his vague and circular responses.

217. The claimant also gave inconsistent evidence in relation to two particular matters. He stated during examination in chief that "key members of management" referred to Ms McInnes. In cross examination he changed his position on this and said it referred to something wider. This inconsistency was a theme running through the investigation and disciplinary meetings.

218. The claimant had been asked whether he recorded the appeal hearing, and he replied that he had. However, the claimant appeared to panic in case this was not the right answer, albeit it was the truth.

219. It was further submitted that the claimant's impartiality was materially affected by his view of how his partner's grievance was handled by the respondent. In comparison the respondent's witnesses came to the Tribunal as impartial professionals without an axe to grind and their evidence was entirely reasonable.

220. Ms McGregor and Mr MacKenzie were not from Hospitality nor had they had any involvement in it and therefore came to the process "clean". Ms Porter was from the respondent's HR team and clearly demonstrated herself to be a professional HR adviser. In addition to this both Ms Porter and Mr MacKenzie had left the respondent's employment by the time they came to give their evidence and therefore they were in no way restricted by any sense of ongoing loyalty or influence by the respondent.

221. Mr O'Dair suggested to Ms McInnes on a number of occasions that she had been furious that the claimant had sent the email and challenged her in this way. Ms McInnes credibly rejected these suggestions: she saw these as work matters and not personal.

222. Mr O'Dair had also suggested collusion by employees of the respondent, which was strongly denied. Ms McLellan submitted that no evidence had been produced to support this assertion and there was no reason for the Tribunal to find anything other than that the respondent's witnesses gave a credible explanation of events.

223. Ms McLellan submitted the respondent's witnesses had been consistent and had demonstrated their evidence was capable of being relied on. Ms McGregor had been extremely nervous during her evidence but this should not impact on her credibility. Ms McLellan invited the Tribunal to prefer the evidence of the respondent's witnesses to that of the claimant and Ms Sipponen in any dispute.

<u>Protected disclosure</u>

224. Ms McLellan submitted the respondent's position is that the claimant did not make a protected disclosure when he sent the email, and that this is a "gloss' he has added to his case retrospectively to justify sending the email. Ms McLellan noted that for a protected disclosure to be made there must be (i) a disclosure of information; (b) the information must relate to one of six types of relevant failure and (c) the worker must have a reasonable belief that the information tends to show one of the relevant failures.

225. Ms McLellan referred to the case of **Cavendish Munro Professional Risks Management Ltd v Geduld 2010 IRLR 38** the EAT noted there is a distinction between "information" and an "allegation" and that "simply voicing a concern, raising an issue or setting out an objection is not the same as disclosing information." The EAT added that the ordinary meaning of "information" is conveying facts. The question for the Tribunal is, did the email sent by the claimant convey facts.

226. Ms McLellan also referred the Tribunal to **Goods v Marks and Spencer plc UKEAT/0442/09** and submitted the claimant's email fell squarely within the realms of **Cavendish** and **Goode**. The email did not amount to information tending to show anything other than the opinions of the claimant, or, at best, a series of allegations.

227. Mr O'Dair had referred to **Kilraine v London Borough of Wandsworth 2016 IRLR 422** which had cautioned the Tribunal from drawing a distinction between "information" and "allegation". Ms McLellan noted the respondent accepted the distinction drawn in **Kilraine** but submitted that ultimately what that case had stated was that the essential question is whether there is sufficient information to satisfy section 43B Employment Rights Act and that this is a matter of fact for the Tribunal to determine in each case. Ms McLellan submitted the case set no wider principle and did not overrule **Cavendish** or other authorities: it had simply urged caution.

228. Ms McLellan invited the Tribunal to look in detail at the facts of **Kilraine** and the wording of the communication sent by the employee, and to compare

the wording with the wording of the claimant's email, and submitted that the same criticisms apply to the email because it was simply too vague to constitute information. The email contained merely a statement of the claimant's state of mind; it included generalised statements outlining his opinion and, at best, allegations which failed to convey any facts to the recipients of the email.

229. Ms McLellan referred to the case of **Eiger Securities LLP v Korshuvnova 2017 IRLR 115** where the EAT confirmed that the identification of the legal obligation does not have to be too detailed, but it has to be more than a belief that the actions were morally wrong.

230. Ms McLellan disagreed with the claimant's submission that he could rely on the context of the situation to bolster the meaning of the email. Mr O'Dair had referred to the case of **Norbrook Laboratories (GB) Ltd v Shaw UKEAT.150/13** in which the EAT held that an earlier communication could be read together with a later one as "embedded" in it, rendering the later communication a protected disclosure even if taken on its own it would not constitute such. The EAT explained that whether two communications can be taken together in this way was a question of fact.

231. Ms McLellan submitted this case was fundamentally different to the claimant's case. In **Norbrook** it was clear from the ET1 that the claimant was relying on two earlier emails and this was further clarified in his witness statement. In addition all of the communications which were considered collectively had been sent by the claimant. In this case, the respondent was not entirely clear what other communications the claimant sought to aggregate or whether he simply wanted the email to be read in the context of the Loveman grievance. Ms McLellan submitted this approach was not supported by any authority, would place an intolerable burden on employers and go significantly further than the law allowed.

232. Ms McLellan invited the Tribunal to bear in mind that when considering whether the email constituted information rather than allegations, that the

claimant made no reference until very late in the process, to making a protected disclosure. The claimant accepted this in cross examination and Mrs Porter, Mrs McGregor and Mr Mackenzie all stated the claimant did not, during the investigation or disciplinary hearings, allege that the email constituted a protected disclosure.

233. This was relevant to what the claimant had in his mind when he sent the email. Ms McLellan invited the Tribunal to find that in sending the email, the claimant had not intended to make a protected disclosure, and he was now trying to retrospectively re-write history. This was extremely important. The public interest disclosure legislation was brought in for very good reason, and that was to protect those who sought to blow the whistle on malpractice. It was not enacted to provide protection for employees to air personal grudges or vendettas nor to excuse serious misconduct. It does not allow employees to go on a tirade, making extremely serious allegations against management without any factual basis and to copy this to multiple colleagues, then to hide behind public interest disclosure to avoid repercussions.

234. Ms McLellan also noted there was a lack of clarity regarding what the claimant believed his protected disclosure actually was. The claimant mentioned for the first time in an email of the 30 September that he believed he had made a protected disclosure. In this email he stated that his protected disclosure was “regarding the legitimacy and use of zero hours contracts across the catering sector”. However, the email did not mention the legitimacy and use of zero hours contracts and the claimant did not raise this at the disciplinary hearing on 8 October.

235. The claimant subsequently, in the first set of grounds of appeal, claimed the protected disclosure he had made related to Christine Barr’s alleged evidence to a parliamentary hearing. This is an entirely different protected disclosure and not one referred to in the email.

236. The claimant, in the revised grounds of appeal, alleged the protected disclosure he had made related to the alleged bullying culture within the hospitality department and he alleged Ms McInnes was acting in breach of her contract of employment in respect of a number of her actions. This reflected the position in the ET1.

237. Ms McLellan acknowledged it would be unfair to place too high a burden on employees, however she submitted they must nonetheless know what malpractice they are seeking to raise as a protected disclosure. The claimant's position had changed three times throughout the process because he did not intend to make a protected disclosure in the email, hence his explanation of this position was subject to change.

238. If the Tribunal took the view that the email provided sufficient information, the claimant must also establish that the information disclosed related to one of the relevant failures as set out in section 43B. Ms McLellan submitted it was not clear what breach the claimant is relying upon. The claimant's position changed during the disciplinary process, and when asked in cross examination he gave a vague answer including his views on various matters he was unhappy with within the Hospitality Department.

239. Ms McLellan submitted it was difficult to see how the email could be taken to allege a relevant failure under section 43B because it was too vague. The terms used by the claimant – for example "sham", "unscrupulous methods" – could cover a multitude of things, and they did not necessarily denote any of the six relevant failures. A reference to a failure to deal with bullying and harassment is not, without more, sufficient.

240. Ms McLellan clarified that should the Tribunal find the claimant had satisfied the above tests, the respondent would not dispute that the claimant had a reasonable belief that the information tended to show one of the relevant failures.

241. The claimant must also show that he reasonably believed that a disclosure was made in the public interest. Ms McLellan submitted the claimant had made the alleged disclosure for personal reasons and that he did not reasonably believe that the statements made in the email were in the public interest. Mrs Porter, Mrs McGregor and Mr Mackenzie all believed it was a personal matter for the claimant.

242. In addition, it was submitted the claimant made the statements because he was angry and upset. Ms McLellan acknowledged the claimant denied this in cross examination but on several occasions throughout the investigation and disciplinary process he had admitted it. Ms McLellan submitted this demonstrated the claimant had been motivated by personal antagonism and a personal grudge against Ms McInnes and other members of the hospitality department management team. The fact the claimant had sent the email in haste and anger explained why he was unable to explain during the investigation and disciplinary process what he in fact meant by the statements in the email.

243. It was submitted that the claimant's position that he was trying to voice the opinions of other zero hours colleagues in the department was not credible. The claimant conceded he had not spoken to any colleagues in advance of sending the email and that none of them had asked him to raise any of the points mentioned in the email. Further, some zero hours colleagues disagreed with what the claimant said in the email, and with the tone and nature of the email. The claimant's response to one of these colleagues was very hostile and this ran contrary to the claimant's position that he was trying to give others a platform to raise their concerns.

244. Ms McLellan noted the email had been sent to Ms McInnes and Ms Hood. Ms McLellan accepted that sending an email to employees who are senior to and have an element of control over the claimant will be treated as a disclosure to the employer. However, the claimant also copied the email to all of his colleagues. Ms McLellan noted there was no direct authority, but referred to the IDS Handbook on Unfair Dismissal where it was stated that

"*a disclosure to a junior colleague or even one of equal status … would be unlikely to be covered"* as a disclosure to the employer, and it was submitted that this represented the correct legal position. The respondent's position was that a disclosure to multiple people at varying levels of seniority is not a disclosure made to "the employer".

245. Ms McLellan submitted that for all of these reasons, the claimant had not established the email constituted a protected disclosure.

246. If however the Tribunal was satisfied that a protected disclosure was made, the next question to be determined is, was there a detriment as alleged and if so, was there a causal link between the protected disclosure and the detriment alleged.

247. Ms McLellan noted the alleged detriment was the decision to initiate an investigation under the respondent's disciplinary procedure. The evidence was to the effect this had been a joint decision by Ms McInnes and Mrs Porter after Ms McInnes approached Mrs Porter for advice on how to proceed in relation to the email. Mrs Porter considered that due to the serious nature of the claimant's comments and the manner in which he raised them, she advised Ms McInnes that it would be appropriate to commence a disciplinary investigation.

248. The first issue for the Tribunal is whether the claimant suffered any detriment. Ms McLellan submitted that it must have been reasonable in the circumstances for the respondent to initiate a disciplinary investigation to better understand the situation. If an employer was prevented from investigating in these circumstances on the basis it may constitute an unlawful detriment, it would be wholly unreasonable. The claimant's email crossed the line of acceptable behaviour and notwithstanding he was aware of other processes to address concerns (the grievance procedure), he chose not to use them and instead raised the allegations in a public forum, copying in all of his zero hours colleagues in the hospitality department.

249. Ms McLellan noted the Public Concern at Work Code of Practice on Whistleblowing listed examples of detriment. The list included the imposition of a disciplinary sanction, but did not include the instigation of disciplinary proceedings. It was submitted that this supported the respondent's position that initiating an investigation in response to the email was not a detriment.

250. If the Tribunal finds the claimant was subjected to a detriment by the respondent's decision to instigate an investigation, then the Tribunal must be satisfied there is a causal link between the protected disclosure and the detriment that has arisen.

251. In the cases of **Aspinall v MSI Mech Forge Ltd UKEAT/891/01** and **London Borough of Harrow v Knight 2003 IRLR 140** it was held that there required to be a causative link between the protected disclosure and the reason for the treatment in the sense of the disclosure being the "real" or "core" reason for the treatment. The detriment must be more than "just related" to the disclosure. In **NHS Manchester v Fecitt 2012 IRLR 64** the Court of Appeal developed this further when they held that the test in detriment cases is whether "*the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower".*

252. Ms McLellan noted that as part of this test, a Tribunal must consider the mental processes (both conscious and unconscious) of the decision makers. Ms McLellan referred the Tribunal to the case of **Bolton School v Evans 2007 IRLR 14** where it was held that protection from detriment under section 47B applied only to the disclosure of the relevant information itself and not to the worker's actions and behaviour in connection with that disclosure. The employee in that case had hacked into his employer's IT systems in order to prove a breach of legal obligation was happening. The Court separated the misconduct from what the claimant alleged was a protected disclosure.

253. A similar approach had been adopted in the case of **Panayiotou v Chief Constable of Hampshire Police 2014 IRLR 500** where it was confirmed

that the fact of the protected disclosures was separable from the way the police officer had pursued the complaints.

254. Ms McLellan submitted the same approach should be adopted in this case insofar as the claimant's misconduct in sending the email (the wording of the email, its tone and method of circulation) should be separated from any protected disclosure and should not be protected as part of the disclosure.

255. Ms McLellan submitted the evidence of the respondent's witnesses supported this. Mrs Porter and Mrs McInnes gave evidence that they were not angered or annoyed by the claimant raising concerns: Mrs Porter acknowledged the claimant's right to bring concerns to the attention of management, but told the Tribunal that the manner in which he had done so was inappropriate. Both witnesses spoke to the language in the email, the serious nature of the allegations and the method of sending the email as potentially amounting to serious misconduct which required investigation.

256. Ms Porter and Ms McInnes rejected the suggestion that the instigation of disciplinary proceedings was in any way connected with, or influenced by, the fact the claimant had sought to raise concerns in the email. Ms McInnes robustly and repeatedly rejected Mr O'Dair's suggestion that she had been "furious" that the claimant would not let go of his concerns regarding bullying and harassment in the hospitality department.

257. Ms McLellan submitted the respondent's position was that disciplinary proceedings were instigated by the respondent because of the tone and language of the email and the fact the claimant copied the email to his zero hours colleagues, and not because the claimant was raising concerns about management. Mr Mckenzie stated the respondent does not have a culture of ignoring staff concerns and that in his experience it investigates these exhaustively. He was of the opinion that if the claimant had followed the correct process to raise his concerns, this would be a different situation.

258. Ms McLellan submitted the fact the claimant made a protected disclosure in no way influenced the respondent's decision to institute disciplinary proceedings, and this element of the claim should be dismissed.

259. The claimant also sought to argue that the reason or principal reason for his dismissal was that he had made a protected disclosure. Ms McLellan referred the Tribunal to the evidence of Mr Mckenzie and what had been in his mind at the time of making the decision to dismiss. It was submitted Mr Mckenzie had given very clear evidence of his reasons for dismissing the claimant, which related entirely to the claimant's misconduct, namely:

- the claimant admitted to sending the email;
- he had tried to obtain explanations from the claimant why he had made the statements in the email, but found the claimant could only give vague, general statements with no details to support them;
- he concluded making the statements, sending the email and copying it to other employees amounted to gross misconduct;
- the claimant's failure to follow the appropriate procedures amounted to serious misconduct;
- the claimant's behaviour towards Ms McInnes was inappropriate and unacceptable conduct;
- the claimant's failure to attend the disciplinary hearing was a failure to comply with a reasonable management instruction;
- the claimant showed no regret about having send the email and
- the claimant would not guarantee that he would not do it again.

260. It was submitted that against this background it was clear that the main and only reason for the dismissal related to the misconduct.

261. Ms McLellan submitted the claimant's protected disclosure and the manner in which he made the disclosure must be separated out and looked at separately.

262. Ms McLellan acknowledged that in the context of whistleblowing cases, a Tribunal was entitled to look behind the knowledge and thought processes of the dismissing manager and consider whether there was, for example, an organisational culture or higher chain of command which impacted on the reason for dismissal. Indeed, Mr O'Dair sought to make a number of challenges during cross examination which suggested a conspiracy on the part of the respondent's employees. It was submitted there were no facts in this case which supported any wider cultural or other influencing factors which would require the Tribunal to look beyond the decision making of Mr Mckenzie. Ms McLellan invited the Tribunal to reject this element of the claim on the basis the respondent had proved he was not dismissed because of having made a protected disclosure.

263. Ms McLellan noted that one theme pursued by the claimant was that the respondent required him to prove his allegations and that he had been dismissed because he was unable to do so. The respondent accepted a putative whistleblower did not need to prove that allegations were correct in order to engage the protection under the legislation. However, it was the respondent's position that the claimant did not refer to a protected disclosure or whistleblowing and this was not clear until he submitted his appeal. Furthermore, it was not unreasonable for the respondent to ask an employee to explain the basis for the statements made, and having done so, the respondent's witnesses each confirmed the claimant could give no explanation and that he in fact failed to provide even a clear and cohesive explanation at points. His answers did not make sense and he talked in vague and general terms. This much was apparent from the transcripts.

264. Ms McLellan further noted that much had been made of whether the respondent's witnesses knew what the statements referred to on the basis of their knowledge of the claimant's involvement in the Loveman grievance and appeal. Ms McLellan noted the claimant clearly stated in his evidence in chief that he made the statements in the email in the context of the Loveman grievance. However, this was not his position during the investigation and disciplinary hearing. Ms Porter and Ms McGregor both said it was not clear whether he was referring to the Loveman grievance or not; and, when asked throughout the course of the disciplinary process, the claimant gave varying and contradictory answers to what grievance procedures he was referring to in the email. This included the express statement that he was not intending his email to refer to an official explicit grievance procedure.

265. The claimant accepted in cross examination that his position on this had fluctuated, and he explained that he had not wanted to get himself into trouble given he understood he could not refer to earlier confidential grievance procedures. The respondent did not accept that explanation. Ms McLellan submitted that what was most relevant was what information on this point the respondent had before it at the relevant time; and, what it had was a set of contradictory statements from the claimant which did not allow it to reach a conclusion on this point. Indeed, the balance of the claimant's position appeared to be that he was not referring in the email to a particular grievance procedure but was talking more generally.

266. Ms McLellan reminded the Tribunal that Mrs McGregor knew nothing about the Loveman grievance, and the only information she had was what she was told by the claimant. The claimant gave snippets of information but not enough to allow Mrs McGregor to fully comprehend the details of the process. Mr O'Dair had suggested Mrs McGregor was "playing dumb", but she rejected this suggestion and Ms McLellan invited the Tribunal to accept Mrs McGregor's position.

267. Mrs Porter also had very little awareness of the Loveman grievance. She had been a note-taker during one investigatory meeting and had no

recollection of any of the details. Ms McLellan invited the Tribunal to find this explanation credible in circumstances where Mrs Porter was new to the respondent and was concentrating on taking notes.

268. Mr O'Dair suggested Mrs Porter had told Mrs McGregor of the facts of the Loveman case and he suggested some form of collusion. Ms McLellan submitted this was not credible and not supported by any evidence.

269. Ms McLellan invited the Tribunal to accept Mr Mackenzie had no knowledge of the Loveman grievance, and he considered this rendered him entirely impartial and neutral.

Ordinary Unfair Dismissal

270. Ms McLellan submitted the reason for the dismissal was conduct, as set out in the letter of dismissal. Ms McLellan referred to the case of **British Home Stores Ltd v Burchell 1978 IRLR 379** and the test set out in that case. It was submitted the respondent's evidence had clearly demonstrated that Mr Mackenzie had a genuine and reasonable belief that the claimant was guilty of misconduct, and that this was the reason for dismissal. Ms McLellan referred to the letter of dismissal where Mr Mackenzie's conclusions had been set out.

271. It was submitted the respondent had reasonable grounds for believing the claimant was guilty of the misconduct on the basis some of the misconduct was admitted and the respondent had carried out a full and reasonable investigation (**Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23**). The respondent is not required to investigate every issue an employee raises in their defence, however the investigation must be even-handed.

272. Mrs McGregor and Ms Porter had met with the claimant twice during the investigation to establish why he had sent the email and why he had visited Ms McInnes in her office. The claimant was given every opportunity to present an explanation and basis for the statements made in the email, but

his responses were unclear, circular and he provided very little detail. Ms McLellan invited the Tribunal to accept the evidence of the respondent's witnesses to the effect they had not been aggressive when questioning the claimant, but that they had been forceful. They had also listened to what the claimant told them: for example, Mrs McGregor asked the claimant to provide the names of others she should speak to as part of the investigation. The claimant told her he would have to check to see whether they would be happy to be named. The claimant did not ever provide the details to Mrs McGregor.

273. Ms McLellan submitted, in relation to allegation 1, that Mrs McGregor and Mrs Porter had tried to get the claimant to explain the basis of the statements made in the email. It was submitted the claimant had either deliberately avoided answering the questions or was unable to do so. Mrs McGregor was clear the claimant had not actually reported any alleged racist behaviour other than in the context of the formal grievance process of Ms Loveman. Mrs McGregor concluded the claimant had no basis for his allegation of a cover up or to support the assertion the respondent swept matters under the carpet.

274. Mrs McGregor interviewed Ms McInnes as part of the investigation. Ms McInnes acknowledged the claimant had made her aware, in the context of a complaint raised by another member of staff, of concerns regarding bullying and harassment within the department. Ms McInnes had investigated these concerns and found nothing to support them. Mrs McGregor was satisfied these concerns had been investigated and that she did not need to re-open the matter.

275. Mrs McGregor also asked Ms McInnes about Mr Anyiam. Ms McInnes confirmed this was the subject of a separate process which was being investigated. Mrs McGregor was satisfied this issue was being addressed and did not require her to investigate further.

276. Ms McLellan submitted the actions of Ms McGregor had been entirely reasonable in circumstances where she was satisfied matters were either being addressed or had been resolved. It was not unreasonable for the respondent not to want to reinvestigate a grievance which had already been exhaustively investigated other than in exceptional circumstances.

277. Mr O'Dair had suggested to Mrs McGregor that she had "warned the claimant off" by preventing him from bringing up matters related to the Loveman grievance. Mrs McGregor confirmed that it was the claimant who had told her there were confidential matters he could not refer to and in response she had told the claimant that he did not need to tell her anything he was uncomfortable with. Mrs Porter's evidence was consistent on this point.

278. In relation to allegation 2, the claimant admitted he sent the email and deliberately copied in his zero hours colleagues. Mrs McGregor tried to find out why he had done this.

279. In relation to allegation 3 both Mrs McGregor and Mrs Porter spoke to the claimant being unclear whether he was referring to an actual grievance process or something more generic. Mrs McGregor concluded the allegation should be partly upheld.

280. In relation to allegation 4, Mrs McGregor had quickly been able to establish that the claimant was aware of the respondent's grievance procedure but had not followed it. She tried, without success, to find out why the claimant had not followed it.

281. In relation to allegation 5, Mrs McGregor fully investigated and, when faced with one person's word against another, she focussed on aspects of the conversation which were agreed and in particular the fact the claimant had asked Ms McInnes if she felt threatened. It was submitted this had been a reasonable approach in the circumstances.

282. Mrs McGregor also viewed the recording of Mrs Christine Barr giving evidence to the select committee. She was satisfied Mrs Barr had not lied.

283. It was submitted the investigation carried out by Mrs McGregor fell within the band of reasonable responses.

284. Ms McLellan noted there had been a great deal of discussion about the fact the claimant was allegedly not able to put forward his case because he was restricted by Mrs McGregor and Mrs Porter from putting forward examples from earlier grievance processes. Mrs McGregor and Mrs Porter were both clear in their evidence that the claimant was not prevented from referring to evidence from previous grievances. Mrs McGregor accepted the claimant had raised this with her, and she confirmed she did not wish to force him to disclose confidential information. This was supported by Mrs Porter who explained the claimant had alluded to confidential grievance processes but he had not been told that, and that it was the claimant who had restricted himself.

285. In any event, Mrs McGregor had listened to evidence which was considered during the Loveman grievance, namely the alleged reduction to her shifts.

286. Ms McLellan submitted that when viewed in the context of the email, the terms of allegation 3 were quite clear. It was referring to the fact that the claimant had referred to what appeared to be confidential grievance procedures in the email which he had copied to all of his zero hours colleagues. The allegation did not prevent the claimant from referring to matters from an earlier grievance procedure in the context of a closed investigation meeting. Mrs McGregor had explained this to the claimant.

287. Mr Mackenzie held a lengthy disciplinary meeting with the claimant, and he had tried to find out why the claimant had made the statements in the email. He gave the claimant numerous opportunities to provide information or examples to explain why the email had been sent. The claimant again provided vague responses with no concrete information for Mr Mackenzie to

follow up. The claimant, for example, insisted on referring to the meeting with Ms McInnes as an example of "unscrupulous methods" notwithstanding the fact this occurred after the email had been sent.

288. Mr Mackenzie rejected Mr O'Dair's suggestion that in effect he wanted the claimant to prove the allegations in the email were true. He explained he needed some information from the claimant in order to understand why the claimant had made the statements in the email. Mr Mackenzie also rejected the suggestion he had not been prepared to listen to the claimant and his witness. Ms McLellan reminded the Tribunal that Ms Sipponen's evidence had supported Mr Mackenzie's position and that she had been given the opportunity to come forward with matters but did not do so.

289. Ms McLellan referred to section 98(4) Employment Rights Act and to the case of **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439** and submitted the decision of the respondent to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might adopt. Mr Mackenzie had upheld five of the six allegations which ranged from serious to gross misconduct. It was submitted that the correct approach was for the Tribunal to assess the whole of the conduct leading to dismissal and not whether individually or cumulatively the individual allegations amounted to gross misconduct. Ms McLellan invited the Tribunal to look at the totality of the claimant's conduct and decide if this amounted to sufficient reason for dismissal (**Governing Body of Beardwood Humanities College v Ham UKEAT/037/13**).

290. It was submitted the language and tone of the email, the nature of the statements made in the email and the fact the claimant copied in all zero hours colleagues was an angry and deliberate attempt by the claimant to undermine management. The claimant reacted in anger to receipt of the invite to the disciplinary investigation meeting and challenged Ms McInnes in an inappropriate way.

291. The claimant, in his evidence, tried to paint a picture of a repressed population of zero hours employees who are badly treated and fearful of raising concerns for fear of repercussions. In truth, the evidence did not support this culture and in fact the claimant's email was sent in response to an invite to attend a meeting which was being held to discuss moving zero hours employees to contracts with guaranteed minimum hours. Mrs Porter told the Tribunal that zero hours employees have the same rights as other employees, including trade union recognition. Mr Mackenzie described them as a vocal group who are not afraid to raise issues. Ms McLellan suggested the picture painted by the claimant was not an accurate one.

292. Ms McLellan submitted the respondent had followed a fair procedure when dismissing the claimant, and any delays in the process had been caused in part by the claimant. In relation to the appeals process, the claimant had initially not wanted to attend the appeal hearing scheduled for 16 November because he wanted to take legal advice. The respondent accommodated this. The claimant then submitted new grounds of appeal after 6pm on Friday 20 November, when the appeal had been re-arranged for 10.15am on Monday 23 November. The respondent adjourned this hearing early, with the claimant's agreement, in order to read the new grounds of appeal.

293. There was a subsequent delay whilst Ms Thomson tried to co-ordinate diaries and take legal advice to ensure the appeals panel was appropriate. The respondent accepted there was no communication with the claimant during this time, but equally the claimant did not contact the respondent for an update. The claimant then withdrew his appeal citing "distortions" in the minutes from the meeting on 23 November combined with time delays. Ms McLellan submitted that in cross examination it became clear that at worst the "distortions" were a very minor omission.

294. Ms McLellan noted the withdrawal of the appeal had been important because it was the first time the claimant had set out the position which he now wished to argue before this Tribunal. In particular, it was the first time he alleged that what is now a central plank of his case; that he was not able

to fully present the basis for the complaints he made in the email because management encouraged him to believe he could not refer to matters arising in a previous grievance. Ms McLellan submitted the revised grounds of appeal were the most articulate statement of the claimant's position in response to the allegations which was important when the respondent's witnesses had struggled to understand his position.

295. Ms McLellan submitted the claimant's actions breached the ACAS Code and merited a 25% reduction in compensation.

296. Mr O'Dair had challenged the decision to initially appoint Ms McInnes to investigate the email. He submitted this supported the claimant's general contention that the respondent had no interest in carrying out a genuine investigation on the basis that Ms McInnes herself was part of the management team who was the subject of the email. It was submitted that Mrs McGregor and Mrs Porter had both spoken to the fact that it was not clear from the email who was being referred to by the reference to "management" in the email, and the claimant's position on this changed between his evidence in chief and cross examination. Ms McLellan invited the Tribunal to accept that initially it had not been clear and so it had been entirely reasonable for the respondent to follow its usual procedure.

297. Ms McLellan invited the Tribunal to find the dismissal fair and to dismiss the claim.

Victimisation under the Equality Act

298. The claimant alleged he has been victimised because of his involvement in the Loveman grievance and the fact he carried out protected acts under section 27(2)(c) and (d) of the Equality Act. The protected acts were:-

- he supported allegations of alleged racism by Loveman in the course of a grievance process against the respondent;

- he supported Loveman by attending a grievance hearing with her as her companion and

- he made allegations of race discrimination against the respondent in the email of 14 July 2015.

299. The respondent accepted these acts were capable of amounting to protected acts under the Equality Act. However, the respondent did not accept the claimant was victimised because he carried out these acts.

300. The claimant, in order to succeed with his claim, must show that he was subjected to a detriment because he had carried out a protected act. The claimant does not need to show that the protected act was the sole reason for the detriment **(Nagarajan v London Regional Transport 1999 IRLR 572)**. If the protected act has a significant influence on the respondent's decision making, then the victimisation case will succeed. However the protected act must be more than simply causative of the treatment, it must be the real reason for the detriment. Ms McLellan submitted there was no evidence to suggest that the claimant's protected acts were the reason for the institution of the disciplinary proceedings or his dismissal or indeed influenced the respondent's treatment of him in any way: in fact the real reason for the treatment in question was the claimant's misconduct.

301. Ms McLellan submitted Tribunals were able to draw a distinction between the protected act and the misconduct. In the case of **Pasab ltd t/a Jhoots Pharmacy v Woods UKEAT/0454/11** the EAT held the employee had been dismissed because she had made an offensive racist comment and not because she had done a protected act. The reason for dismissal was genuinely separable from the employee's implicit discrimination complaint.

302. It was submitted the claimant's protected acts had no bearing whatsoever on the respondent's decision to institute disciplinary proceedings. There was no causal link between the protected acts and the alleged detriment. The decision to institute disciplinary proceedings was wholly due to the

claimant's misconduct in connection with the email. The claimant's previous involvement in Loveman's grievance was irrelevant to the respondent's decision.

303. Ms McLellan reiterated many of the submissions made in relation to the whistleblowing complaints and invited the Tribunal to dismiss this claim.

ECHR

304. Ms McLellan noted the parties were agreed that this is not a free-standing head of claim. The claimant, notwithstanding this, argued that his claims under Article 10 (freedom of expression) and Article 11 (freedom of assembly and association) go to the heart of the unfair dismissal claim. The respondent accepted that in coming to its decision on the fairness of the dismissal, the Tribunal is obliged to give effect to section 98 Employment Rights Act in a way which is compatible with the ECHR.

305. Ms McLellan submitted the right under Article 10 is not unlimited or absolute. Article 10 protects the right to hold opinions and to receive as well as impart information. However, it is limited in order to protect the rights of others and the exercise of these freedoms carries with it duties and responsibilities. It was submitted that threatening, abusive or insulting words or behaviour will not be protected under Article 10. Ms McLellan referred the Tribunal to **Palomo v Spain 2011 IRLR 934.**

306. Ms McLellan also referred to the case law having established that alongside the right to freedom of expression, employees owe to their employer a duty of loyalty, reserve and discretion. If the Tribunal decided Article 10 had been engaged, then the respondent submitted its actions were justified under Article 10(2) because an employer is entitled to take steps to manage its workforce and prevent a communication from one employee to other employees which was inappropriate, offensive and potentially defamatory.

307. It was submitted, in relation to Article 11, that it was commonly referred to in connection with trade union matters and industrial action. Further, it was not an absolute right. Mr O'Dair argued the email enabled the claimant to pursue or advance common causes and interests and that this engages Article 11. Ms McLellan submitted this argument was not credible. The evidence did not support that the claimant sought to represent the collective interests of his peers: he did not speak to them about sending the email; he was not asked to send it and not all of his colleagues agreed with his actions or the contents of the email.

308. Ms McLellan submitted that if the Tribunal decided Article 11 was engaged, then the respondent submitted its actions did not constitute a disproportionate interference with this right because any restrictions placed on the claimant were justified because an employer is permitted to take steps to manage its workforce.

309. Ms McLellan invited the Tribunal to find there had been no breach of the claimant's Article 11 rights, and to dismiss these arguments because they did not impact on the fairness of the dismissal.

Discussion and Decision

Did the claimant make a protected disclosure?

310. We decided to firstly determine the issue of whether the claimant made a protected disclosure when he sent the email of 14 July. We referred to the relevant statutory provisions, being section 43A and 43B Employment Rights Act 1996.

311. Section 43A sets out the meaning of "protected disclosure" and provides that "*In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of section 43C to 43H".*

312. Section 43B sets out disclosures qualifying for protection, and provides that "*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 ….. (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…"*

313. Mr O'Dair invited the Tribunal to find the claimant made a disclosure of information in the email of 14 July, and he submitted the email could, and should, be considered together with the Loveman grievance. Ms McLellan's position was that there had been no disclosure of information and that there was no basis for considering the email of 14 July with the Loveman grievance.

314. The first issue for this Tribunal to consider is whether the claimant made a disclosure of information. We were referred to a number of authorities, and it is helpful to set out the principles and guidance from those cases. In **Cavendish Munro Professional Risks Management Ltd v Geduld** (supra) the claimant sought to rely on a letter from his solicitor as containing a protected disclosure, disclosing that the employer was in breach of its legal obligations towards him by engaging in conduct unfairly prejudicial to his interests as a minority shareholder. The EAT held that in order to fall within the statutory definition there had to be a disclosure of information, and that there was a distinction between "information" and "allegation" for the purposes of the Act. The ordinary meaning of giving information was conveying facts. The EAT held the letter from the claimant's solicitor did not convey information as contemplated by the legislation. It was a statement of position quite naturally and properly communicated during the course of negotiations. It was written as part of an ongoing unresolved dispute between the parties: it did not disclose any facts.

315. In **Goode v Marks and Spencer plc** (supra) the EAT held that expressing an opinion about an employer's proposal, after consultation, to change an enhanced redundancy scheme which was discretionary does not amount to

a qualifying or protected disclosure. It was stated that *"the Employment Tribunal was entitled to conclude that what was disclosed to Mr Raichura was, at its highest, only "information" in the sense of being a statement of his state of mind, namely that he was "disgusted" with the proposals which had been put forward. … the Tribunal was entitled to conclude that an expression of opinion about that proposal could not amount to the conveying of information which, even if contextualised by reference to the document of 11 July, could form the basis of any reasonable belief such as would make it a qualifying disclosure."*

316. In **Kilraine v London Borough of Wandsworth** (supra) a Tribunal dismissed a claim following its decision that the alleged third and fourth disclosures were not protected disclosures because they had contained allegations and not information. The EAT upheld the Tribunal's decision in respect of the third disclosure because if the word "inappropriate" was removed from the relevant sentence, it said nothing specific and was far too vague. Further it was difficult to see how what had been said alleged a criminal offence, a failure to comply with legal obligations or any of the other matters to which section 43B(1) made reference. The EAT stated that *"Employment Tribunals had to take care in the application of the principle arising out of Cavendish Munro and should not be too easily seduced into asking whether an alleged protected disclosure was information or an allegation when reality and experience suggested that, very often, "information" and "allegation" were intertwined. The question was simply whether it was a disclosure of information".*

317. In the case of **Eiger Securities LLP v Korshunova** (supra) the EAT held that the words used by the claimant to the managing director intertwined allegation and information. Whether such words were to be regarded as a "disclosure of information" within the meaning of section 43B depended upon the context and the circumstances in which they were spoken. The decision as to whether such words which included some allegations crossed the statutory threshold of disclosure of information was essentially a question of fact for the employment Tribunal which had heard evidence.

318. The EAT in that case also went on to state that it was not obvious that not informing a client of the identity of the person with whom they were dealing if the employee was trading from another person's terminal was plainly a breach of a legal obligation. That being so, in order to fall within section 43B, the Tribunal should have identified the source of the legal obligation to which the claimant believed the managing director or the respondent were subject and how they had failed to comply with it. The identification of the obligation did not have to be detailed or precise but it had to be more than a belief that certain actions were wrong. Actions could be considered wrong because they were immoral, undesirable or in breach of guidance without being in breach of legal obligation.

319. The email of 14 July had as its subject matter "zero hours contracts" and it contained the following points:

- due to the extent that management are prepared to lie to zero hours staff … will this meeting be a continuation of lies and disinformation;

- how can employees be confident that anything said by a less than honourable management team will in fact be the truth;

- I am not at all trusting of management methods;

- key management figures have shown to use unscrupulous methods when dealing with employees, to whitewash and discredit them rather than listen to their concerns and

- you have enabled a culture of bullying and racism in the work place and seek to take a prejudicial stance against those who challenge your lack of concern.

320. Mr O'Dair referred to the claimant's response in cross examination when he was asked to explain the protected disclosure, and said "*I've tried to speak about racism, management were not adhering to obligation to investigate racism and bullying complaints; management were trying to cover things up."* Ms McLellan countered this by referring to the claimant being unsure what his protected disclosure was, as evidenced by the fact that the first time a protected disclosure was mentioned by the claimant (email of 30 September) he stated his protected disclosure was regarding "the legitimacy and use of zero hours contracts across the catering sector". The email of 14 July did not mention this. There was also subsequent reference to the protected disclosure being Ms Barr's alleged evidence to the Select Committee and to the alleged bullying culture in the catering department.

321. We had regard to the content of the email of 14 July and we asked whether there was a disclosure of information in that email which tended to show a breach of a legal obligation (employer's duty of care towards employees) had happened, was happening or was likely to happen. We acknowledged that Tribunals have been cautioned when drawing a distinction between "information" and "allegations", however the example given by the EAT in ***Cavendish Munro*** is illustrative of the difference there may be between the two things. In that case the EAT contrasted an allegation, for example, "you are not complying with the health and safety requirements" with conveying information, for example "the wards have not been cleaned for the past two weeks. Yesterday sharps were left lying around".

322. We considered that illustration helpful, and we further considered it was in keeping with the later authorities where the EAT have held that merely making a statement of opinion or an unsubstantiated rumour will not be sufficient. The claimant, in his email of 14 July, gave vent to his opinion about management and their failures: he was of the opinion that management were prepared to lie to zero hours staff; that they were prepared to use unscrupulous methods to whitewash and discredit employees rather than listen to their concerns and that they had enabled a culture of bullying and racism in the workplace. The claimant did not

however provide any detail to support those opinions with examples: he did not provide information to allow the person/people reading the email to understand what he was talking about.

323. The position regarding the email was further confused by the fact the subject matter of the email was "zero hours contracts". This may lead those reading the email to think that its contents related to zero hours contracts, particularly as (i) the claimant's email appeared to be a response to the email from Ms Hood inviting zero hours employees to a meeting, and (ii) his email was copied to zero hours colleagues. However, the email, whilst suggesting the meeting with management would be a further continuation of lies and disinformation, clearly went on to make allegations about other matters. We considered that in those circumstances, there was an even greater need for clarity and information to support/clarify what the claimant was referring to.

324. We decided, having had regard to the provisions of section 43A and 43B, the case authorities to which we were referred, the submissions of the representatives, the email and the evidence of the claimant that the email did not disclose/convey information. The email set out the opinions and statements of the claimant and made a series of allegations.

325. Mr O'Dair, in his submission to the Tribunal, acknowledged the email of 14 July might be seen as no more than allegations. He suggested the email could not be taken alone and should be read in conjunction with the Loveman grievance and in particular the evidence the claimant had given to Ms McInnes that management were allowing a campaign of bullying by an employee known as "the pit bull" and that racially derogatory remarks had been made about students by catering staff. Mr O'Dair invited the Tribunal to find Ms McInnes had, upon receipt of the claimant's email of 14 July, known the grievance being referred to was that of Ms Loveman.

326. Mr O'Dair relied on the case of **National Laboratories v Shaw** as authority for his position that the email should be seen with, and in the context of, the Loveman grievance.

327. We had regard to the authority to which we were referred. We noted that in the ***National Laboratories*** case the employee sought to rely on two earlier emails which he had sent, and argued they should be considered collectively. The EAT accepted that argument and held that an earlier communication can be read together with a later one as "embedded" in it, rendering the later communication a protected disclosure even if taken on its own it would not constitute such. It was stated that whether two communications can be taken together in this way was a question of fact.

328. We next had regard to whether Ms McInnes knew the grievance being referred to in the email of 14 July was the Loveman grievance, and if so, what difference this made. We noted that in cross examination Ms McInnes was asked, in reference to the letter inviting the claimant to a disciplinary investigation (page 52), and in reference to allegation 3, that "you knew the grievance you were referring to?" and Ms McInnes responded "yes, the only recent grievance I'd been involved with was Loveman's".

329. We also noted that Ms McInnes was asked, in relation to the claimant's email of 14 July, that "it must have been obvious that the claimant was addressing the same things as Loveman?". Ms McInnes responded "No, I wouldn't say so." She was also asked "you said the claimant gave no specifics regarding the matters Loveman was complaining about" and Ms McInnes responded "yes". Mr O'Dair suggested the claimant had made Ms McInnes aware of "pit bull" and she responded "he referred to that name".

330. We accepted Ms McInnes' evidence that during the Loveman grievance the claimant had raised concerns regarding bullying and harassment in the Hospitality department, and said that he had witnessed some issues. Ms McInnes asked the claimant to provide examples and names of witnesses,

and he declined to do so. Ms McInnes was clear the claimant had not referred to Mr Anyiam by name.

331. We concluded, based on the above, that when Ms McInnes read the claimant's email of 14 July, she assumed the grievance being referred to was Ms Loveman's grievance because that was the only grievance she had been involved with recently. We further concluded it had not been obvious to her upon reading the email that the claimant was addressing the same matters Ms Loveman had complained about.

332. We, having had regard to the authority to which we were referred, the evidence of Ms McInnes and the submissions of the representatives, distinguished the claimant's situation from that of the employee in the *National Laboratories* case. We did that on the basis that although Ms McInnes knew the grievance being referred to was the Loveman grievance, she did not know whether the email raised the same issues as the Loveman grievance. The claimant made no reference to the Loveman grievance in the email and we noted that when asked to explain what "sham grievance procedures" he was referring to he offered a variety of very confused and confusing responses and denied it was a specific grievance.

333. The claimant, throughout this process and during the Loveman grievance, was prone to making statements which, when asked to explain, or provide the names of witnesses, he refused to do. Ms McInnes noted this, as did Ms McGregor, Ms Porter and Mr Mackenzie. We did not accept the claimant was constrained by allegation 3, but even if he had been, this did not apply when he was giving evidence to Ms McInnes during the Loveman grievance. Ms McInnes accepted that the heart of Loveman's grievance was that there was a culture of bullying and harassment and that management were failing to deal with it. The claimant had an opportunity to speak to these matters, but failed to give specifics about the matters Loveman was complaining about and declined to give the names of witnesses.

334. We decided to reject Mr O'Dair's submission that the email should not be taken alone, but considered together with the information provided in the Loveman grievance. We reached that decision because we accepted Ms McInnes' evidence, and concluded the basis upon which we were being invited to consider the email with the information in the Loveman grievance was not established.

335. We, for all the reasons set out above, decided the claimant did not, in the email of 14 July, make a protected disclosure.

336. We should state that if we are wrong in reaching this decision, and the email did disclose sufficient information, then we would have had to consider whether the information tended to show one of the relevant failures provided for in section 43B.The claimant's case (as submitted by Mr O'Dair) was that the matters complained of in the email tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he is subject, and that this referred to the employer's duty of care towards employees.

337. Ms McLellan invited the Tribunal to have regard to the ***Kilraine*** case when considering this issue because, it was submitted, the allegations made by the claimant fell within a similar category to that considered by the EAT in that case. We noted that in the ***Kilraine*** case the employee wrote that her achievements had been made despite bullying and harassment that was tolerated and at times encouraged and that "since the end of last term, there have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented".

338. The EAT held that if the word "inappropriate" was removed from the above sentence, the sentence would say nothing specific, and did not sensibly convey any information at all. Further, that even if they were wrong in this, it was difficult to see how what was said alleged a criminal offence, a failure to comply with legal obligations or any of the other matters referred to in section 43B.

339. We accepted that the claimant's use of terminology such as "sham" and "unscrupulous methods" would fall into the same category as above, and that without more it was difficult to see how what was said alleged a relevant failure in section 43B. However, we distinguished the claimant's allegation that "you have enabled a culture of bullying and racism in the workplace and seek to take a prejudicial stance against those who challenge your lack of concern" because we considered this allegation tended to show breach of the legal obligation of the duty of care.

340. We noted the respondent did not dispute that the claimant had a reasonable belief that the information tended to show this relevant failure.

341. The final issue which we would have had to consider regarding the issue of whether a protected disclosure was made, is the issue of whether the claimant reasonably believed the disclosure was made in the public interest. We, on the one hand, acknowledged that a culture of bullying and racism in the workplace within the respondent, would be a matter of public interest. However, on the other hand, we accepted the claimant wrote and sent the email of 14 July for personal reasons because he was angry with the outcome of the Loveman grievance and appeal. The claimant admitted during the investigation that he had been angry when he sent the email. Furthermore, there was no suggestion the claimant believed, when he wrote and sent the email of 14 July, that he was making a protected disclosure: it was therefore difficult to accept he reasonably believed the disclosure of information was made in the public interest.

342. We were not clear what prompted the claimant to send the email of 14 July. We referred above to the fact the email subject matter is noted as being zero hours contracts. The email does deal with this subject, but what was not clear was why the claimant had included reference to management using unscrupulous methods when dealing with employees and reference to a culture of bullying and harassment? Was this included to support his position that management would lie and use unscrupulous methods at the

forthcoming meeting regarding contracts; or was it included because he was angry about it and wanted to air it?

343. The whole focus of the claimant's case at this Hearing was the link between the Loveman grievance and the issues raised by the claimant in the email. This however ignores the fact the email was sent in response to the invitation to attend a meeting to discuss contract changes, and was another example of the confusion created in this case.

344. We concluded that whilst the claimant believed at this Hearing that the information in the email was made in the public interest, he did not reasonably believe this at the time he sent the email. We reached this conclusion because of the confusion regarding the reason why the email was sent and because we were satisfied the claimant sent the email in anger to air his personal views and unhappiness that Ms Loveman's grievance had not been upheld.

345. We, in conclusion, decided the claimant did not, in the email of 14 July, make a disclosure of information. However, if we are wrong in that conclusion, and the claimant did make a disclosure of information, we further concluded the disclosure was not made in the reasonable belief of the claimant that it was in the public interest. We decided the claimant had not made a protected disclosure.

346. The claimant argued that he had been subjected to detriment and dismissed for making a protected disclosure. We decided it would be appropriate to determine those complaints and we proceeded to do so on the basis that the claimant's email of 14 July was a protected disclosure.

Was the claimant subjected to a detriment on the ground that he made a protected disclosure?

347. Section 47B Employment Rights Act provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act,

by his employer done on the ground that the worker has made a protected disclosure.

348. The claimant argued that the detriment to which he was subjected was the fact he was subjected to disciplinary procedures.

349. We were referred to a number of authorities regarding the approach to be adopted by the Tribunal when considering this type of claim. In the case of **London Borough of Harrow v Knight** (supra) the EAT held that the term "done on the ground that" requires an analysis of the mental processes (conscious or unconscious) which caused the person to so act. It is necessary in a claim under section 47B to show that the fact that the protected disclosure had been made caused or influenced the employer to act in the way complained of. Merely to show that "but for" the disclosure the act or omission would not have occurred is not enough.

350. In **Fecitt v NHS Manchester 2011 EWCA Civ 1190** the Court of Appeal held 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 whistleblower.

351. Mr O'Dair in his submission to the Tribunal, argued that Ms McInnes had taken the decision to initiate disciplinary proceedings against the claimant, and in doing so, she had subjected the claimant to a detriment on the ground that he had made a protected disclosure. We could not accept the submission that Ms McInnes had taken the decision to initiate disciplinary proceedings because it was contrary to the clear evidence before this Tribunal. Ms McInnes told the Tribunal, and we accepted, that she spoke to HR (Ms Porter) for guidance, and for advice regarding what the reaction to the email should be. Ms Porter advised Ms McInnes that due to the serious nature of the claimant's comments and the manner in which he raised them, that it would be appropriate to commence a disciplinary investigation to allow the claimant an opportunity to explain why the email had been sent.

Ms McInnes and Ms Porter drafted the letter inviting the claimant to a disciplinary investigation.

352. We were satisfied that the decision to initiate disciplinary proceedings against the claimant was taken by Ms McInnes and Ms Porter. We must examine their mental processes for reaching that decision, and ask whether the email of 14 July (the protected disclosure) materially influenced that decision.

353. Mr O'Dair suggested that Ms McInnes' decision was influenced by the claimant having made a protected disclosure as evidenced by the fact she admitted in evidence that she knew the claimant's email was referring to the Loveman grievance when he referred to "sham grievance procedures"; that she had headed the Loveman grievance notwithstanding that it was her management team which was being criticised and that she was the head of the management team which the email of 14 July alleged to be continuing to enable a culture of racism.

354. We noted that Ms McInnes was asked in cross examination and by way of reference to page 52, being the letter of invite to the disciplinary investigation, whether she knew, in relation to allegation 3, the grievance being referred to. Ms McInnes said "yes, the only recent grievance I'd been involved with was Loveman's."

355. We further noted that Ms McInnes did not accept Mr O'Dair's suggestion that it had been inappropriate for her to hear Ms Loveman's grievance. Ms McInnes explained that it fell to her, as Head of the Department, to investigate the concerns in the first instance. Ms McInnes referred to the fact there was an appeals mechanism and inferred that any inappropriateness could be rectified at that stage.

356. Ms McInnes accepted that she was the head of the department which was the focus of the claimant's concerns, and that it may not have been appropriate for her to conduct the disciplinary investigation.

357. We noted Ms McInnes rejected the suggestion she had been furious upon receipt of the email from the claimant because he would not let go of Loveman's concerns.

358. We had regard to the reasons why Ms McInnes and Ms Porter decided to initiate disciplinary proceedings against the claimant. The claimant's email was sent to Ms McInnes and Ms Hood. Ms McInnes described that she had been "surprised" when she received the email because of "some of the wording and content". Ms McInnes was aware a meeting had been planned for later that week, for her to meet with zero hours employees to discuss changes to contracts. Ms McInnes contacted HR for advice on (i) what the reaction to the email should be; (ii) the fact the meeting had been arranged for later that week and (iii) the fact Ms McInnes had received emails from other staff expressing concern about the content of the claimant's email and its impact on them.

359. Ms Porter described the email as appearing to make "extremely serious and potentially defamatory comments regarding the conduct and behaviour of the Department's management". She advised Ms McInnes that given the serious nature of the comments and the manner in which they had been raised, that it would be appropriate to commence disciplinary proceedings.

360. We accepted Ms Porter's evidence that she did not know the "sham grievance procedure" referred to in the claimant's email was Ms Loveman's grievance. Ms Porter explained that part of the reason for the investigation was to establish to which grievance or grievances the claimant was referring.

361. We concluded, for the reasons set out above, that the links Mr O'Dair sought to establish to support his argument that the decision to initiate disciplinary proceedings was done on the ground that the claimant had made a protected disclosure were not established. We, in reaching this conclusion, relied on the evidence of the witnesses Ms McInnes and Ms Porter.

362. We next asked ourselves why Ms McInnes and Ms Porter decided to initiate a disciplinary investigation. The respondent's position was that disciplinary proceedings were instigated because of the tone and language contained in the email and because the claimant had copied it to all zero hours colleagues.

363. We were referred to the case of **Bolton School v Evans** (supra) which was a case involving a teacher had concerns regarding the security of a new computer system. The teacher aired these concerns, but the respondent decided to proceed with the new system. The teacher decided to gain access to the system in order to test security and demonstrate what he considered to be its failings. The teacher was disciplined for deliberately hacking into the system. The Court of Appeal held the Tribunal had erred in holding the claimant had been given a disciplinary warning because he had made a protected disclosure and not, as the employers contended, because he had committed an act of misconduct by breaking to the computer system. The Court of Appeal went on to say that even assuming that the whole course of conduct should be regarded as a continuing act of disclosure, the employer's reason for the warning was its belief that the claimant had at the same time committed an act of misconduct. While a Tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure itself, in the present case there was no reason to attribute ulterior motives to the employers. Looking at the whole of the claimant's activities, it was plain that the warning was given for the claimant's irresponsible conduct, and not for telling his employers, by whatever means, that their system was insecure.

364. In the case of **Panayiotou v Chief Constable of Hampshire Police** (supra) the EAT held the Tribunal had not erred in treating the consequences of the claimant's complaints as separable from the fact that he had made protected disclosures. It was stated that, as a matter of statutory construction, section 47B did not prohibit the drawing of a distinction between the making of protected disclosures and the manner or way in which an employee goes

about the process of dealing with protected disclosures. Further, that depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed.

365. We acknowledged that we must examine the respondent's position with some care because employers will rarely (if ever) accept they took action on the ground of a protected disclosure having been made. We, in examining the respondent's position, noted and accepted the evidence of Ms Porter, that the claimant was entitled to raise the concerns he had raised in the email. Ms Porter told the Tribunal, in response to a question whether the claimant was entitled to raise these concerns, "You are absolutely right he had the right to bring the concerns to the attention of management …. but the manner in which he did it was inappropriate."

366. We concluded that in circumstances where (i) the email sent by the claimant contained extremely serious, highly critical and unsubstantiated allegations regarding the management team; (ii) the email had been copied to the zero hours contract staff; (iii) it was not clear the "sham grievance procedures" referred to the Loveman grievance; (iv) it was not clear the claimant was referring to the issues he had raised in the Loveman grievance and (v) the decision to initiate disciplinary proceedings was a joint decision based on the advice of Ms Porter, that the respondent, in taking the decision to initiate disciplinary proceedings was not materially influenced by the fact of the protected disclosure made by the claimant.

367. We must state that there was no clarity what the protected disclosure actually was. Mr O'Dair relied on the email of 14 July, but there were many allegations within that email, and he was not specific about what constituted the protected disclosure.

368. We were entirely satisfied that disciplinary proceedings were initiated against the claimant because of the manner in which he had pursued the complaints, and because the respondent wanted to understand the basis for

the claimant making the allegations. For example, the claimant referred in the email to being witness to "a succession of sham grievance procedures". We considered it entirely reasonable for the respondent to wish to ascertain which grievance procedures were considered by the claimant to be "sham" and why.

369. We decided, for all of these reasons, to dismiss the complaint that the claimant had been subjected to a detriment on the ground of making a protected disclosure.

Was the claimant dismissed because he made a protected disclosure?

370. We referred to section 103A Employment Rights which provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

371. We were referred to the case of **Kuzel v Roche Products 2008 ICR 799** where the Court of Appeal held that it is for the employer to show the reason for the dismissal. If the employer does not show, to the satisfaction of the Tribunal, that the reason for dismissal was the one put forward by the employer, it is open to the Tribunal to find that the real reason was that asserted by the employee.

372. We were also referred to **Martin v Devonshire Solicitors** (supra) which was a victimisation case where the EAT upheld the decision of a Tribunal that the true reason for the dismissal was not that the claimant had made allegations of discrimination but the continuing mental ill health demonstrated by their (unacknowledged) falsity and the consequent risk of further disruptive behaviour. The EAT held the distinction relied on by the Tribunal was valid and that the Tribunal had been right not to apply the "but for" test.

373. The EAT noted (paragraph 19) that the Tribunal, in its reasoning, had rightly looked behind the label of "breakdown of trust and confidence" used by the respondent and sough to analyse the reason for the dismissal with specificity. It was stated that "*The Tribunal acknowledged, as it was bound to do in the light of the terms of both the .. dismissal letter and .. the reasons for dismissing her appeal, that the fact that she had made complaints of sex and disability discrimination, in the initial grievance and the series of subsequent grievances, formed part of the facts relied on by the Respondents in deciding to dismiss her. But it did not believe that it followed that that was part of the Respondent's "reason" for dismissing her in the sense required by the authorities, and specifically by the decision of the House of Lords in* ***Nagarajan v London Regional Transport; Derbyshire v St Helen's Metropolitan Borough Council*** *and* ***Pothecary Witham Weld v Bullimore.*** *Rather, what the Tribunal sought to determine was what it was about the Appellant's conduct, including the making of those complaints, which motivated the Respondents to dismiss her; and it was that which it treated as their "reason" in the relevant sense. Following that approach it found that the reason had nothing to do with the fact, as such, that the Appellant had made complaints of discrimination, but rather with the facts that those complaints involved false allegations of considerable seriousness, that they were repeated and that the Appellant refused to accept they were false; the relevance of those facts being, taken together, that they led to the conclusion that she had a mental illness which was likely to lead to unacceptably disruptive conduct in future. To put it another way, it found that the reason for the dismissal was that the Appellant was mentally ill and the management problems to which that gave rise; and that the significance of the complaints was as evidence of that fact*"

374. The EAT agreed the reason asserted and found constituted a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself. The EAT held that the distinction made by the Tribunal in reaching its conclusion as to the respondent's reason for dismissing the claimant ought as a matter of principle be regarded as legitimate. The EAT recognised that the distinctions

may appear subtle, but they were real and they required to be recognised if the anti-victimisation provisions were to be confined to their proper effect and not to become an instrument of oppression. The EAT acknowledged this was an area of law where the questions to be answered could not always be straightforward, and that arose from the fact of the complexities of legislating for the subtleties of human motivation.

375. The EAT, in addressing the grounds of appeal that the Tribunal had failed to distinguish the grounds for the decision and what motivated the decision maker to make that decision, had regard to the judgment of Lady Hale in ***R v Governing Body of JFS 2010 IRLR 136*** where she set out an analysis of the case law and noted the questions to be asked when ascertaining what caused the employer to take the detrimental decision. The EAT considered it appropriate for Tribunals to ask "what were the mental processes which were, in the relevant sense, the reason why the putative discriminator acted in the way complained of – what was his motivation?"

376. The key issue for this Tribunal to determine is the reason for the dismissal: the claimant believed he had been dismissed because he made a protected disclosure. Mr O'Dair, in support of his position, invited the Tribunal to draw inferences from the "catch 22" situation in which the claimant was placed whereby he was required to substantiate his claims but by doing so would put himself in breach of allegation 3, and he invited the Tribunal to find this was no accident. He further invited us to draw inferences from (i) Mr Mackenzie's implausible denial of any knowledge that the "recent confidential grievance procedures" referred to the Loveman grievance; (ii) the decision to view as gross misconduct any allegation of bullying or racism unless the claimant was able to substantiate it; (iii) the use of allegation 3 to render it impossible for the claimant to defend himself against the other allegations; (iv) the respondent's failure to follow up and look at the Loveman grievance; (v) the willingness to add further allegations at every opportunity; (vi) Mr Mackenzie's failure to follow up on any of the instances of bullying cited to him by Ms Sipponen and (vii) the decision to dismiss notwithstanding the claimant acknowledged his email was not well worded.

377. The respondent denied it had dismissed the claimant because he made a protected disclosure, and asserted the reason for dismissal was gross misconduct arising from the making of unsubstantiated allegations and the manner of the disclosure. Ms McLellan, in support of her position, invited the Tribunal to focus on the decision-making process of Mr Mackenzie.

378. We found the reference to the ***Devonshire Solicitors*** case helpful when considering this case, because that case also involved an employee who had made false allegations of discriminatory conduct against partners of the firm of solicitors. The Tribunal and EAT acknowledged the written allegations formed part of the facts relied upon by the respondent when dismissing her. We adopted this language and acknowledged that the email of 14 July, sent by the claimant, formed part of the facts relied upon by the respondent when dismissing him. The email (for the purposes of determining this complaint) contained a protected disclosure, or disclosures, and the question we must ask is whether the fact a protected disclosure was made influenced/motivated the respondent, either consciously or subconsciously, to dismiss him.

379. We have already determined (above) that the claimant was not subjected to a detriment when the decision to initiate disciplinary proceedings was taken. We accepted a number of very serious allegations had been made regarding the management team in the catering department, and that there were concerns not only about this but also about the manner in which the claimant had raised these concerns and copied his email to zero hours contract employees.

380. Mr O'Dair argued the claimant had been placed in a catch 22 situation because he had been asked to substantiate the allegations but could not do so without breaching allegation 3. We could not accept that submission for two reasons. Firstly, we considered it crystal clear that in using the term "substantiate", the claimant was not being asked to "prove" the allegations he made, but rather he was being asked, during the investigatory meeting

and disciplinary hearing, to explain to the employer what had caused him to write the email. The claimant, for example, referred to "management" and "key management figures" and the respondent wished to establish to whom this referred. Further, there was a reference to "sham grievance procedures", "key management figures using unscrupulous methods when dealing with employees"; "to white wash and discredit them"; "a culture of bullying and racism in the workplace" and "take a prejudicial stance against those who challenge your lack of concern". Ms McGregor, Ms Porter and Mr Mackenzie wished to understand from the claimant what he was referring to, and to obtain some details so they could carry out an investigation.

381. The claimant was not being asked to "prove" that management was using unscrupulous methods when dealing with employees to white wash and discredit them, but he was being asked to tell the employer what he meant when he said this and to explain the basis for saying it: the respondent wanted to know what had happened to make the claimant think that unscrupulous methods were being used: what were those methods, and who was involved? The respondent, without this information, could not take the matter forward.

382. Secondly, we did not accept (for the reasons set out above) that the terms of allegation 3 prevented the claimant from talking about/referring to previous grievances or issues raised in those grievances. The terms of allegation 3 related to the claimant making reference in the email of 14 July to "sham grievance procedures" which he had witnessed and copying that email to a large number of colleagues. We were entirely satisfied (based on the evidence of Ms McGregor, Ms Porter and Ms Sipponen) that it was the claimant himself who considered himself bound by confidentiality and who was not willing to disclose information without firstly seeking the express permission of the person involved.

383. We considered that if the claimant had truly thought himself restricted by allegation 3, he would have sought clarification from the respondent

regarding his ability to refer to these matters within the context of a disciplinary procedure. He did not do so.

384. Mr O'Dair invited the Tribunal to consider whether Ms McInnes and Ms Porter had deliberately formulated allegation 3 in this way to prevent the claimant from raising the issues from the Loveman grievance again. We had regard to the evidence of Ms Porter regarding this matter. Ms Porter accepted, in cross examination, that she had thought carefully about the wording of allegation 3 before committing it to paper. Ms Porter did not know that the confidential grievance being referred to in the email of the 14th July was Ms Loveman's, and she explained that that was what the investigation wanted to establish.

385. We also had regard to the evidence of Ms McInnes: she accepted that she "knew" the grievance referred to in allegation 3 was Ms Loveman's because that was the only grievance she had been involved with recently. Ms McInnes was asked if she and Ms Porter were aware that the allegations put the claimant in an impossible position because if he gave examples from Loveman's grievance, he would be in breach of allegation 3, and she responded "yes". She was asked whether she was aware of this at that time, that is the effect of allegation 3 as described above, and she responded "no". Ms McInnes, in re-examination, confirmed that she did not believe the claimant had been precluded from referring to anything from the Loveman grievance.

386. We concluded, based on this evidence, that Ms Porter and Ms McInnes did not deliberately formulate allegation 3 to prevent the claimant from raising issues from the Loveman grievance. We reached that conclusion because it was clear from Ms Porter's evidence that she did not consider allegation 3 had that effect, and it was clear from Ms McInnes' evidence that she had not been aware of the effect of allegation 3, as suggested by Mr O'Dair, until he set this out in his question. In addition to this, the respondent's witnesses confirmed time and again that there was nothing to prevent an employee from raising issues which had previously been raised; however, the

respondent may not investigate the issue again unless there was new/further information.

387. We noted there was no clarity at this Hearing regarding what the claimant would have told the respondent during the investigation and/or disciplinary hearing had been believed himself not to be restricted by allegation 3. What information did the claimant have to support and/or explain why he had made the statements in the email: the claimant was not restricted regarding what he could say at this Hearing, yet he did not appear to have any additional information.

388. We next turned to examine the decision making of Mr Mackenzie, who took the decision to dismiss the claimant. Mr O'Dair invited the Tribunal to find it implausible that Mr Mackenzie did not know about the Loveman grievance. We noted, in considering this matter, that Mr Mackenzie was from a different department, and had no knowledge of the claimant. Mr Mackenzie, in his evidence in chief, said that when he read the allegations and the reference to "sham grievance procedures" he "guessed" this was to do with the Loveman grievance. In cross examination he was asked with regard to allegation 3, whether in order to decide this, he needed to know which confidential grievance procedures were being referred to, and he responded "not in this case: when I read the documents and spoke to the claimant it did not demonstrate any breach." It was suggested to him that he "knew" recent confidential grievances referred to Ms Loveman, and he responded "no". It was also suggested that he knew the claimant was referring to Ms Loveman's grievance, and he responded "no I wasn't aware of her case".

389. We concluded from this evidence that whilst Mr Mackenzie was aware Ms Loveman had raised a grievance, he was not aware of the details of that grievance. Further, that whilst Mr Mackenzie might have assumed, or guessed, that was the grievance being referred to, he would not, and did not "know" this until the claimant confirmed that to be the case, and this was precisely why the claimant was asked to explain his position.

390. We next considered whether an inference could be drawn from the "failure" of Mr Mackenzie to look at the Loveman grievance. There was no dispute regarding the fact Mr Mackenzie did not investigate the Loveman grievance, however there was a complete lack of information at the disciplinary hearing and at this Hearing to demonstrate why Mr Mackenzie should have looked at the Loveman grievance. We acknowledge the submissions of Mr O'Dair and his position that it was "obvious" the Loveman grievance was being referred to; that Ms McGregor, Ms Porter and Ms Mackenzie "knew" this and knew the claimant could not refer to it for fear of breaching allegation 3, however that was neither clear, nor the position adopted, at the investigatory and disciplinary hearings. What was it the claimant wanted to refer to but felt he could not; what was it in the Loveman grievance that he wanted Mr Mackenzie to look at: what would have been gained from looking at the Loveman grievance: those were all questions we could not answer after having heard all of the evidence in this case.

391. We accepted Mr Mackenzie wanted to understand why the email of 14 July had been sent and what information the claimant had to support the allegations. Mr Mackenzie's approach was to take each statement made in the email and ask the claimant to explain why the statement had been made and to give examples of what he alleged. Mr Mackenzie did not consider the claimant was prevented from raising issues from the Loveman grievance: he was clear that if the claimant had examples he could have brought them forward, and if the claimant had not been sure whether he could raise them, he could have sought clarification. Mr Mackenzie was clear that the claimant was not prevented from raising things.

392. Mr Mackenzie sought to draw a distinction between the claimant wanting the Loveman case reviewed or re-run, and the claimant raising issues. He considered that if the claimant had examples, he was not prevented from raising them. Indeed, the claimant did give examples when he referred to Ms Lama's experience of zero hours contract staff not reporting issues for fear of repercussions, and Mr Anyiam experiencing racism. The difficulty was that those issues had already been, or were being, addressed. If the

claimant was not satisfied with how the respondent had dealt with those issues, he had to bring forward information to explain this to the respondent to allow them to understand the point/s being made and to investigate them. This is what the claimant was asked to do but failed to do.

393. We were not prepared to draw any adverse inference from the fact Mr Mackenzie did not look into the Loveman grievance. We were satisfied the claimant was not prevented from raising issues from that (or any other) grievance, and he did not give the respondent any understanding why they should look into the Loveman grievance.

394. Mr O'Dair submitted an adverse inference should also be drawn from the fact Mr Mackenzie did not follow up on the examples of bullying provided by Ms Sipponen. There was no dispute regarding the fact Ms Sipponen raised an issue regarding bullying. Mr Mackenzie did not investigate this matter because he understood it had already been investigated and dealt with. (We noted Ms McInnes' evidence to the effect "the pit bull" had been given a warning regarding her conduct towards Ms Sipponen.)

395. We concluded there was no adverse inference to be drawn from Mr Mackenzie's failure to investigate Ms Sipponen's concerns in the circumstances. We considered this again emphasised the need for specific rather than general information to be provided regarding these matters in order for Mr Mackenzie to know what was being asked of him.

396. We, having dealt with the respondent's criticisms of Mr Mackenzie, returned to examine his motivation for dismissing the claimant. Mr Mackenzie was satisfied, and there was no dispute regarding the fact, the claimant had written the email of 14 July, sent it to Ms McInnes and Ms Hood, and copied it to all zero hours contract employees. He was further satisfied the claimant had made a number of very serious allegations in the email, yet when asked to explain the basis for those allegations, the claimant had been unwilling and/or unable to do so. An examination of the notes of the disciplinary hearing showed the claimant giving very vague, general and confusing

answers to the questions he was asked. The claimant, at no time during the investigation or disciplinary hearing, presented the evidence in the way he did at this Tribunal.

397. Mr Mackenzie did not uphold allegation 3 because he was satisfied the claimant had not made reference to a specific grievance or disclosed the identity of any party.

398. Mr Mackenzie upheld allegation 4 because there was no dispute regarding the fact the claimant knew of the respondent's procedures for raising grievances, and chose not to use it.

399. Mr Mackenzie concluded in relation to allegation 5 that the claimant had acted inappropriately in approaching Ms McInnes to challenge her about the decision to initiate disciplinary proceedings.

400. Mr Mackenzie concluded in relation to allegation 6 that the claimant had disobeyed a management instruction to attend the disciplinary hearing and had, instead, simply chosen not to turn up. Mr Mackenzie was satisfied the claimant could have attended and sought a postponement of the hearing.

401. Mr Mackenzie also explored with the claimant whether he regretted sending the email in those terms and whether he would do it again. The claimant acknowledged he may modify the language, but gave no assurance that he would not act in the same way again. Mr Mackenzie concluded he had no confidence the claimant would not send a similar communication in the future.

402. We also had regard to the fact that Mr Mackenzie denied the suggestion he had been told the claimant was a trouble-maker who had to be dealt with a firm hand. Mr Mackenzie described that the process had been very "clinical" with papers being left for him to review. The thrust of the claimant's case was that there was a conspiracy within the catering department to cover up bullying and racism and to discredit and punish those who complained. If

that was correct, it would have involved a very large number of people, including those from HR and outwith the catering department. We formed no impression whatsoever of any conspiracy or cover up.

403. The claimant, at this Hearing, presented a sophisticated case with Mr O'Dair very skilfully drawing out points and making links to support the case. However, as we have stated before, this was not the case the claimant presented during the investigation and the disciplinary hearing.

404. We concluded there was no causal connection between the protected disclosure and the dismissal of the claimant. The motivation for the dismissal arose from the fact Mr Mackenzie sought an explanation why the statements in the email had been made, and did not get one; and, the manner in which the email had been copied to all of the zero hours contract staff. In addition to this, and unrelated to the matters contained within the email, the claimant had failed to follow the correct procedure to raise his concerns; he had acted inappropriately towards Ms McInnes; he failed to attend the disciplinary hearing on the 1st October and Mr McInnes was not confident the claimant would not send a similar communication in the future.

405. We decided to dismiss this claim.

Article 10 and Article 11 ECHR

406. We had regard to the Human Rights Act and to Schedule 1 Part 1 of that Act which sets out Articles 2 to 12 and 14 of the Convention. Article 10 provides that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the

protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

407. Article 11 provides that everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. The restrictions on this right are as set out above.

408. The representatives agreed the claimant could not bring a free standing claim to the effect these freedoms had been breached. The claimant however argued that breach of these freedoms went to the heart of the fairness of the dismissal. Mr O'Dair submitted that disciplining the claimant for the content of the email and because he copied it to zero hours colleagues was a breach of the claimant's freedoms under Articles 10 and 11 and therefore, unless the respondent could justify their interference with those rights, the dismissal must be unfair.

409. The respondent accepted that in determining the fairness of the dismissal of the claimant, the Tribunal had to give effect to section 98 Employment Rights Act in a way which was compatible with the European Convention on Human Rights.

410. We were referred to the case of **Heinisch v Germany** where an employee had been dismissed without notice on the ground she had lodged a criminal complaint against her employer, and the domestic courts had refused to order her reinstatement. There was no dispute regarding the fact the criminal complaint had to be regarded as whistleblowing and that this fell within the ambit of Article 10. Further, there was no dispute that the dismissal amounted to an interference with the employee's rights under Article 10. The issue to be determined was whether the interference was prescribed by law and necessary in a democratic society.

411. The European Court of Human Rights held that the fundamental principles underlying the assessment of whether an interference with the right to

freedom of expression is proportionate are to be looked at in the light of the case as a whole. The Courts, whilst acknowledging that whistleblowing should in certain circumstances, enjoy protection, were also mindful that employees owe to their employer a duty of loyalty, reserve and discretion. In light of this duty, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information can be disclosed, as a last resort, to the public. In assessing whether a restriction is proportionate, therefore, the Courts will take into account whether the applicant has any other effective means of remedying the wrongdoing which he intended to uncover…

412. The Courts will also have regard to a number of other factors when assessing the proportionality of the interference in relation to the legitimate aim pursued. The second factor relevant to this balancing exercise is the authenticity of the information disclosed. It is open to the competent State authority to adopt measures intended to respond appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith. Moreover, freedom of expression comes with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable. On the other hand the Courts must weigh the damage, if any, suffered by the employer as a result of the disclosure and assess whether such damage outweighed the interest of the public in having the information revealed. The motive behind the actions of the reporting employee is another determinant factor in deciding whether a particular disclosure should be protected or not. For instance, an act motivated by personal grievance or personal antagonism would not justify a particularly strong level of protection. It is important to establish that, in making the disclosures, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other more discreet means of remedying the wrongdoing was available to him. Finally the review of proportionality requires a careful analysis of the penalty imposed on the applicant and its consequences.

413. Ms McLellan referred the Tribunal to the case of **Palomo v Spain 2011 IRLR 934** and **Ahmed v United Kingdom 1999 IRLR 188** and we had regard to those cases. We noted from the first case that Article 10 does not guarantee an unlimited freedom of expression (threatening, abusive or insulting words or behaviour will not be covered) and the protection of the reputation or rights of others constitutes a legitimate aim permitting a restriction of that freedom. Further, it was held that an attack on the respectability of individuals by using grossly insulting or offensive expressions in the professional environment was liable to cause disruption in the workplace and therefore it exceeded the bounds of the right to freedom of expression.

414. The claimant, in his email of 14 July, made a number of very serious allegations regarding the management team in the catering department. We acknowledged that if the employer's reaction was one where the claimant had simply not been permitted to raise concerns, that may have been a breach of his freedoms under Article 10. However, that was not the case here: the claimant could have raised a grievance and given the respondent an opportunity to address his concerns. Furthermore, the claimant was not disciplined for making the statements, he was disciplined because he made them and then could not, or would not, offer any explanation for having made them. That is an entirely different situation.

415. We concluded the claimant's statements in the email of 14 July were not covered by Article 10; however, if we are wrong in that, we were satisfied the respondent's interference with that right was proportionate and justified and that they had a legitimate aim in restricting offensive and potentially defamatory statements which were likely to cause disruption in the workplace.

416. We further concluded, with regard to Article 11, that it had not been engaged in the circumstances of this case. Mr O'Dair sought to argue that the email enabled the claimant to pursue or advance common causes or interests and in this way engaged Article 11. However, the evidence before this Tribunal

did not support that position. There was no evidence to suggest the claimant sought to represent the collective interests of his colleagues: he did not speak to them about sending the email, he was not asked by them to send the email and some of those to whom he copied the email disagreed with its contents and his actions in sending it.

417. We, for these reasons, could not accept the submission that there had been unjustified interference with the claimant's freedoms under Articles 10 and 11. We were accordingly satisfied these matters had no impact on the fairness of the dismissal.

Unfair Dismissal

418. We had regard to section 98 Employment Rights Act which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2). Second, if the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair under section 98(4) and this requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

419. The respondent admitted, in their response to the claim, that they had dismissed the claimant and asserted the reason for dismissal was conduct, which is a potentially fair reason for dismissal falling within section 98(2)(b). The claimant's position was that he was dismissed because he made a protected disclosure or because he had done a protected act. We have already decided (above) that the protected disclosure was not the reason for dismissal (and we decided, below, that the claimant was not dismissed because he had done a protected act). Accordingly, we must decide whether the respondent has shown the reason for dismissal.

420. We had regard to the case of **British Home Stores Ltd v Burchell** (supra) where the EAT held that the employer must show that:-

(i) it believed the employee was guilty of the misconduct;

(ii) it had in mind reasonable grounds upon which to sustain that belief and

(iii) at the stage at which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

421. Mr O'Dair, in his submission, referred the Tribunal to the case of **X v Y** (supra) which, he submitted, meant the Tribunal had to make its judgment on unfair dismissal on the facts which were, or ought to have been, before the decision maker and to confine its findings of primary fact (that is, what really happened) to contribution. The law was set out in the case referred to, and was as follows:

- if the respondent's conduct was prima facie an infringement of Convention Rights then the Tribunal will need to consider whether the interference was justified by a qualification to the right contained within the ECHR itself;

- if it is not then the employer will almost always be in breach of section 98(4) which must be read so as to make it comply with the Convention and

- since the qualifications almost always involve questions of proportionality the band of reasonable responses test does not to this extent apply.

422. We decided (above) that the respondent's conduct was not an infringement of Convention Rights, and accordingly we concluded that the tests to be

applied by this Tribunal were those as set out in the **Burchell** case together with the band of reasonable responses.

423. We looked firstly at the investigation carried out by the respondent in this case, and took into account the case of **Sainsbury's Supermarkets Ltd v Hitt** (supra) where the EAT held that the band of reasonable responses applies to an employer's investigation and accordingly it is for the Tribunal to decide whether the investigation carried out by the employer fell within that band.

424. We noted the employer's task is to gather all the available evidence and once in possession of the facts, the employer will be in a position to make a reasonable decision about what action to take. We also noted that the extent of an investigation will vary according to the particular circumstances, although the more serious the allegations the more thorough the investigation should be.

425. The claimant faced six disciplinary allegations as follows:

> *1. That you have made serious, potentially defamatory, and currently unsubstantiated statements namely:*
>
> *(a) "key management figures have been shown to use unscrupulous methods when dealing with employees, to white wash and discredit them rather than listen to their concerns";*
>
> *(b) "you [management] have enabled a culture of bullying and racism in the work place, and seek to take a prejudicial stance against those who challenge your lack of concern";*
>
> *(c) "management are prepared to lie to zero hours staff, as has been exposed in a recent succession of sham grievance procedures which I have been witness to".*

2. *That you shared, and therefore published, these potentially defamatory statements by copying other members of University staff into the email.*

3. *That you have committed a serious breach of confidentiality by referring to recent confidential grievance procedures.*

4. *That you have failed to follow the appropriate University procedures in relation to complaints to do with matters relating to your employment with the University.*

5. *The manner and content of your conversation with Ms McInnes on 16 July 2015, which took place in Ms McInnes' office and*

6. *Failure to comply with a reasonable management instruction by not attending the Disciplinary Hearing on 1 October 2015.*

426. Ms McGregor carried out the investigation and she met with the claimant on two occasions to obtain information from him in response to the allegations. There was no dispute regarding the fact the claimant had sent the email, and had copied it to the zero hours staff. We noted the thrust of the investigation was to give the claimant an opportunity to explain why he had made the various statements referred to in the email. Ms McGregor wanted, for example, to understand who the "key management figures" referred to were, what "unscrupulous methods" referred to, when they had been used and who was involved and what the claimant meant by referring to "white wash and discredit". This was an entirely reasonable and appropriate approach because without this information Ms McGregor would not be able to investigate and consider whether there was merit in the claimant's statements.

427. Ms McGregor and Ms Porter found the claimant's responses to questions to be unclear, confused and confusing. The claimant struggled to give a clear

answer to questions and could not/would not provide the information requested to support the statements he had made in the email. For example, Ms McGregor wished to know to whom the phrase "key management figures" referred and she asked the claimant if it referred to Ms McInnes. The claimant responded to say it referred to "Hospitality management". Ms McGregor tried to clarify whether it was a reference to Ms McInnes, her deputies or supervisors and the claimant responded to say "that was difficult" and refused to comment further. Accordingly the only conclusion Ms McGregor could draw, based on the information provided by the claimant that the term "key management figures" was a reference to the entire management team within Hospitality.

428. Ms McGregor asked the claimant to provide the names of people he would like to call as witnesses. The claimant told Ms McGregor he would "like to say to people first about this …. in case they felt coerced into being a witness". The claimant's position resulted in him not calling any witnesses to the investigation or disciplinary hearing and not providing Ms McGregor with the names of people he wished her to interview regarding the statements he had made.

429. The key issue which the claimant relied upon to explain his reluctance, or inability, to provide information to Ms McGregor was twofold: (a) that he could not provide information which had been included in a confidential grievance process and (b) that if Ms McGregor looked into Ms Loveman's grievance she would find the information which the claimant was relying upon.

430. We have already set out the reasons for our conclusion that the claimant was not prevented, or led to believe he was prevented, from raising information from previous grievances. We preferred the respondent's evidence and that of Ms Sipponen and concluded the claimant's reluctance to provide information arose from his own views regarding confidentiality and the restrictions he put on himself.

431. Mr O'Dair submitted there was a flaw in the investigation carried out by Ms McGregor because she failed to look into the Loveman grievance to discover the information provided in that grievance. We could not accept that submission for two reasons: firstly, the claimant refused to clarify that the grievance to which he was referring was the Loveman grievance. He was asked about the "sham grievance procedures" and to explain what this referred to, and he refused to give a straight answer. We acknowledge Mr O'Dair's position that it must have been obvious that the claimant was referring to the Loveman grievance because that was the only grievance he had been present at, but we considered that position was adopted with the benefit of hindsight and constructing the claimant's case. We did not consider that at the time of these events it was clear and that was precisely why Ms McGregor asked the claimant to clarify. It is not for an employer to make assumptions or jump to conclusions regarding what an employee may or may not be referring to. Further, the claimant had, in the email referred to sham grievance "procedures" which implied that he was referring to more than one grievance procedure.

432. The second reason we could not accept Mr O'Dair's submission was because it was not Ms McGregor's role to re-open Ms Loveman's grievance. She asked the claimant time and again what it was he wanted to refer to and he could not, or would not, answer. We, having heard all of the evidence in this case, still do not know what it was the claimant wanted to refer to. The claimant did not, in his evidence, to this Tribunal, explain what he would have told Ms McGregor if he had been able to refer to the Loveman grievance. It appeared to this Tribunal that the only matters the claimant wished to complain about were the matters he had already raised during the Loveman grievance and which had been investigated. We acknowledge the claimant may not have been satisfied with the outcome of the investigation, but if that was his position the onus was on him to explain to the employer (and to this Tribunal) why he was not satisfied with it. The claimant referred to "unscrupulous methods" but without the claimant's explanation regarding what those unscrupulous methods were, who adopted them and when, the

respondent would have no understanding of the claimant's complaint and no ability to investigate it.

433. The claimant did refer to a number of issues during the investigation, but the issues referred to were the same ones he had raised during the Loveman grievance. For example, the situation with Mr Anyiam. This was a situation which the respondent was aware of and dealing with. If the claimant was not satisfied with this the onus was on him to explain why: it was not sufficient to simply raise Mr Anyiam's situation as a generality because all the respondent could do with this was refer to the fact it had been investigated and a decision had been taken that Mr Anyiam had reacted due to provocation.

434. The same point can be made regarding "the pit bull". There was no dispute regarding the fact concerns had been made regarding the conduct of this member of staff, however those concerns had been investigated. If the claimant was critical of Ms McInnes' decision regarding this aspect of the Loveman grievance, the onus was on him to explain what he regarded as the failings of Ms McInnes. The respondent could not take forward bold assertions that, for example, there had been a "white wash" because there was no understanding what this meant. Furthermore, it appeared the respondent had acted on concerns regarding the behaviour of the member of staff because there was evidence that she had been issued with a disciplinary warning.

435. We concluded the claimant was not prevented by allegation 3, or the respondent, from raising issues to explain why the statements, in the email had been made. However, the claimant either did not, or would not, provide the information being sought; and any incidents he did refer to had already been investigated and he provided no explain why those matters should be re-opened or looked at again.

436. Ms McGregor did, in relation to allegation 5, interview Ms McInnes. Ms McGregor also raised with Ms McInnes the fact the claimant had told her he

had raised concerns with Ms McInnes regarding bullying and harassment. Ms McInnes confirmed the claimant had done so within the context of a complaint raised by another member of staff. Ms McInnes told Ms McGregor that the claimant, when asked about these matters, had failed to give specific examples of the issues raised. Ms McInnes had investigated all of the matters during the grievance, but had not found any evidence to support the concerns. Ms McGregor was satisfied, following this discussion, that the claimant's concerns had been dealt with and she had no additional information which would lead her to re-open these matters.

437. Ms McGregor also watched the video footage of Ms Barr at the Select Committee.

438. We concluded, having had regard to all of the above reasons, that the investigation carried out by the respondent fell within the band of reasonable investigations which a reasonable employer might have adopted.

439. We next asked whether the respondent had reasonable grounds for believing the claimant was guilty of misconduct. We concluded the respondent had reasonable grounds, based on its investigation, to believe the claimant had made three serious, potentially defamatory, and currently unsubstantiated statements in the email of 14 July. Ms McGregor and Mr McKenzie had reasonable grounds to believe the claimant had made those statements: the statements were serious, they were potentially defamatory and the claimant, when asked to substantiate the statements, had been unwilling or unable to do so.

440. Mr O'Dair invited the Tribunal to accept that the use of the term "substantiate" meant the claimant was being asked to "prove" what he said was true. We could not accept that suggestion because the evidence did not support it. The claimant, very clearly, was asked to explain what he had said because the respondent wanted to understand the basis for the claimant making the statement so they could investigate. The claimant was not asked to "prove" what had been said.

441. There was no dispute, in relation to allegation 2, that the claimant had sent the email and deliberately copied in the zero hours contract staff. The claimant had not spoken to the other zero hours contract staff prior to naming them on the email or copying them into the email; and he had not established whether they agreed with what was said. We concluded the respondent had reasonable grounds to believe the claimant had published the serious allegations which he had made against the University.

442. Mr MacKenzie did not uphold allegation 3 because he was satisfied the claimant had not made reference to any particular grievance or disclosed the identity of any party. The claimant had been asked during the disciplinary process whether the term "sham grievance procedures" referred to a particular grievance or grievances, and had adopted the position that the term meant something he did not agree with. Ms McGregor had been prepared to assume this was a reference to a confidential grievance procedure, but Mr MacKenzie was not prepared to make this assumption and was satisfied there had not been a breach of confidentiality in circumstances where a specific grievance or party had not been disclosed.

443. There was no dispute in relation to allegation 4 that the claimant was aware of the respondent's grievance procedure. We were satisfied Mr MacKenzie had reasonable grounds to believe the claimant had not followed the correct procedure.

444. Allegation 5 related to the claimant's conversation with Ms McInnes on 16 July. Ms McGregor acknowledged that she was faced with differing accounts of what had happened and she therefore adopted the approach of focussing on what was agreed in the accounts of Ms McInnes and the claimant. On that basis she concluded it was wholly inappropriate for the claimant to visit Ms McInnes' office to discuss the letter (which was a letter of invite to attend a disciplinary investigation) and to ask her if she felt "threatened". Mr MacKenzie confirmed the claimant agreed he had visited Ms McInnes' office to challenge the need for a disciplinary investigation and that he had said to

Ms McInnes "is it because you feel threatened that you have been exposed in front of your peers". We concluded that in circumstances where there was no dispute regarding the fact the claimant had made that statement and visited the office intent on challenging the need for an investigation, that there were reasonable grounds for the respondent to believe the claimant guilty of allegation 5.

445. The final allegation related to the claimant failing to attend for the disciplinary hearing arranged for 1 October. Mr MacKenzie acknowledged that he found the claimant's email of 30 September (sent at 9.36pm) when he returned to the office after the disciplinary hearing at which the claimant failed to appear. The claimant did not attend the disciplinary hearing because he felt it would be "unwise" to do so, and he also referred to having taken the last few days to recap on matters and that he had only just received the minutes from the meeting on 13 August and had not yet finished analysing them.

446. Mr MacKenzie made enquiries of HR and ascertained the minutes of the meeting of 13 August had been sent out to the claimant on 27 August. He also noted the claimant did not provide any feedback on the minutes although he subsequently suggested they did not represent an accurate account of the meeting. There was no dispute regarding the fact the claimant attended for work on 1 October.

447. Mr MacKenzie was satisfied there was nothing to prevent the claimant from attending the disciplinary hearing and making these points. We considered there were reasonable grounds to sustain that conclusion.

448. We next asked whether the respondent did believe the claimant guilty of the misconduct in question, and we were satisfied that they did hold this genuine and reasonable belief. We concluded the respondent had shown the reason for dismissal was conduct, which is a potentially fair reason for dismissal falling within section 98(2)(b) Employment Rights Act.

449. Mr O'Dair submitted the real reason for dismissal was because the respondent resented the fact the claimant would not let go of the complaints about bullying and grievances which he had raised not being properly investigated. We could not accept that submission given the reasonable investigation carried out by the respondent and the evidence of the respondent's witnesses. They were asked whether this was the real reason for dismissal, and whether Ms McInnes had been angry/frustrated by the claimant raising these matters again in the email. The respondent's witnesses, and Ms McInnes in particular, rejected those suggestions.

450. We accepted the clear evidence of Ms McGregor, Ms Porter and Mr MacKenzie that they tried to obtain information from the claimant so they could investigate; that there was no bar on him raising matters which had been previously raised in prior grievances and the respondent would re-open matters already investigated if there was good reason to do so, like further information: the respondent would not investigate the same issue again simply because a person was not satisfied with the outcome.

451. Mr O'Dair also submitted that the real reason for dismissal had been conceded by Mr MacKenzie when he was being cross examined on sanction and said the claimant would have to have agreed not to raise bullying and racism again in order to avoid dismissal. We could not accept Mr O'Dair's submission because in response to the question "*to avoid dismissal he would have to say he would not raise issues of bullying and racism again"* Mr MacKenzie responded "No, the issue was not about raising the issues. The dismissal was based on the allegations being misconduct." We accepted Mr MacKenzie's evidence that he drew a distinction between the claimant's ability to raise issues (which there was no objection to) and the manner in which the claimant did so.

452. We must now go on to consider the fairness of the dismissal for that reason.

453. Mr O'Dair was critical of Mr MacKenzie for a number of reasons, and we considered each of them. The first criticism was to the effect Mr MacKenzie

had been disingenuous in his denial of knowledge of the prior grievance process. We concluded (above) that Mr MacKenzie did not know the details of Ms Loveman's grievance (he stated he did not know what Loveman's grievance "entailed"), and he did not "know" that the prior grievance process referred to was Ms Loveman's. We could not accept this criticism of Mr MacKenzie because there is a difference between having knowledge of something (for example the details of a grievance) and knowing the name of the person who brought the grievance being referred to. Mr MacKenzie was not a member of the Hospitality department and had no knowledge of the claimant. There was nothing to suggest why Mr MacKenzie would have had knowledge of Loveman's grievance, other than the inference of a conspiracy, and we have already explained why we could not accept there was a conspiracy in this case.

454. The second criticism was that he demonstrated a complete disinterest in following up the examples of bullying and harassment provided by the claimant Ms Lama and Ms Sipponen. We had regard to the evidence of Mr MacKenzie and we were satisfied that when the claimant raised an example of bullying and harassment, Mr MacKenzie tried to ascertain more information which included gaining an understanding whether the matter had been raised with management previously. The issues referred to by the claimant had been raised previously and Mr MacKenzie was satisfied there was no basis for him to re-examine them. We referred above to the example of Mr Anyiam's name being given when asked to explain the reference to racism. The difficulty with this, however, was that Mr Anyiam's case had been investigated by the respondent, and the claimant did not ever give Mr MacKenzie information to allow him to understand (and therefore investigate) what it was about the previous investigation and outcome that merited further investigation and reconsideration.

455. We also had regard to the evidence of Ms Sipponen who asserted Mr MacKenzie had not been interested in hearing what she had to say, but then, when referred to the notes of the meeting, she acknowledged that she had been given the opportunity to have her say at the end of the meeting.

The point at which Mr MacKenzie stopped her was because he wanted to hear what the claimant had to say. Mr MacKenzie, having heard from Ms Sipponen, was satisfied that the matters she referred to had also been investigated.

456. We, for these reasons, could not accept that Mr MacKenzie had shown complete disinterest in following up examples of bullying and harassment.

457. The third criticism related to allegation 3 and the suggestion that Mr MacKenzie had been fully aware that this was the reason the claimant was unable to defend himself. We had regard to the cross examination of Mr Mackenzie on this point and we noted the following points:

Q – if the claimant had an example of bullying and racist behaviour which arose during the Loveman grievance, he couldn't raise this because of allegation 3?

A = I read it somewhat differently because he referred to a culture and a culture does not exist based on one example.

Question was put again.

A = If he had examples he could have brought them forward. I made it clear I wanted examples. Plus if he had said he had examples but was unsure if he could raise them, I would have discussed this. He was not prevented from raising things.

Q – On page 83 (investigation notes from 6 August) at paragraph 52, Ms McGregor was indicating there were things he could not provide?

A = It could be an interpretation. I don't know what she meant.

Q – this would be a concern if it was said?

A = yes, but I am not sure it says what you've said. Plus I was not looking at this one thing; he said there was a culture so where were the examples.

Q – supplementary page 40 (claimant's notes of 6th August) on page 56, Ms Porter said you're bound by confidentiality there so you're struggling to give further examples?

A = If she was closing him down that would be inappropriate, but there are different interpretations. What was her rationale for this?

Q – she says this because allegation 3 says you can't refer to confidential grievances?

A = I think that's fair.

458. We concluded, having had regard to the totality of Mr MacKenzie's evidence that he did not consider the effect of allegation 3 was to prevent the claimant from being able to defend himself. We considered this conclusion is supported by the fact Mr MacKenzie did not uphold allegation 3 because the claimant had not, in the email of 14 July, made reference to a specific grievance and had not disclosed the identity of any individual.

459. The fourth criticism was Mr MacKenzie's willingness to add to the allegations at every opportunity. We could not accept this criticism because there was no evidence that Mr MacKenzie decided to add to the allegations. The evidence suggested that HR had a significant involvement.

460. We next had regard to the case of **Iceland Frozen Foods Ltd v Jones** (supra) where the EAT held that the correct approach to determining the fairness of a dismissal is to decide whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might adopt. We were also referred to **Governing Body of Beardwood Humanities College v Ham** where the EAT held that

the proper focus should be on the employee's conduct as a whole and the impact of that conduct on the sustainability of the employment relationship.

461. We, in considering the fairness of the dismissal, had regard to the procedural fairness of the dismissal. The case of **Polkey v A E Dayton Services Ltd** established procedural fairness as an integral part of the fairness of a dismissal. The claimant made a number of challenges to the procedural fairness of his dismissal. The first such challenge related to the investigation of Ms McGregor being inadequate and oppressive. We have already concluded above that the investigation carried out by the respondent was within the band of reasonableness and accordingly we could not accept the submission that the investigation was inadequate. Mr O'Dair suggested Ms McGregor and Ms Porter had teamed up during the investigation to shout down the claimant. We could not accept that submission because it did not reflect the evidence before this Tribunal. The evidence of Ms McGregor supported by the notes of the meetings demonstrated she had taken a very careful approach to trying to extract information from the claimant. She was not dismissive of what he said and she did not badger him. She listened to what he said and tried to bring some clarity to the very confused picture painted by the claimant.

462. The second challenge related to the effect of allegation 3. We have already dealt with this above, and we concluded allegation 3 did not have the effect Mr O'Dair invited us to accept. We were satisfied the claimant was not prevented, or led to believe he was prevented, from referring to matters raised in previous grievances.

463. The third challenge was that Ms McGregor and Ms Porter did not provide Mr Mackenzie with full and accurate notes. This challenge is based on the claimant's transcript of the meetings, and we have already dealt with this above and explained why we preferred and relied on the notes of the meetings produced by the respondent.

464. The fourth challenge was that Ms McGregor and Ms Porter wilfully failed to take up the invitation to read the notes of the Loveman grievance. We have already dealt with this above.

465. The fifth challenge was that when the claimant provided an example of bullying (Mr Anyiam) they failed to investigate it. We have already dealt with this above and concluded that Ms McGregor ascertained that this matter had been raised with management previously and investigated, and accordingly there was no reason (in the absence of any further information from the claimant) to re-open that matter.

466. The sixth challenge related to the Mr MacKenzie not being sufficiently trained for the job. This challenge was based on Mr MacKenzie not understanding the reference to "protected disclosure" or the reference to "confidential grievance processes". Mr MacKenzie acknowledged that the term "protected disclosure" was not familiar to him and he had not understood the claimant was "whistleblowing". He also acknowledged that when he read the reference to "confidential grievance processes" he did not know this was a reference to the Loveman grievance. Mr MacKenzie considered this to be a positive because it meant he was coming to the process fresh.

467. We asked ourselves whether the fact Mr MacKenzie did not understand the claimant was making a protected disclosure rendered the process unfair because he was not sufficiently trained for the job. We noted there was nothing to suggest what Mr MacKenzie would have done differently if had he known the claimant was making a protected disclosure, and in the absence of any such evidence, if was difficult to assess what impact Mr Mackenzie's lack of knowledge actually had. This was not a situation where the claimant made Mr MacKenzie aware during the disciplinary hearing that he was whistleblowing: there was no reference to it and the claimant did not seek to use, or obtain information about, the respondent's whistleblowing policy.

468. We concluded that the mere fact Mr MacKenzie did not understand the claimant was making a protected disclosure did not render him insufficiently trained for the job. The vast majority of cases which come before this Tribunal and concern whistle blowing, involve parties who were unaware at the time that a protected disclosure was being or had been made.

469. The seventh challenge was that Mr MacKenzie had failed to follow up on examples of racism provided by the claimant and Ms Lama, and had failed to look into the background of the Loveman grievance. We were satisfied that Mr MacKenzie did not follow up on the examples he was given because they had previously been reported to management and had already been investigated. He was not given any new information which would have caused those matters to be re-opened.

470. The final challenge related to the appeal process where there had been unacceptable delay and where Ms Thomson had not informed the appeal panel they had a discretion to allow the claimant a legal representative. We noted, in terms of time scales that the appeal hearing was initially scheduled for 16 November. The claimant sought a postponement of this appeal hearing to allow him time to seek legal advice. The respondent granted this request and re-arranged the appeal hearing to 23 November.

471. The appeal hearing took place on 23 November but it was agreed the hearing would adjourn in order for the appeal panel to read and consider the new revised grounds of appeal.

472. The claimant was advised by email of 11 December that a new appeal panel had been appointed and that the appeal would take place on 22 December.

473. We accepted Ms Thomson's evidence that the delay had been caused by difficulties in trying to find a date for the re-arranged appeal which suited the members of the appeal panel, and eventually the decision had been taken to appoint new members to the appeal panel in order to make progress. We noted there was a delay of 18 days between the adjourned appeal hearing

and the claimant being notified of the new date. We did not consider this to be an unreasonable or unacceptable delay in the circumstances and particularly given the fact the respondent had agreed to the claimant's request to postpone and re-arrange the first appeal hearing date.

474. Ms Thomson accepted that she had briefed the appeal panel regarding the claimant's request to be accompanied by a legal representative, and she had also made reference to the University's policy. Ms Thomson accepted she had "probably not" explicitly made reference to the fact an exception to the policy could be made. We did not consider this to be a procedural error of sufficient weight to impact on the fairness of the dismissal, because the respondent acted within the terms of its policy regarding representatives at hearings (and, in any event, the claimant withdrew his appeal).

475. We next asked ourselves whether the decision of the respondent to dismiss the claimant was fair or unfair. Mr MacKenzie took the decision to dismiss the claimant. We have set out above that as much investigation as was reasonable in the circumstances of this case was carried out; that the respondent had reasonable grounds upon which to sustain their belief that the claimant was guilty of allegations 1, 2, 4, 5, and 6 and that they did genuinely and reasonably believe the claimant was guilty of the misconduct alleged. We have also set out above our conclusion that the respondent followed a fair procedure when dismissing the claimant.

476. Mr MacKenzie was keen to ascertain from the claimant whether he accepted his conduct had been inappropriate. The claimant, when asked about this, accepted that he might alter the language used in the email, but would give no assurance that he would not send the same type of email again. Mr MacKenzie concluded from this exchange that the claimant appeared not to accept his conduct was unacceptable, and he had no confidence the claimant would not act in the same way again. Mr MacKenzie further concluded that given this, and the seriousness of the claimant's conduct, that a sanction less than dismissal was not appropriate.

477. We decided the decision of the respondent to dismiss the claimant for gross misconduct fell within the band of reasonable responses which a reasonable employer might adopt. We reached that conclusion having had regard to the investigation carried out by the respondent; the fact the claimant was given every opportunity during the investigation and disciplinary hearing to provide information and explain his position; the fact they had reasonable grounds upon which to sustain their belief in the guilt of the claimant; the fact the allegations against the claimant were serious and the fact he showed no remorse for his actions and gave the respondent no confidence he would not repeat his actions.

478. We decided to dismiss the claim of unfair dismissal.

Victimisation

479. We had regard to section 27 Equality Act which provides that a person victimises another person if s/he subjects that other person to a detriment because that other person does a protected act. The claimant alleged he had done a protected act when he supported allegations of alleged racism by Ms Loveman in the course of a grievance process against the respondent; supported Ms Loveman by attending a grievance hearing with her as her companion and when he made allegations of race discrimination against the respondent in the email of 14 July.

480. The respondent accepted the claimant had done the protected acts as alleged. The respondent, however, denied the claimant was victimised because he had carried out the protected acts.

481. The claimant alleged he had been victimised when the respondent initiated disciplinary proceedings against him and when they dismissed him.

482. We had regard to the case of **Nagarajan v London Regional Transport** (supra) where the EAT held the claimant must show he was subjected to a detriment because he had carried out a protected act. The claimant does not

need to show the protected act was the sole reason for the detriment, but if the protected act had a significant influence on the respondent's decision making then the victimisation case will succeed.

483. We were also referred to the case of **Pasab Ltd t\a Jhoots Pharmacy v Woods** (supra) where the EAT, upheld by the Court of Appeal, found the employee had been dismissed because her employer believed she had made an offensive racist comment and not because she had done a protected act. The two things were separable. (We also had regard to the **Martin v Devonshire Solicitors** case).

484. We noted that the decision to institute disciplinary proceedings was prompted by the fact the claimant sent the email of 14 July, which the respondent considered made serious and potentially defamatory allegations and which had been copied to a large number of zero hours staff. The question we must address is whether the protected act of making allegations of race discrimination prompted the institution of disciplinary proceedings. We were entirely satisfied that the fact the email raised allegations of race discrimination was not the reason for the institution of disciplinary proceedings and did not influence the respondent's decision in this matter.

485. The evidence of the respondent's witnesses was consistent and reliable regarding the fact there was no bar to the claimant raising these matters and no feelings of anger or frustration that he had done so. Ms Porter confirmed employees are free to raise matters which have already been raised: the only limitation is that the respondent will not investigate matters which have already been investigated unless there is good reason to do so (for example, new information).

486. Ms McInnes also wholly rejected the suggestion she had been frustrated with the claimant because he would not let go of the matters raised in the Loveman grievance.

487. We noted the decision to institute disciplinary proceedings was taken by Ms McInnes and Ms Porter. Ms McInnes' evidence was clear to the effect she sought advice from Ms Porter regarding the email because she unsure of how to respond, unsure of its impact on the meeting arranged with zero hours staff to discuss new contracts and worried about the impact on other staff who did not agree with the content/sending of the email. We considered this evidence demonstrated the concern of Ms McInnes was not with the fact the claimant had raised race discrimination, but with much wider matters.

488. We also noted the disciplinary allegations against the claimant were not limited to the content of the email. Allegations 2, 3, 4 and 5 concerned the claimant's actions in sending the email to others; breaching confidentiality; not following the appropriate procedure and his conversation with Ms McInnes.

489. We were entirely satisfied, having had regard to the above points, that the claimant was not subjected to disciplinary proceedings because he had done a protected act: he was subjected to disciplinary proceedings because of the manner in which he had written the email in addition to the other allegations.

490. We next considered whether the claimant was dismissed because he had done a protected act or acts. We firstly noted that whilst Mr MacKenzie was aware Ms Loveman had raised a grievance, he was not aware of what this had "entailed". We were accordingly satisfied Mr MacKenzie did not dismiss the claimant because of the first two protected acts.

491. We next asked whether Mr MacKenzie dismissed the claimant because he had raised allegations of race discrimination. Mr MacKenzie was asked whether he had, essentially, been put up to deal with the claimant because he was a trouble maker and would not let the previous allegations go. Mr Mackenzie roundly rejected that suggestion and described the process which had been followed as "clinical". He had been given the paperwork and left to proceed.

492. We were satisfied Mr MacKenzie took the decision to dismiss because he was satisfied the claimant had either admitted misconduct, or there was sufficient information upon which to reasonably conclude the claimant had been guilty of the misconduct in question.

493. We decided for these reasons (which do not repeat much of what has been said before) to dismiss the complaint of victimisation.

Employment Judge: Lucy Wiseman
Date of Judgment: 30 June 2017
Entered in register and copied to parties: 3 July 2017