Case Number: 2301301/2016
2300447/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS J FORECAST**
MS B BROWN

BETWEEN:

Ms P Clarke

Claimant

AND

GlaxoSmithKline Services Unlimited

Respondent

ON: **4, 5, 6, 7, 8, 11 and 12 September 2017**

Appearances:
For the Claimant: **In person on day 1 and thereafter did not attend**
For the Respondent: **Mr M Salter, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claims fail and are dismissed.

REASONS

1. By claim forms presented on 12 July 2016 and 2 February 2017 the claimant Ms Phyllis Clarke claims ordinary and automatically unfair dismissal (whistleblowing), direct race discrimination, victimisation and whistleblowing detriment.

The claimant's postponement application

2. The claimant made a postponement application the week before the hearing commenced and renewed this on the first day of the hearing. When it was refused, it was immediately followed by a reconsideration application which we dealt with and we confirmed our original decision.

3. Written reasons were requested and given separately as the claimant pursued an urgent appeal to the Employment Appeal Tribunal. The

appeal was considered by The Honourable Lady Wise on 5 September 2017. It was held that the appeal had no prospect of succeeding and should not be allowed to proceed.

4. Following the refusal of the claimant's postponement application the claimant emailed the tribunal at 17:40 hours on 4 September to say that she "refused to participate" in what she described as an "unfair trial". She said she would be instituting proceedings against the Employment Tribunal.

5. The respondent requested that the hearing proceed which was the inevitable outcome of our decision not to grant a postponement.

The issues

6. At a preliminary hearing on 26 September 2016 Employment Judge Morton carried out an initial identification of the issues and made orders for further particulars.

7. A revised list of issues dated 23 February 2017 was filed pursuant to the Order of Judge Morton. It was an agreed list of issues. The parties agreed that it superseded and replaced the initial list of issues contained in the Order of Judge Morton dated 26 September 2017 and the claimant's Scott Schedules dated 17 October 2017 and 16 November 2016. References below to the "first claim" are references to case number 2301301/2016 presented on the 12 July 2016 and references to the "second claim" refer to case number 2300447/2017 presented on the 2 February 2017.

Jurisdiction

8. The claimant presented the first claim on 12 July 2016. The ACAS conciliation period ended on 19 June 2016. The claimant presented the second claim on the 2 February 2017 and no early ACAS conciliation was required because of the interim relief application.

9. The respondent contends that the claimant's claims of race discrimination were not presented to the Employment Tribunal in compliance with s123(1) of the Equality Act 2010 ("the 2010 Act") ie within time.

10. The claimant contends that the employment tribunal has jurisdiction to hear all her claims.

11. If, which is not admitted, the tribunal finds that the alleged acts are out of time the claimant contends that the acts are a series of connected acts done at the end of the period and/or it is just and equitable to extend time.

12. The respondent denies that any acts complained of constitute an act extending over a period within the meaning of section 123(3)(a) of the Equality Act and that therefore the tribunal does not have jurisdiction to

consider this complaint.

13. Further and/or in the alternative and without prejudice to the above, the respondent further contends that it would not be just and equitable in the circumstances for the Employment Tribunal to extend the time limits under which the claimant should have submitted her claims of race discrimination.

Protected Characteristic - race

14. The claimant describes herself as a black British woman of African Caribbean heritage (statement paragraph 1).

Section 13 Equality Act 2010 - Direct Race Discrimination

15. The claimant contends that the respondent treated her less favourably because of her race:

a. By Rory Gummerson HR manager and/or Mark Shelmerdine deliberately downgrading her to Grade 8 instead of Grade 7 when recruited between November 2013 to February 2014. The claimant was offered the job of Supply Planner at an annual salary of £39,000. This was increased to £40,000 following negotiation plus 8% bonus. The claimant's comparators are Jamie Morgan (white, male) and Olga Van Vlokhoven (white, female) who were appointed to the same role on higher grade, Grade 7 with a higher salary/bonus.
b. By suspending the claimant on 26 January 2016 on no reasonable basis.
c. By keeping the claimant on prolonged and unjustified suspension.
d. By failing to address the claimant's concerns about race discrimination adequately or at all from 3 December 2015 to submission of the first claim.
e. By failing to conclude the claimant's grievance complaints dated 11 February 2016, 16 March 2016, and 29 March 2016.
f. Being selected for redundancy. The claimant contends that the respondent sought to dismiss the person not delete the post. The claimant says that her job remained but in another guise.
g. Being put through a sham redundancy process.
h. Being put through a sham consultation process.
i. Failure to offer a suitable alternative job (paragraphs 22-24 ET1 second claim). With respect to the detriment alleged relating to suitable alternative employment the respondent asserts that the detriment should be worded as "failure to offer the claimant the role of Supply Planning Director" (being the one role for which the claimant applied).
j. By terminating the claimant's employment on 27 January 2017.

16. Save that the respondent accepts that the claimant's employment was

terminated on 27 January 2017, the respondent denies that the said acts occurred.

17. If so, (and including the claimant's dismissal) do the above acts amount to less favourable treatment because of the claimant's race?

18. The claimant relies upon the actual comparators referred to above and where no actual comparator is named she relies upon a hypothetical comparator who has no material difference in their circumstances relating to each alleged act of less favourable treatment save for their race.

19. Are there facts from which the tribunal could properly decide that the treatment of the claimant was less favourable than the treatment that would have been afforded to the actual or hypothetical comparator and such treatment was afforded to the claimant because of her race?

20. If so, has the respondent provided a non-discriminatory explanation for the treatment?

Section 27 Equality Act 2010 – Victimisation

21. The claimant contends that she was subjected to detriments because she did a protected act or the respondent believed that the claimant had done, or may do, a protected act.

22. It is contended that the following amount to protected acts:

    a. On 3 December 2015 an oral complaint by the claimant of discrimination and harassment made during her meeting with Mr. Shelmerdine at 16:00. The claimant complained asking why she was the only manager without a credit card and complained that she believed it was discriminatory.
    b. On the 7 December 2015 the claimant asked Mr Shelmerdine to go through with her complaints of bullying, harassment and discrimination and the claimant alleges that Mr Shelmerdine used words to the effect that she should not to include the acts of discrimination and only focus on the concerns from 2015.
    c. On the 8 January 2016 a written grievance complaining of bullying, harassment and discrimination. She complained about being awarded the lowest grade in the department for Supply Planners. A written complaint of discrimination and harassment in her email attaching an Excel spreadsheet to Mr. Shelmerdine dated 03 December 2015 and a second follow up email dated 08 January 2016 and 15 January 2016. The claimant stated that "in line with the issues raised around discrimination and being treated the same way as other team members, unfortunately I am unable to attend the meeting" or words to that effect;
    d. A grievance complaint of discrimination and harassment dated 29 January 2016. The protected act includes p. 334(a) – (b) from the claimant's bundle and the excel spreadsheet referred to therein;

e. On 12 July 2016 the first claim, alleging discrimination and harassment.

23. The respondent accepts that these are protected acts but disputes causation. The respondent does not take any point about the disclosures not being made in good faith.

24. The claimant alleges the following detriments:

a. By suspending the claimant on 26 January 2016 on no reasonable basis.
b. By keeping the claimant on prolonged and unjustified suspension.
c. By failing to address the claimant's concerns about race discrimination adequately or at all from 3 December 2015 to submission of tribunal complaint.
d. By failing to conclude the claimant's grievance complaints dated 11 February 2016, 16 March 2016, and 29 March 2016.
e. Being selected for redundancy. The claimant contends that the respondent sought to dismiss the person not delete the post. The claimant says that her job remained but in another guise.
f. Being put through a sham redundancy process.
g. Being put through a sham consultation process.
h. Failure to offer a suitable alternative job. With respect to the detriment alleged relating to suitable alternative employment the respondent asserts that the detriment should be worded as "failure to offer the claimant the role of Supply Planning Director" (being the one role for which the claimant applied).

25. If so, are these detriments?

26. If so, was the claimant subjected to the detriments because of doing the protected acts or because the respondent believed that the claimant had done, or may do, a protected act.

27. Was the claimant dismissed because of doing the protected acts?

28. If so, is the claimant disqualified from relying on the victimisation provisions of the Equality Act 2010 by virtue of section 27(3) which disapplied the statutory protection where the protected act was false or not made in good faith?

<u>Protected Disclosures – Detriment - section 47B Employment Rights Act 1996</u>

29. Did the claimant disclose the following information:

a. Verbal disclosure at a meeting on 3 December 2015 from 09:00-12:30 attended by her line manager Mr Mark Shelmerdine. The claimant says she disclosed information about Mr Shelmerdine's conduct of directing managers to mark the Grade 1's when they had not met their objectives, which was contrary to GSK guidelines on

calibration of grades, GSK Managers Guidance on Performance Rating Calibration and GSK guide on ratings for managers. The claimant followed up by email to Mark Shelmerdine on 3 December 2015 at 12:28.

b. Verbal disclosure in a one to one meeting with Mark Shelmerdine on 3 December 2015 on or around 16:00 followed by written disclosure by email attaching an Excel spreadsheet on 3 December 2015 to Mark Shelmerdine at 17:09. The claimant says she disclosed information about Mr Shelmerdine's conduct of directing managers to mark the Grade 1's when they had not met their objectives, which was contrary to GSK guidelines on calibration of grades, GSK Managers Guidance on Performance Rating Calibration and GSK guide on ratings for managers.
c. In the grievance hearing dated 15 February 2016 at which Paul Archdeacon, Melanie Backhouse and Suzanne Burton were present. The claimant says she disclosed the information as set out in the minutes of the hearing (bundle page 625) which she says included information about the performance review process being mismanaged resulting in selected staff being overrated and given grades that were unwarranted as set out under point 16 of those grievance minutes.
d. Verbal and written disclosure on 18 February 2016 by the claimant to Mr Adrian Lennox-Lamb. The claimant says that she disclosed information about Mr Shelmerdine instructing the claimant to commit a potential act of gross misconduct by disregarding and not following the performance rating policies and guidelines, which the claimant believed she was contractually bound to apply.
e. Written disclosure on 8 March 2016 to Ms Harinder Virdee via the Disciplinary Investigation Report reference UKHR10000087551. The report was created by Mr Lennox-Lamb and sent to Ms Virdee on or around 8 March 2016. The claimant refers to paragraph 3.15 of the Investigation Report (bundle page 1476), paragraph 3.95 (page 1489) and 4.13 (page 1494), Appendix 1.8 paragraph 51 (page 1556) of the bundle and appendices 58-61 (pages 1687-1693). In Appendix 1.8 point 13 (page 1538) the claimant called for an investigation into the conduct: The claimant described the decision to disregard the respondent's policies by them as "insubordination" and "gross misconduct", which she firmly believes should be investigated. The information disclosed included allegations of fraud by the management team which Ms Virdee apparently attempted to conceal in her rewording of the allegations (at page 1558) to those listed in the Disciplinary invite (bundle pages 728-729).
f. Written disclosure on 9 March 2016 to Ms Lisa Hughes (page 743). The claimant says that she disclosed information to Ms Hughes about Ms Vijay's grading being changed to a Grade 3 without any objective basis and prior to conclusion or outcome of the disciplinary investigation or proceedings. In the same email the claimant disclosed information about her whistleblowing concerns as it related to team members and others rated 3, 2, 1 outside the company performance procedures, leading to unfair bonus payments

and financial mismanagement and/or fraud.

g. Written disclosure on 16 March 2016 to the respondent's Speak Up line (pages 712-717). Report numbers 123156200 and 123156269. The claimant says she disclosed information about the management team's fraudulent activities in manipulating the bonus procedure and overrating the grading;
h. Written disclosure on 29 March 2016 to Mr Adrian Jones by the claimant in emails timed at 7:35am and 20:02. The claimant says she disclosed information to Mr Jones (Deputy Compliance Officer) at 07:35 about the respondent misleading the stock market and potential investors by issuing inaccurate financial statements (page 742);
i. Written disclosure on 29 March 2016 to Ms Hughes about her concerns in relation to Ms Virdee's failure to act on knowledge of financial mismanagement and/or fraud (page 743).
j. Written disclosure on 5 April 2016 to Ms Hughes. The claimant says that she disclosed information to Ms Hughes about her concerns about the concealment of fraud and victimisation for whistleblowing and victimisation for whistleblowing by email (page 767);
k. Written disclosure on 23 June 2016 to Ms Laura Hague and Mr Alex Henderson. The claimant says that she disclosed information about Ms Vijay, (page 1211).
l. By her ET1 in the first claim presented on 12 July 2016 the claimant referred to her whistleblowing concerns about the manipulation of bonus awards and complained that false information had been given about meeting the inventory target. Further, the claimant ticked the box in her claim form requesting that her whistleblowing complaint be referred to the regulator.

30. The respondent does not dispute that the communications were made. The respondent disputes that they are protected disclosures and disputes causation.

Qualifying Disclosures

31. If so, were they "qualifying disclosures" under section 43B(1) of the ERA? This requires resolution of the following questions in relation to each alleged disclosure:

32. Was there a disclosure of information?

33. If so, did these communications disclose information that tended to show:

a. that a criminal offence had been, was being or was likely to be committed namely fraud, or concealment of same.
b. that a person had failed, is failing or is likely to fail to comply with a legal obligation to which they were subject namely breach of the Equality Act 2010 (unlawful race discrimination), misleading financial markets, or concealment of same.

c. Were the disclosures made to the claimant's employer or other relevant person? This point did not appear to be in issue as the respondent did not contend otherwise.

34. If so, in relation to each of the alleged disclosures contained within the communications referred to above, whether the claimant believed this tended to show that the respondent:

a. had committed, was committing or was likely to commit a criminal offence or
b. had failed, was failing or was likely to fail, to comply with the legal obligations identified.
c. If so, was this belief reasonable?
d. Did the claimant believe this disclosure was in the public interest?
e. If so, was this belief reasonable?

Detriments

35. The claimant contends the following are the alleged detriments:

a. By suspending her on 26 January 2016 on no reasonable basis.
b. By keeping her on prolonged and unjustified suspension.
c. By failing to address her concerns about race discrimination adequately or at all from 3 December 2015 to submission of tribunal complaint.
d. By failing to conclude her grievance complaints dated 11 February 2016, 16 March 2016, and 29 March 2016.
e. Being selected for redundancy. The claimant contends that the respondent sought to dismiss the person not delete the post. The claimant says that her job remained but in another guise.
f. Being put through a sham redundancy process.
g. Being put through a sham consultation process.
h. Failure to offer a suitable alternative job (paragraphs 22-24 ET1 second claim). With respect to the detriment alleged relating to suitable alternative employment the respondent asserts that the detriment should be worded as "failure to offer the claimant the role of Supply Planning Director" (being the one role for which the claimant applied).

36. Are these detriments? If the events above are detriments, whether the claimant was subjected to these detriments on the grounds that the claimant made one or more of the protected disclosures.

Automatic Unfair Dismissal – section 103A ERA 1996.

37. Was the claimant automatically unfairly dismissed pursuant to section 103A ERA 1996 in that the reason or principal reason for her dismissal was that she had made any of the protected disclosures as set out above?

Ordinary unfair dismissal

38. If not, what was the reason for the claimant's dismissal? The respondent's case is that the reason for dismissal was redundancy.

39. The claimant does not contest the fact that there was a genuine redundancy situation (her witness statement paragraph 200).

40. If the claimant was dismissed for the potentially fair reason of redundancy, was the decision to dismiss the claimant fair in all of the circumstances. In particular:

    a. Was the selection process fair?
    b. Was the claimant adequately consulted?
    c. Did the respondent, where available, offer all suitable alternative employment, including making information available to the claimant with respect to any available suitable alternative employment? The respondent does not agree that this is a correct framing of the legal test.

41. If the tribunal finds that the decision to dismiss was procedurally unfair, would the claimant would have been dismissed in any event.

42. The claimant contends that the respondent was in breach of section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended) by its failure to carry out any fair disciplinary or investigation procedure and process. The clamant seeks an uplift of compensation of up to 25% for the alleged failures. The respondent denies that the ACAS Code of Practice on Disciplinary and Grievance Procedures applies.

43. Whether the claimant is entitled to an uplift, and if so, how much, in relation to the alleged breach.

Witnesses and documents

44. There was a witness statement for the claimant (75 pages and 216 paragraphs). It was not sworn in evidence.

45. For the respondent the tribunal heard from nine witnesses: (1) Ms Jasbinder Attwal, HR Manager, (2) Mr Mark Shelmerdine, the claimant's line manager, (3) Ms Harinder Virdee, an accountant and disciplinary hearing manager, (4) Ms Lisa Hughes, Employee Relations Director, (5) Mr Paul Archdeacon, a Programme Manager and the grievance officer, (6) Mr Alex Henderson, a Data Management Head and the grievance appeal officer, (7) Mr Sergio Hernandez, Global Head of Supply Chain Operations and then Global Planning Hub Lead who dealt with the restructuring, (8) Mr Raphael Weizenegger who is a Recruitment Account Manager and is not an employee of the respondent and (9) Ms Ruth Deane, HR Manager.

46. The evidence of Mr Weizenegger was taken by video link from Switzerland and the evidence of Ms Hughes was also taken by video link as she had recently been hospitalised and was not well enough to travel to the tribunal.

47. We had separate cast lists and chronologies from claimant and respondent and an opening note from the respondent. The claimant told the tribunal that she did not agree with the respondent's opening note.

48. A set of documents ran to seven lever arch files and over 2,300 pages.

49. We also had a small bundle containing the respondent's witness statements and the claimant's witness statement separately.

50. We had a written submission from the respondent to which counsel spoke. There was no submission from the claimant. We have considered fully the respondent's submission and the authorities referred to even if not expressly referred to below.

Findings of fact

51. As the claimant refused to participate in the hearing after her postponement application was refused, we heard the respondent's evidence which went unchallenged by way of cross-examination. The majority of our findings are based on the unchallenged evidence of the respondent's witnesses. We read the claimant's witness statement but this was not sworn in evidence. It therefore carried less weight than if the claimant had appeared as a witness.

<u>The claimant's recruitment and grading</u>

52. The claimant joined the respondent from L'Oreal on 17 February 2014 as a Supply Planner within the European Central Supply Hub at grade 8. The respondent's grades go in reverse order so that a 7 is higher than an 8. Supply Planners within the team are organised into teams. The Hub itself was set up towards the end of 2013.

53. Mr Mark Shelmerdine had the task of setting up and running the Hub. The Hub had a number of grade 6 Supply Planning Managers from different national backgrounds including Russian, Greek, Spanish, Italian, Irish and Spanish. In June 2015 Mr Jamie Morgan (who is white British) was seconded on an acting basis from a grade 7 role when one of the Supply Planning Managers took another temporary role.

54. The Hub employed about 60 people from diverse backgrounds. The (then) Supply Chain Director for the hub, Ms Winnie John, is of Indian ethnicity.

55. Supply Planners such as the claimant were recruited at both grade 7 and grade 8. The claimant's case is that when she was recruited Mr

Shelmerdine and Mr Rory Gummerson from HR deliberately downgraded her from a 7 to an 8. The respondent was recruiting at both grades for Supply Planners. The respondent did not have a fixed quota for the number to be appointed at each grade.

56. Mr Morgan was a strong internal candidate and was offered grade 7. His interviewers regarded him as someone who was likely to move quickly on to the role of Supply Planning Manager at grade 6. Mr Morgan performed very well in the Supply Planner's role.

57. The claimant did not perform to grade 7 in her interview and she was offered and accepted a grade 8. The criteria were based on experience and apparent technical proficiency (Mr Shelmerdine's statement paragraph 17).

58. Ms Olga Van Vlokhoven is a white Dutch national and she was also recruited from L'Oreal (like the claimant) as a Supply Planner. Ms Van Vlockhoven was recruited at grade 7. She had good experience and a good professional background. Mr Shelmerdine carried out her first telephone interview; he did not interview the claimant. He considered that based on Ms Van Vlockhoven's interview performance and experience she merited a grade 7. Ms Van Vlokhoven remained at grade 7 until she left to return to Holland in July 2016.

59. Mr Shelmerdine's view was that both Mr Morgan and Ms Van Vlockhoven were more experienced than the claimant and they justified a grade 7 on merit.

<u>Promotion to Data Analytics Manager</u>

60. Mr Shelmerdine took the view that the claimant was very technically proficient as a Supply Planner and he considered that she would be well suited to the role of Data Analytics Manager where there was a vacancy. Mr Shelmerdine suggested this to the management team and with their approval he discussed it with the claimant who took up this role a month and a half after commencing in employment with the respondent, on 1 April 2014. She rose very quickly from grade 8 to grade 7 with the consequent increase in pay and benefits.

61. We find based on Mr Shelmerdine's evidence that the appointments to Supply Planner were made on merit based on experience and technical proficiency. Mr Morgan was appointed to a grade 7 because he was a strong internal candidate and this was initially on an acting and not a substantive basis. Mr Shelmerdine interviewed Ms Van Vlokhoven and appointed her to grade 7 on merit based on her experience.

62. We find that the reason for the grading upon recruitment was on merit and was not because of race.

<u>The claimant's suspension on 26 January 2016</u>

63. Mr Shelmerdine, as the claimant's line manager, received consistent feedback from team members and managers that she was difficult to work with. The feedback told him that it was challenging to get the claimant to do things and she was non-collaborative in meetings. Mr Shelmerdine discussed this with the claimant in her end of year review for 2014 and the claimant would not accept the feedback.

64. Mr Shelmerdine set the claimant's 2015 objectives and this included work around behaviours and managing relationships. Mr Shelmerdine's view (statement paragraph 43) was that the claimant was not prepared to debate issues or acknowledge the validity of the opinions of others. He also found her excessively defensive, she increasingly refused to attend meetings and often passed blame to her team members.

65. As a result of this Mr Shelmerdine asked the claimant to participate in a 360 degree feedback review. She was reluctant to do this and it took a period of months but ultimately she did so. It was an on-line process. Mr Shelmerdine's evidence was that the claimant had some difficulty with it and IT support had to be brought in. Once the results were in, the claimant did not want to discuss them with Mr Shelmerdine as much of it was negative.

<u>The Calibration Meeting of 3 December 2015</u>

66. A Calibration Meeting took place on 3 December 2015 with 12 managers including the claimant where the performance rating of members of the team was discussed. The process was described in the respondent's procedure at page 1577. The performance grading suggested by line manager is reviewed within teams and across teams, to ensure consistency. The meeting reviews the gradings proposed by the line managers. We find that this is so that the line manager does not have the final word for reasons of consistency. The claimant was the most junior attendee at that meeting. Mr Shelmerdine and Ms Evans facilitated the meeting and they are both grade 5, all other attendees were grade 6 save for the claimant who was a grade 7.

67. One of the claimant's direct reports was Ms Lakshitha Vijay, a New Zealand national with South Pacific Island origins. At the meeting the claimant scored Ms Vijay as a 4 which meant underperforming. Other managers did not agree and wanted to upgrade Ms Vijay to a 3. There was universal agreement amongst the other managers present that 4 was an unjustly low rating and there was a collective decision to grade Ms Vijay as a 3.

68. The claimant considered that Mr Shelmerdine's view of Ms Vijay was biased because he had attended Ms Vijay's birthday party on 5 November 2015 along with other work colleagues. The claimant was not invited to this birthday party. There were no formal invitations as it was an ad hoc arrangement. It was not on work premises. It was no more than a group

of people going out after work for someone's birthday. Mr Shelmerdine did not in fact attend the event and could not remember if he had even been invited. We saw in the notes of the claimant's grievance hearing on 15 February 2016 (page 626 point 17) that she said that she could not definitively say that everyone was invited and she mentioned others who did not attend. We find that the claimant's approach to not being invited to the birthday event was an overreaction.

69. The respondent's rules are such that even if an employee has missed an objective during the year, they are not necessarily graded as a 4. Objectives set at the beginning of a year can change, as can priorities, during the year. The consensus was that Ms Vijay's attitude, work and contribution to the team had been good.

The Calibration Guidelines

70. The respondent's Manager's Guide: Performance Assessment (starting at page 1570) says that all relevant factors should be considered including the context and environment during which the results were achieved and a rating should balance all the criteria especially the "how" as well as the "what". This allows the respondent to weigh a wide range of factors into the balance.

71. The claimant's position was that the Calibration Guidelines (page 1569) state that the managers should aim for consensus but ultimately the team leader makes the ultimate decision. The claimant's view is that she was the team leader and that she therefore made the ultimate decision. Under the Guidelines, heading Main Process Points on page 1569, it says that the calibration meeting should be facilitated by a team leader supported by HR. We find that the team leader referred to in that process is the person who facilitated the Calibration meeting. The claimant was not the facilitator of the meeting, this was Mr Shelmerdine with Ms Evans. The claimant did not therefore have the final say on Ms Vijay's grading as the team leader referred to at point 7 of the Calibration Guidelines as this was Mr Shelmerdine.

72. The claimant relied in her witness statement (paragraph 89) on an email from Ms Backhouse of HR (dated 9 May 2016 page 1018) as supporting her view that it was the claimant as line manager who had the final say. We do not agree with the claimant's interpretation. In that email Ms Backhouse said "*The manager determines a rating based on overall feedback."* We find that the manager referred to was Mr Shelmerdine who facilitated the meeting and received the feedback.

73. We have considered the claimant's evidence in her witness statement as to what she said verbally (rather than in writing) by way of a disclosure at the 3 December meeting. She says that she "*highlighted the pre-requisite of employees meeting all objectives to be considered for grade 2 and above*", she says she "*expressed concerns about the Ethics of the management team*", she asked why the management team had spent

many meetings blaming her team for issues. We can find no words in the claimant's witness statement to show precisely what she said by way of verbal disclosure at the meeting on 3 December 2015 which tended to show either a breach of a legal obligation, a criminal offence being committed or a cover up of such matters.

74. The claimant's view was that she did have the final say and that it was potentially gross misconduct for her not to apply her own choice of grading and that Mr Shelmerdine was asking her to commit an act of insubordination. We find to the contrary that it was the claimant who was acting in an insubordinate manner by disregarding the decision of the Calibration meeting and Mr Shelmerdine's follow-up email instructions as her line manager to grade Ms Vijay as a 3. We find that it was procedurally important that the claimant's grading decision had some further objective consideration by way of the respondent's processes when she had a pending grievance complaint against Ms Vijay. Mr Shelmerdine was not aware of the grievance at the date of the Calibration meeting.

75. The claimant sent an email to Mr Shelmerdine on 3 December 2015 with a spreadsheet of her concerns. We looked at this spreadsheet (417-418a) and could not find anything that amounted to a disclosure of information that there had been a breach of a legal obligation, criminal offence or cover up. The claimant also relies of a further verbal disclosure on 3 December in a one to one meeting with Mr Shelmerdine. She said in her statement that she raised issues about his conduct in directing managers to give grade 1's when employees had not met their objectives. She said she raised the issue of "wrongdoing" and said it was contrary to internal guidelines. This was very general and we find that it did not disclose information that there had been a breach of a legal obligation, criminal offence or cover up. It did no more than point to the claimant's view that the respondent had not followed internal guidelines. It represented a difference of opinion on how the guidelines should be applied.

76. The claimant's view was that the grading of Ms Vijay would lead to an unfair bonus payment, financial mismanagement and/or fraud (statement paragraph 135). The claimant considered that Ms Vijay would receive a bonus of £600 when in the claimant's view it was not warranted. At paragraph 148 the claimant analysed that this could result in a loss to HMRC of £14 million if employees were awarded greater bonus payments that their performance merited (in her view).

77. The claimant said in her statement (paragraph 149) that she believes the "unjustified" performance rating to be a criminal offence of fraud, tax evasion and misleading financial markets and financial reporting / disclosure requirements. We do not agree with the claimant. On our finding she did not have the final say on the grading of Ms Vijay. The final say lay with the facilitator of the Calibration meeting Mr Shelmerdine to ensure consistency (Guidelines at page 1577). This is perfectly proper.

78. The claimant sent an email on 3 December 2015 (page 414) saying that she would not follow the decision and any change of grade would "*be brought to the attention of HR*". Later that day the claimant sent Mr Shelmerdine a spreadsheet of her historic concerns and complaints (page 416 to 418a).

79. One of the claimant's many concerns highlighted in that spreadsheet was that she had not been issued with a company credit card. Mr Shelmerdine's evidence which we accept and find is that this was because the claimant and her team did not need to travel as part of their role. We find nothing discriminatory in the failure to provide the claimant with a company credit card.

80. The claimant disregarded the instruction to rate Ms Vijay as a 3 and proceeded to rate her as a 4. She told Mr Shelmerdine that she was unable to submit a 3 for Ms Vijay because the claimant had "*a Bullying and Harassment claim against her*" (email page 1560). Mr Shelmerdine was unaware of this until the claimant told him on 15 January 2016. The claimant brought the bullying and harassment complaint against Ms Vijay because she had not been invited to her birthday party (claimant's statement paragraph 100) and she regarded this as an act of bullying and harassment by her junior in the line management structure.

81. The claimant declined to attend a meeting with Mr Shelmerdine on 22 January 2016. He was not happy about this.

82. Mr Shelmerdine took the view that the claimant's attitude towards other Supply Planning Managers and to himself as her line manager, with her refusal to attend meetings and to co-operate and to engage had reached the point where it was affecting the functioning of the Hub. He summarised the situation to his manager Ms John in an email on Sunday 24 January 2016 (page 1616).

83. Mr Shelmerdine took advice from Ms Jasbinder Attwal in HR and he and Ms Attwal took the view that the situation warranted a disciplinary investigation because the claimant had refused to comply with a range of reasonable management instructions. This included the refusal to attend the meeting on 22 January and the grading of Ms Vijay. The claimant also refused to attend Mr Shelmerdine's weekly update meetings on supply planning issues saying she considered them "*inherently self-defeating"* and unjustified (Mr Shelmerdine's statement 50 and claimant's email 19 August 2015 at page 317).

<u>The suspension</u>

84. Ms Attwal contacted an outside organisation used by the respondent, CMP Resolutions, to commission a disciplinary investigation. Mr Shelmerdine made the decision to suspend the claimant in consultation with Ms Attwal and sent the claimant a suspension letter (page 554-555).

85. We saw the disciplinary policy and procedure for the UK commencing at page 119. At page 121 it states in relation to suspension that the period will be kept to a minimum and will not normally exceed one calendar month. It also stated at page 120 "*There will no access to the Grievance and Harassment and Bullying Grievance policies and procedures on matters relating to the application of the Disciplinary Policy and Procedure. Where issues arise, the disciplinary appeal procedure will be followed".*

86. The policy at page 126-127 sets out a list of conduct which may be regarded as gross misconduct. It includes "*any act of serious insubordination, or wilful failure to carry out reasonable instructions".*

87. There is suspension guidance for managers, pages 82-84. The decision to suspend depends on the circumstances of the case and whether the suspending manager believes it is necessary, as a risk to the business. Common suspension reasons include the need to carry out an investigation without interference by the employee and concern about the behaviour of the employee. It also sets out sources of support for the suspended employee available by telephone and on-line.

88. The claimant was called to the suspension meeting on 26 January 2016 and was suspended by Mr Shelmerdine who was accompanied by Ms Claire Evans, a Supply Planning Category Director. The suspension meeting lasted 45 minutes with the claimant refusing to be suspended.

89. Mr Shelmerdine contacted Ms Attwal for advice on how to deal with matters and he and Ms Evans took the claimant to see her. Ms Attwal gave further explanation to the claimant on the reason for the suspension.

90. After some resistance, the claimant eventually returned her company lap top and security pass (which is normal company procedure on suspension) and Ms Attwal escorted her to reception. The meeting between Ms Attwal and the claimant on 26 January lasted half an hour. This was on top of the 45 meeting between the claimant and Mr Shelmerdine.

91. The suspension letter of 27 January 2017 was at page 554 of the bundle. It gave the reason for suspension as serious concerns about the claimant's behaviour and persistent failure to carry out reasonable management instructions. An example of this was given as the failure to change grading of a member of her team (Ms Vijay's grading). The letter said that the period of suspension would be kept to a minimum and in normal circumstances would not last more than 10 working days.

92. We find that Mr Shelmerdine had a reasonable basis for suspending the claimant and he had taken advice from Ms Attwal. The claimant was becoming increasingly difficult to manage with her refusal to attend meetings and to co-operate and engage such that it was affecting the functioning of the Hub. She does not deny that she refused to comply

with the management instruction over the grading of Ms Vijay. Over the course of the preceding year Mr Shelmerdine had found her obstructive and problematic and by December 2015/January 2016 it had reached crisis point (his statement paragraph 56). We find that the suspension was for the reasons he gave and was not because of the claimant's race.

The continuation of the suspension

93. On 31 January 2016 the claimant sought a review of her suspension. Ms Attwal replied on 1 February saying that it would be in place until such time as management/HR decided (page 558).

94. The claimant was invited to an investigation meeting on 11 February 2016 (page 562). On 10 February the claimant said she was unable to attend (page 605). She wanted time to consider the "ramifications" and asked a number of questions.

95. Mr Adrian Lennox-Lamb from CMP Resolutions was appointed as the investigating officer. The claimant relies on having sent Mr Lennox-Lamb an email on 18 February 2016 as a protected disclosure. We could not locate this email in the bundle and it was not referenced in the relevant paragraph of the claimant's witness statement (paragraph 132). The respondent accepts that disclosures to Mr Lennox-Lamb potentially fall within the ambit of the whistleblowing legislation in that the claimant had previously made a disclosure of substantially the same information to the employer (section 43G(2)(c) ERA 1996).

96. The list of issues informed us that the claimant relied on disclosing that Mr Shelmerdine had instructed her to "*commit a potential act of gross misconduct*" by disregarding and not following the performance rating policies and guidelines which she believed she was contractually bound to apply. We have made findings that the guidelines are not contractual and that the claimant did not have the final say on the grading of Ms Vijay at the Calibration meeting. It was not reasonable for her to believe that she did. We also take account that she gives in her CV one of her skills as being "contract and employment law" and we find that there was no reasonable basis upon which to believe that this was a contractual obligation or a matter of misconduct. It was the claimant who was being insubordinate by not complying with Mr Shelmerdine's instructions. The claimant did not dispute that she failed to comply with Mr Shelmerdine's instruction in relation to Ms Vijay's performance grading.

97. Mr Lennox-Lamb completed his report on 3 March 2016 (commencing at page 1470). The claimant does not complain about his report. It was considered by Ms Harinder Virdee, the disciplinary officer, in mid-March 2016. The claimant relies on having made a protected disclosure to Ms Virdee via this report at point 3.15 which says "*PC also alleges that at the calibration meeting….a collective decision was made to disregard the GSK guidelines that she objected to at the time".* She also relied upon point 3.95 of that report (page 1489). This refers to her saying that Mr

Shelmerdine gave Supply Planning Managers grades 1 and 2 for their rating when they did not meet their objectives or targets. She also relies on paragraph 4.13 (page 1494) which said she alleged that the Supply Managers management team had mismanaged the bonus pool because they had not followed the guidelines for performance ratings. The claimant relied on a repeat of the same at Appendix 1.8 to Mr Lennox-Lamb's report at point 51, bundle page 1556. We repeat our findings above that this is not enough to disclose the breach of a legal obligation, a criminal offence having been committed or a cover up of the same.

98. The claimant also relied upon Appendices 58-61 of the Lennox-Lamb report (pages 1687-1693). Save for pages 1691-1692 these were charts relating to EU Inventory Performance. The claimant did not create these charts. Page 1693 was a list of employees and performance grades. The only words the emanate from the claimant within these documents come in an email dated 18 January 2016 to Ms Bocianowska, a Supply Planning Manager, asking for some year-end data to be shared against targets. This comes nowhere near to amounting to a protected disclosure. Whether the claimant was seeking to obtain information to support her complaints is another matter, but this was not a disclosure of information on her part.

99. The claimant relied upon Appendix 1.8 of the report paragraph 13, starting on page 1537 and the highlighted passage on page 1538 which said: "*During a calibration meeting attended by PC, MS and Supply Planning Managers (SPMs), the guidelines were handed out by MS and a collective decision was made by MS and the SPM's to disregard the guidelines and not follow them, a stance that PC was opposed to at the time. PC described the decision to disregard GSK policies by them as "insubordination" and "gross misconduct" which she firmly believes should be investigated. Please refer to reference document 7 where PC contract requires her to comply with GSK policies procedure and standard operating procedures. During the meeting, the SPMs stated that they had all failed to meet all of their objectives; PC advised them that she had not and will be meeting all objectives this year. Supporting documentation and comments by PC supplied post interview:"* This is another reference to what the claimant said at the meeting on 3 December 2015.

100. Ms Virdee's preliminary and provisional view on the disciplinary issue was that the claimant's conduct did not amount to gross misconduct (statement paragraph 8). She wanted to understand the dynamics within the team and see whether mediation could play a part.

101. The claimant also relied upon an email from herself to Ms Hughes on 9 March 2016 as being a protected disclosure (page 691). In this email the claimant took issue with her suspension. The claimant continued with her complaint about Ms Vijay's performance rating. She said that she practised the respondent's values of transparency and made comments about her team being able to see where each individual was in relation to their objectives. This does not disclose information tending to show that a

criminal offence has been committed, a breach of a legal obligation or the concealment of such matters. The claimant was unhappy with the way in which Ms Vijay had been graded and was asking for a policy to support the way in which this had been dealt with. We find that the respondent had already complied with the relevant Guidelines.

Invitation to a disciplinary hearing

102. By a letter dated 24 March 2016 the claimant was invited to a disciplinary hearing on 31 March 2016 (page 728-729). On 29 March 2016, two days before the hearing, the claimant raised a grievance complaint against the disciplinary officer, Ms Virdee (referred to below). We understood from the list of issues that the claimant's case was that Ms Virdee attempted to conceal a breach of a legal obligation or the commission of a criminal offence and that the claimant made a public interest disclosure as to this. We were directed via the list of issues to a schedule of 13 allegations in the appendices to Mr Lennox-Lamb's report (page 1558) and a schedule of 13 disciplinary allegations enclosed with Ms Virdee's letter of 24 March. The claimant complains that Ms Virdee "reworded" the allegations.

103. The claimant in paragraph 139 of her witness statement relies on making a disclosure to Ms Lisa Hughes, Employee Relations Director on 29 March 2016 in relation to Ms Virdee. This was her 29 March 2016 grievance. It appears that the claimant relies on the wording "*Please be aware Harinder Virdee has been named as being made aware and failing to take action in a report relating to this concern which was disclosed under the Public Interest Disclosure Act 1998.* She also generically referred to *"concealment of fraud within the Public Interest".* This is in connection with the invitation to her disciplinary hearing. We find that this was the claimant's defence to the disciplinary charges and her attempt to deflect attention from the conduct which the respondent wished to address with her as a disciplinary matter. We find that this was not a reasonable belief that the matters to which she referred were disclosing a deliberate concealment of a criminal offence or breach of a legal obligation and furthermore it was in her personal interest.

104. The claimant did not consider the disciplinary hearing to be "objectively justified".

105. The claimant requested a postponement of the disciplinary hearing. Ms Hughes, to whom the grievance of 29 March had been submitted, made a decision to postpone the disciplinary hearing until the claimant's grievances had been dealt with. Ms Virdee was involved in that decision in discussion with Mr Paul Ulrich of HR. Mr Ulrich had been brought in to assist because the claimant had complained about Ms Attwal. Ms Virdee wanted to hold the disciplinary but due to the allegations that had been made, Ms Hughes considered it right to allow those matters to be dealt with first. This is consistent with the approach in the ACAS Code on Disciplinary and Grievance Procedures (2015) (paragraph 46) which states that where an employee raises a grievance during a disciplinary

process, the disciplinary process may be temporarily suspended in order to deal with the grievance.

106. On 29 April 2016 the claimant contacted Ms Hughes by email with regard to the impact of her suspension (page 966). The claimant said that her requests to work from home or to be placed in another part of the business had not been addressed.

107. On 12 April 2016 Mr Archdeacon, the grievance officer, invited the claimant to a grievance hearing in relation to her first grievance (dated 29 January 2016). The meeting took place on 15 April 2016.

108. Ms Hughes sent an email to the claimant on 5 May 2016 (pages 971-972) confirming that the disciplinary was on hold and noting the points the claimant had raised.

Reports to the respondent's Speak Up line

109. The claimant's case is that she made protected disclosures to the respondent's Speak Up line. She made three such complaints on 16 March 2016 and the written record of these was at pages 712-717. The first (page 712) is a repetition of her complaint about Ms Vijay's grading. She could not see how it was possible that her manager could override her decision. We find she did not disclose information that tended to show the breach of a legal obligation, the commission of a criminal offence or the concealment of such matters. The second (page 714) is about the 3 December calibration meeting. The penultimate sentence said "*The impact of this is an unfair subjective rating process which has led to employees receiving bonus awards that cannot be objectively justified".* The third (page 716) disclosed that Mr Shelmerdine had not acted upon her complaint of discrimination, harassment and bullying in relation to the lack of invitation to Ms Vijay's birthday party. It also continued to cover the issue of the Calibration meeting.

The claimant's January 2016 grievance

110. The claimant lodged her first grievance three days after her suspension 29 January 2016 (page 556). In that grievance she referred to "Equality/Discrimination in my recruitment process" which she said she had raised "recently" with Mr Shelmerdine.

111. The claimant met with Mr Shelmerdine on 15 February 2016. The claimant relies on having made a protected disclosure at that meeting and we were taken to the notes at page 625. The claimant relies on the same disclosure issue, relating to her perspective that staff were being given grades that were unwarranted (her witness statement paragraph 131). In the notes of the hearing (page 625) the claimant referred to grades being "political" and her feeling that the bonus was being mismanaged. We find that this does not go as far as to disclose information that there had been a breach of a legal obligation, a criminal offence or a cover up and it was

not reasonable for the claimant to believe that it did.

The claimant's three grievances of 10 February 2016, 16 March 2016 and 29 March 2016

112. The grievance of 10 February 2016 (page 594-595) was against members of the HR team. The claimant complained about the use of the disciplinary process and her suspension. She described her suspension as "discriminatory", she complained about email communications which she considered were unfair and damaging to her reputation and a failure to apply to ACAS Guidelines and the respondent's policies. She complained of "institutionalise[d] bullying and harassment". The grievance was by way of a printed form and it did not go into detail.

113. The outcome the claimant sought from this grievance (page 1806) was the lifting of her suspension, the "reassignment" of the HR managers and a review of the disciplinary action against her, to find out the "true motivation".

114. This grievance was comprehensively investigated by Ms Cathy Potgieter of CMP Resolutions and we saw her investigation report dated 21 March 2016 at pages 1742 to 1816 of the bundle. Ms Hughes as the Employee Relations Director took the view that the resources involved in dealing with the claimant's multiple and voluminous grievances required prioritisation. She chose to give priority to the first grievance of January 2016 in the first instance to enable a more timely resolution of this grievance for the benefit of the claimant and those against whom serious allegations had been made. Other matters were put on hold pending this.

115. The complaints to the Speak Up Line were at pages 712-717. There were three, each dated 16 March 2016. The complaints were about different aspects of the grading issue at the Calibration meeting.

116. The complaints to the Speak Up Line were investigated by Ms Rhiannon Martin, Global HR Investigation and Disciplinary Project Lead (report page 833-836). On 3 May 2016 Mr Adrian Jones, Deputy Compliance Officer, emailed the claimant (page 972a) giving an outcome. He found the complaints unsubstantiated and where the allegations overlapped with other complaints, they should continue within the ongoing process.

117. The grievance of 29 March 2016 (page 743-744) was against Ms Virdee two days before the disciplinary hearing was due to take place. The claimant said that Ms Virdee was proceeding to a disciplinary hearing "without justification". She complained of bias, false evidence, false allegations, inconsistencies, a lack of application of the respondent's policies and she gave a list of employment law legislation including the Employment Rights Act 1996 and the Equality Act 2010, she also referred to financial mismanagement and/or fraud. The claimant complained about concealment of fraud "within the public interest" and victimisation under the Equality Act. The claimant also relied on a follow up email to Ms

Hughes on 5 April 2016 repeating the same information (page 767-768).

118. Among the attachments to the 29 March grievance was a document detailing her concerns. She referred on page 774 to "failure to apply employment law" which demonstrated to us her knowledge of employment law. The claimant referenced her complaints repeatedly by reference to employment law including case law (page 780). We find that this is a claimant who is conversant with employment law.

119. On 30 March 2016 Ms Hughes made the decision to postpone the disciplinary hearing until after the grievances had been concluded. The disciplinary was originally scheduled for 31 March. The claimant had requested a postponement of the disciplinary hearing (page 757) and this was taken into account by Ms Hughes. As some of the grievance issues were directly related to and relevant to the disciplinary, we find that it was reasonable and sensible for Ms Hughes to agree to postpone the disciplinary. This is more generous than the policy provides as we describe below. Ms Hughes considered that many of the complaints amounted to the claimant's "defence" to the disciplinary. The respondent needed time to deal with the numerous matters and complaints raised by the claimant before the disciplinary hearing could go ahead.

120. Effectively the outcome of the 29 March grievance was in the claimant's favour because the disciplinary hearing with Ms Virdee did not go ahead. Ultimately it was superseded by the restructuring and redundancy process referred to below.

121. Ms Hughes met with the claimant on 7 April 2016. The purpose of the meeting was to update the claimant and advise her on next steps within the process.

122. Ms Hughes wrote to the claimant on 5 May 2016 to update her on the current state of the disciplinary and grievance process (pages 971-972). There was no indication in the documents before us that Ms Hughes gave serious thought to the claimant returning to work or working from home. The respondent's policy does not anticipate a lengthy period of suspension but Ms Hughes told us in oral evidence that the situation was not unprecedented. There were a high number of grievance complaints which impacted on the disciplinary process. The respondent could have taken the decision to prevent the claimant from using the grievance process to derail the disciplinary (page 120) but they chose not to do so. Ms Hughes also informed the tribunal and we find that the respondent would have made adjustments so that the claimant's objectives and performance rating would not have been negatively affected by the continued suspension.

123. We also find that given that Ms Hughes said that the claimant had brought complaints about almost everyone with whom she had come into contact, there was a legitimate concern about her potential impact on any area of the business to which she might return before matters were fully resolved.

The hearing of the January 2016 grievance

124. The claimant's grievance hearing took place before Mr Paul Archdeacon, Programme Manager. It took place over four days, 15, 19, 20 and 22 April 2016. The claimant sent numerous emails to Mr Archdeacon after the hearing with attachments running to over 100 pages (pages 845-959 of the bundle) which he took into consideration. Mr Archdeacon delivered his outcome on 6 May 2016 (pages 1003-1005). The grievance that Mr Archdeacon was ostensibly dealing with, was the first grievance of 29 January 2016. He dealt with more than just the first grievance complaint as he addressed a total of 21 complaints which he set out in his outcome letter.

125. Mr Archdeacon upheld the claimant's complaint that at the Calibration meeting of 3 December 2015, that Ms Evans commented on the claimant's management style and made her sound like a bully. Mr Archdeacon did not otherwise deal with the issues relating to Ms Vijay's grading. He partially upheld the complaint that at a meeting on 29 July 2015 a comment was made that the claimant "*might be transparent with us"* in a sarcastic tone which caused the claimant to feel undermined and offended.

126. Mr Archdeacon dealt with the claimant's complaint about the company credit card which she relies upon as an act of race discrimination and it was not upheld (page 1003).

127. Mr Archdeacon did not deal with the grievance of 29 March 2016 which was against the disciplinary hearing officer Ms Virdee.

128. Mr Archdeacon's evidence to the tribunal was that he thought the claimant brought her complaints in good faith and not in order to cause trouble for someone else, he felt her concerns were genuinely felt by her and were not malicious.

129. On 6 May the claimant emailed Ms Hughes to say that she wished to appeal any of the grievances that were either partially or not upheld (page 1008).

130. We find that the grievances of 10 February 2016 and 29 March 2016 were in effect the claimant's defence or answer to the disciplinary case and it was difficult to conclude these without the disciplinary hearing taking place. These complaints were part and parcel of the disciplinary process and needed to be dealt with in that context. These grievances were investigated. The grievances of 16 March were concluded, with the outcome given by Mr Jones on 3 May 2016.

The grievance appeal

131. Mr Alex Henderson heard the grievance appeal (January 2016 grievance).

This took place over three days, on 17, 24 and 25 May 2016. Mr Henderson had a high volume of documents and grievance complaints to deal with. He found it difficult to keep the claimant focused on the issues, as each time an issue or point of appeal was raised or discussed, the claimant wanted to discuss many other matters. This contributed to the length of the hearing.

132. Although it was not his role to rehear the grievance, he ended up doing so. He had a large number of follow-up actions after the appeal hearing. The notes of the meeting were sent to the claimant for review. She amended them and included amendments which did not reflect what had been discussed. Mr Henderson went on to hold meetings with Ms Backhouse from HR, Mr Archdeacon the grievance officer, Mr Shelmerdine, her line manager, Ms Marissa Knowles, HR Business Partner who assisted Mr Shelmerdine, Ms Vijay, the claimant's direct report, Ms Joy Sweeney, a contractor based in the USA, Mr Fabio la Creta, one of the claimant's direct reports (as the claimant wanted to know if he had been invited to Ms Vijay's birthday party) and a further meeting with the claimant.

133. This series of meetings took place over June and up until 18 July 2016. We find that given the number of meetings that had to be arranged and held, this was a reasonable time frame.

134. On 23 June 2016 the claimant sent an email to Ms Laura Hague, HR Manager and to Mr Henderson (page 1211) confirming that she would be attending a meeting with them the following week in connection with her grievance appeal. She relies on wording in that email that says she was suspended without warning and refers to "manipulation" of the bonus award for Ms Vijay. She complained about her suspension and victimisation and said "*I believe I have given GSK many opportunities to put a stop to and put right what I believe are unethical and illegal practices".* She complained about disregard for the law. Again we find that this is in relation to the performance rating of Ms Vijay with which she strenuously disagreed.

135. Mr Henderson then worked on his grievance outcome letter (pages 1228-1251 of the bundle). It was extremely thorough and detailed. Mr Henderson was dealing with about 21 points of appeal. At this time in 2016 he had recently started a new job within the respondent and was travelling internationally as well as dealing with the claimant's grievance appeal.

136. Mr Henderson spent 60-70 additional hours after the May 2016 grievance hearing dates, considering the complaints and taking the additional action as described above.

137. Mr Henderson said that significant efforts needed to be made by the claimant and her colleagues to restore workable relationships (page 1237). He recommended facilitated mediation between the claimant and

Mr Shelmerdine and on-line conflict resolution training through the Employee Assistance Programme to which he provided a link.

138. Mr Henderson's appeal decision was dated 12 August 2016. He attached a detailed appendix summarising the grievance appeal outcome on each of the 21 points of appeal. The claimant's grievance appeal was not upheld.

139. Within his outcome letter Mr Henderson said he had taken account of a series of factors, including not having seen the claimant in her day-to-day work interactions and he considered whether others had given a "tainted impression" of her. He said (page 1236):

> "*However, on a balance of probability I think that you have been a very challenging person to work with. I have seen for myself how you talk over people, how intransigent you are in your views, and how unwilling you at least appear to be to see the perspectives of other people or interpret scenarios in a way that may cast your own judgment or actions in any negative light."*

140. Mr Henderson agreed with Mr Archdeacon's view that the claimant had a genuine belief in what she saw as her reality, but she struggled to understand when she was challenged on this.

141. Allegations of race discrimination did not feature significantly during the three days on which Mr Henderson heard the grievance appeal. The amount of time spent on this was relatively small and when they reached point 20 of the appeal (racial harassment) the claimant wanted to move quickly over this issue (page 1233-1234).

142. On these complaints of race discrimination he found it significant that she made no attempt to raise these issues at or near the time they were alleged to have occurred. The first comment relied upon was on or around 12 May 2014 at a managers' dinner and second (claimant's witness statement paragraph 167) was in a meeting with Mr Shelmerdine and Mr Capello in September 2014. During the appeal hearing when Mr Henderson raised the issue of race discrimination she said she did not wish to pursue it any further because she felt she had closure on the matter (page 1234 final paragraph). Mr Henderson did not therefore fail to deal with this, he was guided by the claimant saying she had closure on the matter.

143. Given the considered and meticulous grievance outcome letter and the fact that Mr Henderson was coping with the demands of a new role involving international travel, we find that it was entirely reasonable for him to take from 18 July to 12 August to produce his grievance outcome.

<u>The restructuring and redundancy situation</u>

144. Mr Sergio Hernandez dealt with the restructure and redundancy situation

with the assistance of Ms Ruth Deane in HR. He was the Europe/Global Planning Hub Lead, which is a grade 4 role and he is based in Switzerland. When Mr Hernandez designed the new structure, between March and June 2015, he did not know anything about the claimant. He simply knew about the existence of her role. The restructure involved the creation of a new supply planning model for the organisation.

145. Mr Hernandez carried out three consultation meetings with the claimant by telephone. We find based on his evidence that he did not know her racial group (his statement paragraph 3) and he had never met her. The first consultation phone call was on 6 September 2016 and he responded to questions from the claimant on 9 September 2016 (page 1299). The second call was on 18 October 2016 to which the claimant responded by email the same day (page 1331). Mr Hernandez believes that there was a third consultation meeting by phone but he could not recall the date. Between 6 September 2015 to about 10 January 2016 Mr Hernandez said he spoke to her on about three or four occasions. Mr Hernandez was aware that the claimant was suspended but he had no knowledge of any disclosures (relied upon as protected disclosures) or protected acts done by the claimant.

146. The consultation process was conducted by telephone with the claimant in the same way that the respondent conducts telephone consultation with employees who are on any sort of extended leave such as maternity or ill health.

147. No-one, including the claimant, raised any concerns about the restructuring process so at the end of October 2016 the respondent decided to issue letters notifying termination of employment by reason of redundancy. The claimant's letter was at page 1349. Notice was given, terminating her employment on 27 January 2017. The claimant was given a right of appeal (page 1352).

148. The claimant replied by email on 7 November 2016 (page 1363) that because legal action was ongoing (her first claim) she did not feel it was "practical" to appeal against her redundancy dismissal. This was entirely her choice and she had the benefit of legal representation at the time.

149. Two other employees Andre Capello, a Supply Planning Manager (who is from Curacao, a Dutch Caribbean island and his nationality is Netherlands) and Steve Short, a Regional Supply Planning Manager (white British) were also unable to find alternative positions and were dismissed by reason of redundancy on the same date as the claimant.

150. We find, based on his evidence, that Mr Hernandez was not influenced or instructed as to his actions by anyone else who had knowledge of the claimant's disclosures or protected acts.

<u>Consultation and selection for redundancy</u>

151. The claimant was not selected for redundancy. She was the only person performing the role of Data Analytics Manager at grade 7. There were roles graded above the claimant which were also affected with the number of Supply Planning Managers reducing from eight to six. They were placed in a pool for selection but the claimant was not in that pool because she was in the grade below.

152. The claimant was in a category entitled "role displaced/significantly changed". She was not part of a pool, closed or otherwise. Mr Andre Capello and Ms Claudia Mayer were the Supply Planning Managers who were the grade 6 employees who were unsuccessful in securing ongoing grade 6 roles. Ms Mayer was seconded elsewhere and Mr Capello was made redundant as well as Mr Short who was more senior. It was not appropriate to put the claimant in a pool for selection with those employed in a different role on a higher grade. We therefore find that there was no unfair selection for redundancy. The claimant's was a stand-alone role.

153. On 21 September 2016 Mr Hernandez sent an email to the claimant asking if she understood the reasons for the changes (the restructuring) and asking her to sign the attached form to confirm that the respondent had concluded the consultation process with her (page 1312). The claimant signed and returned the form within about 3 hours. The form was at pages 1314-1315.

154. In the form, she confirmed that she had been given the opportunity to provide feedback on the new organisation and had been given a response to her points; that she did not have any further comments or questions at this time; that she understood the rationale as to why her role had been eliminated and that her questions to date had been answered. She made reference to her ongoing legal proceedings (the first claim). She said she would like to apply for new roles available to her and she would like to review the job descriptions for these.

155. The claimant did not say when signing off the redundancy consultation that she considered the consultation process to be a sham. In answer to the question about the rationale for the elimination of her role she did not say that this was a sham.

<u>Suitable alternative employment</u>

156. On 12 November 2016 Ms Ruth Deane of HR asked Mr Hernandez to forward to the claimant details of two vacancies. Mr Hernandez informed the claimant of the deadline for applying and said she should send a CV. The roles were both at Grade 6, one grade higher than the claimant's existing position. The roles were NPI Planning Manager and Supply Planning Processes Manager. The claimant responded requesting the job description for the Supply Planning Director role at grade 5, two grades higher than her existing role. Mr Hernandez' evidence which we accept and find was that the grade 6 roles were the closest available match for the claimant.

157. There were no suitable roles that could have been offered to the claimant without assessment because of the difference in grade. The claimant's case was that she was excluded from applying for all available jobs. We find that she was not excluded from applying from the jobs but that they were subject to assessment rather than assimilation.

158. On 18 October 2016, the claimant confirmed to Mr Hernandez that she did not wish to apply for either of the suggested grade 6 roles, but she was keen to apply for other roles in particular the Supply Planning Director role at grade 5 once it was available (emails at pages 1331–1332).

The Supply Planning Director Role

159. The claimant applied for the Supply Planning Director role (page 1388). The role was based in Switzerland. The assessment process involved CV screening followed by an interview with the HR recruitment manager whose role was to validate each candidate's record to check that they had the relevant skills and experience for the role. The recruiting manager was Mr Raphael Weizenegger.

160. Mr Weizenegger, who is based in Switzerland, conducted a telephone interview with the claimant on 16 December 2016 which is standard procedure where the candidate is overseas. If successful at that stage, the next stage is a face to face interview with the stakeholders with whom the successful candidate would work, such as the Global Head of Novartis Inter Affiliates Operations and Head of Finance of Operations.

161. Mr Weizenegger's evidence was that the claimant was overconfident despite her lack of experience, she could not substantiate why she was ready for a Director role which was 2 grades above her own and she had significant gaps in her understanding of the challenges of the role. He made a recommendation that the claimant's application should not be progressed.

162. On 22 December 2016 the claimant was given telephone interview feedback by Mr Weizenegger. The claimant did not accept the feedback. She responded by email and Mr Weizenegger forwarded this on to Mr Hernandez and Ms Deane. The claimant sought further feedback from Mr Hernandez and he offered to call her after his Christmas holidays, in January 2017.

163. There were two lengthy phone calls between the claimant and Mr Hernandez, on 10 and 13 January 2017 (one for 45 minutes). The claimant still would not accept the situation.

164. The claimant had access to information on other vacancies. She did not apply for any other role save for the grade 5 role.

165. It was Mr Weizenegger who interviewed the claimant and decided not to

put her forward for the grade 5 role. He only knew the claimant's racial group because she told him during the telephone interview. We accept and find that Mr Weizenegger's did not know, when interviewing the claimant and making his decision, that she had raised complaints about race discrimination or made whistleblowing allegations.

166. Mr Weizenegger is not an employee of the respondent but was brought in to carry out this first interview role. We find based on his evidence and on a balance of probabilities that he did not know the detail of the complaints raised by the claimant (whether relied upon as protected acts or protected disclosures) and that he was uninfluenced by any protected act or protected disclosure.

167. We find that the claimant was not "excluded" from applying for roles as she asserts. She was free to apply for the roles and demonstrate the competencies of the role in a selection process. She chose not to apply for the grade 6 roles. She did not meet the criteria for the grade 5 role.

168. Mr Weizenegger and Mr Hernandez spoke to the claimant on 13 January 2017 for about 45 minutes to explain why she did not meet the requirements of the grade 5 role. The claimant did not accept the explanation she was given.

<u>The termination of employment on 27 January 2017</u>

169. The claimant was sent a standard letter page 1349 which she acknowledged on 27 October 2016. Her notice period terminated on 27 January 2017.

170. We find that the reason for dismissal was redundancy based on the restructure carried out by Mr Hernandez. Mr Hernandez did not know the claimant's racial group. Mr Steve Short who is white British was also dismissed for redundancy at the same time. We find therefore that the dismissal was not because of race.

171. We accepted Mr Hernandez' evidence and find that he did not have any knowledge of the claimant's alleged protected disclosures or her protected acts. We find that the dismissal was not because of any alleged protected disclosures and was not because of any of the protected acts.

172. We find that Mr Hernandez carried out a fair consultation process with the claimant, in which she participated, which was not a sham. The claimant signed off the document concluding the consultation process, as we have found above. It was not a sham redundancy process. The claimant accepts that there was a genuine redundancy situation.

173. The respondent put forward to the claimant two roles at grade 6 (one grade above her own) in which she had initially expressed an interest. She chose not to apply for those roles which were the most suitable in the circumstances. The claimant applied for a Director role two grades above

her own and was unsuccessful for the reasons described by Mr Weizenegger. We find that the respondent did not fail in its duty to offer alternative employment to the claimant.

Time limits

174. Through her witness statement (paragraph 209) we were taken to the claimant's CV at page 1327 of the bundle. Amongst her skills she lists "contract and employment law". In internal documents the claimant often made mention of ACAS guidelines (for example in her grievance at page 595). The three-month time limit is a very basic tenet of employment law in terms of enforcement of rights and based on this evidence we find on a balance of probabilities that the claimant had knowledge of the time limit.

175. In her grievance of 29 March 2016 (page 743) as we have found above, the claimant set out a list of UK employment law legislation including the Employment Rights Act 1996 and the Equality Act 2010. This supports our finding that the claimant had knowledge of time limits.

176. We have also found above by reference to her grievance of 29 March 2016 that this is a claimant who is conversant with employment law.

The law

177. Redundancy is a potentially fair reason for dismissal under section 98(2)(c) of the Employment Rights Act 1996. Under section 98(4) where the employer has established a potentially fair reason for dismissal, the determination of whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

178. The leading case of ***Williams v Compair Maxam Ltd 1982 IRLR 83*** establishes the principles for a fair redundancy dismissal and the and these are:

    a. Whether selection criteria for redundancy were objectively chosen and fairly applied.

    b. Whether the claimant was warned and consulted about the impending redundancy and whether there was consultation with any recognised trade union.

    c. Whether instead of dismissing the claimant, the respondent offered any suitable alternative employment.

179. For the purposes of automatically unfair dismissal Section 103A ERA 1996 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.

180. Section 13 of the Equality Act 2010 provides that a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others.

181. Section 23 of the Equality Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

182. Section 136 of the Equality Act deals with the burden of proof and provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

183. Section 27 provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act. A protected act is defined in section 27(2) and includes the making of an allegation (whether or not express) that there has been a contravention of the Equality Act.

184. Section 123 of the Equality Act provides that:

(1) …….proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

185. Section 136 of the Equality Act 2010 provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

Protected disclosures

186. Under section 48A of the Employment Rights Act 1996, a "protected disclosure" is defined as a "qualifying disclosure" which is disclosed in accordance with sections 43C to 43H of that Act.

187. Section 43B(1) of the Employment Rights Act 1996 defines a qualifying disclosure:

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

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

(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."

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

188. Section 43C ERA provides that a qualifying disclosure is made in accordance with this section if the worker makes the disclosure to his employer.

189. Section 47B 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.

190. For the purposes of automatically unfair dismissal Section 103A ERA 1996 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.

191. The time limit for bringing a detriment claim under section 47B is set out in section 48(3) of the Employment Rights Act 1996. It is the "reasonably practicable" test. An employment tribunal shall not consider a complaint unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

192. In ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325*** the EAT said that in order for a communication to constitute a qualifying disclosure under section 43Bm, it must involve the disclosure of information as opposed to the mere making of an allegation or statement of position. Slade J at paragraph 24 said "*Further, the ordinary meaning of "information" is conveying facts…..Communicating "information" would be: 'The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around'. Contrasted with that would be a statement that: 'You are not complying with health and safety requirements.' In our view this would be an allegation not information".*

193. In ***Western Union Payment Services Ltd v Anastasiou EAT/0135/13*** the EAT reviewed the earlier authorities including ***Cavendish Munro.*** Eady J said that section 43B of the ERA required the disclosure to be one of "information", not merely the making of an allegation or a statement of position. The distinction can be a fine one to draw and will always be fact sensitive. The disclosure of information must further identify, albeit not in strict legal language, the breach of legal obligation relied on.

194. Some doubt has been cast on the decision in ***Cavendish Munro*** by the recent decision of the EAT in ***Kilraine v London Borough of Wandsworth***. ***2016 IRLR 422*** which considered the distinction between an allegation and information. Langstaff P said "*I would caution some care in the application of the principle arising out of* ***Cavendish Munro****……. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point*".

195. On 10 July 2017 the Court of Appeal handed down judgment in the case of ***Chesterton Global Ltd v Nurmohamed 2017 IRLR 837*** dealing with the question of the public interest test. The worker's belief that the disclosure was made in the public interest must be objectively reasonable. The words "in the public interest" were introduced to prevent a worker from relying on a breach of his or her own contract of employment where the breach is of a personal nature and there are no wider public interest implications.

196. In ***Chesterton*** whilst the employee was most concerned about himself (in relation to bonus payments) the tribunal was satisfied that he did have other office managers in mind and concluded that a section of the public was affected. Potentially about 100 senior managers were affected by the matters disclosed. Mr Nurmohamed believed that his employer was exaggerating expenses to depress profits and thus reducing commission payments in total by about £2-3million.

197. The Court of Appeal held that the mere fact that something is in the worker's private interests does not prevent it also being in the public interest. It will be heavily fact-dependent. Underhill LJ noted four relevant factors:

a. The numbers in the group whose interests the disclosure served
b. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
c. the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people
d. the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest although this should not be taken too far.

198. The Court of Appeal also sounded a note of caution (judgment

paragraph 36) stating that the public interest test did not lend itself to absolute rules. The broad intent behind the amendment to the law in July 2013 introducing the public interest test, is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved.

199. In ***Blackbay Ventures Ltd v Gahir 2014 ICR 747*** the EAT summarised the case law in relation to public interest disclosures as set out below. We drew this case and the guidance set out below to the attention of the parties on day 1 of the hearing when we asked the claimant to particularise the disclosures that she relied upon.

> *1. Each disclosure should be identified by reference to date and content.*
>
> *2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.*
>
> *3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.*
>
> *4. Each failure or likely failure should be separately identified.*
>
> *5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.*
>
> *6. The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s.43B(1) and under the 'old law' whether each disclosure was made in good faith; and under the 'new' law whether it was made in the public interest.*

200. In ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** the House of Lords said in relation to “detriment”, that the tribunal must find that by reason of the act complained of a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to “detriment”. However it is not necessary to demonstrate some physical or economic consequence.

Conclusions

Unfair dismissal

201. We have found above that the reason for dismissal was redundancy. It was not because of any disclosure made by the claimant or any protected act and it was not therefore an automatically unfair dismissal.

202. We have also found above that Mr Hernandez carried out a fair consultation process with the claimant, in which she participated, which was not a sham. The claimant signed off the document concluding the consultation process, as we have found above. It was not a sham redundancy process. The claimant accepts that there was a genuine redundancy situation.

203. The respondent put forward two roles at grade 6 (one grade above her own) in which the claimant had initially expressed an interest. She chose not to apply for those roles which were the most suitable in the circumstances. The claimant applied for a Director role two grades above her own and was unsuccessful for the reasons described by Mr Weizenegger. We found that the respondent did not fail in its duty to offer alternative employment to the claimant.

204. The claim for unfair dismissal therefore fails.

Direct race discrimination

205. We have found above that the reason the claimant was recruited at grade 8 and not grade 7 was not because of her race.

206. Even if we are wrong about that, we find that this claim is out of time in any event. The claimant rose from a grade 8 to a grade 7 in April 2014 and her claim was not presented until 12 July 2016. The claim is two years out of time and is a discrete matter which does not form part of a continuing act with other matters upon which she relies. As we have found above, the claimant had and has knowledge of the time limit and we had no evidence to show that it would be just and equitable to extend time. This claim is therefore out of time in any event.

207. We have found above that Mr Shelmerdine had a reasonable basis suspending the claimant on 26 January 2016 and it was in accordance with the disciplinary policy and the suspension guidance. He was concerned about the impact the claimant was having on the proper functioning of the team and the Hub. The claimant had become unmanageable and it had reached crisis point.

208. We have found that the act of suspension was justified. The prolonged nature of the suspension resulted from the multiple complaints raised by the claimant, which we have found above was in an attempt to postpone and deflect the disciplinary process. It was not a situation in which nothing happened during the course of the suspension. The respondent clearly chose not to invoke the provision in the disciplinary policy (page 120) to say that the claimant could not use the grievance procedure within the context of a disciplinary. We have found no connection with

the claimant's race. There is no named comparator and we find that a hypothetical comparator behaving in the same manner as the claimant would have been treated in the same way.

209. In relation to the allegation that the respondent failed to address concerns about race discrimination from 3 December 2015 to the submission of the first claim, we considered Mr Henderson's evidence and his outcome letter referred to above (page 1233). The claimant was not clear either in the list of issues, or before Mr Henderson, exactly what complaints of race discrimination she says were not addressed. As we have found above, the claimant did not seek to pursue this at the grievance appeal hearing, wishing to move swiftly on. She also told Mr Henderson that she did not wish to pursue matters these further because she felt she had closure (page 1234). The final meeting between Mr Henderson and the claimant on the grievance appeal was on 1 July 2016 and the first claim was lodged on 12 July 2016 before the claimant had received the grievance outcome of 12 August 2016. We find that in the light of the claimant's representations to Mr Henderson it was reasonable for the respondent not to take the matter any further and it was not an act of direct race discrimination.

210. We have considered whether the respondent failed to conclude the claimant's grievance complaints dated 11 February 2016, 16 March 2016, and 29 March 2016 and if not whether this was an act of direct race discrimination. We have found above that the grievance complaints of 16 March 2016 via the Speak Up line were concluded with the outcome from Mr Adrian Jones. Although Mr Henderson was ostensibly dealing with the January 2016 grievance, we have also found above that he went further and dealt with some of the matters raised by the claimant in the February and 29 March grievances.

211. The respondent prioritised the first grievance of January 2016. There was no suggestion that the respondent would not have continued with the grievances which were on hold, had events not been overtaken by the redundancy process. This was entirely independent of the circumstances of the claimant's complaints and/or the disciplinary process. We find no connection with the claimant's race and we find that this was not an act of direct race discrimination. There is no named comparator and we find that a hypothetical comparator raising the same number and complexity of complaints as the claimant would have been treated in the same way.

212. We have found above that there was a fair and reasonable redundancy process and that the claimant was not treated less favourably within that process because of her race. The claimant accepts that there was a genuine redundancy situation. She chose not to apply for two grade 6 posts and aimed two grades higher for a grade 5 Director post, the criteria for which she did not meet and for which she underwent a telephone interview with Mr Weizenegger.

213. We have found that the redundancy process and the consultation process was not a sham and that there was no failure to offer her suitable alternative employment. The claimant did not point to any job, other than the Director role, which she says should have been offered to her and was not.

214. Our finding above is that the reason for dismissal was redundancy. It was not (amongst other complaints) a dismissal because of her race.

215. The claim for direct race discrimination therefore fails.

Victimisation

216. The respondent admits that the claimant did the protected acts relied upon.

217. The acts of victimisation relied upon mirrored many of those relied upon as acts of direct race discrimination.

218. We found that Mr Shelmerdine had a reasonable basis suspending the claimant on 26 January 2016. This was not an act of victimisation. The claimant's behaviour and refusal to follow reasonable management instructions such as attending meetings and her refusal to engage and cooperate was affecting the functioning of the hub and Mr Shelmerdine's view was that by January 2016 it had reached crisis point.

219. We have found that the act of suspension was justified. The prolonged nature of the suspension resulted from the multiple complaints raised by the claimant, which we have found above was in an attempt to postpone and deflect the disciplinary process. It was not a situation in which nothing happened during the course of the suspension. The respondent chose not to invoke the provision in the disciplinary policy to say that the claimant could not use the grievance procedure within the context of a disciplinary. It was the multiplicity and complexity of the complaints, the need to deal with them and the need to prioritise which led to the length of the suspension, not the nature of the complaints themselves.

220. We repeat our conclusions above in relation to direct race discrimination. It is not clear what were the outstanding complaints about race discrimination and we have in any event set out our findings as to why any such complaints were not addressed. It was not because the claimant had done any protected act. Furthermore, the first claim cannot be a protected act relied upon by the claimant for this purpose as she time-limits the detriment to the date upon which the first claim was lodged.

221. We repeat our conclusions above in relation to direct race discrimination. The 16 March grievance was concluded and Mr Henderson and Mr Archdeacon dealt with some of the other grievance complaints when dealing with the January 2016 grievance. Failure to conclude any other

grievance issues was for the reasons set out above and not because the claimant had done any protected act.

222. We rely on our conclusions above in relation to direct race discrimination in relation to the redundancy process. Our finding is that there was a fair and reasonable redundancy process and a proper consideration of alternative employment. There was no victimisation of the claimant within that process because of any protected act.

223. The claim for victimisation therefore fails.

The whistleblowing claim – did the claimant make protected disclosures

224. The respondent accepts that the disclosures relied upon were made and communicated to the respondent. The respondent disputes that they were protected disclosures within the meaning of sections 43A and 43B of the Employment Rights Act 1996.

225. Most of the disclosures relied upon go to the issue of Ms Vijay's performance rating and the performance rating of other members of staff arising from the Calibration meeting of 3 December 2015. The respondent accepts (submissions paragraph 22) that a disclosure about race discrimination is a disclosure about a breach of the Equality Act and is therefore capable of amounting to a protected disclosure. The respondent does not accept that the claimant had a reasonable belief that such a disclosure was in the public interest or disclosed information which tended to show any of the matters in section 43B(1) Employment Rights Act.

226. Based on the evidence of Mr Archdeacon and Mr Henderson, we find that the claimant believed in the information that she disclosed. We have considered whether it was a reasonable belief that the information she disclosed was in the public interest and tended to show, in short form, that a criminal offence had been committed, that there had been a breach of a legal obligation or that such matters were being deliberately concealed.

227. On the public interest test we have considered carefully the decision of the Court of Appeal in the ***Chesterton*** case. One of the differences with ***Chesterton*** is the disclosure in that case was about exaggerating expenses to depress profits and reduce commission payable to the senior managers. The case before us concerns the reverse situation. The claimant's disclosure was that bonuses were being paid which she felt were too much and were unjustified but others did not share that view. This was about performance grading and not profit related commission. Bonuses payable to staff would be subject to tax in any event.

228. The claimant was indignant that her personal grading of Ms Vijay, her direct report, against whom she had brought a grievance for bullying and

harassment for failure to invite her to a birthday "do", was being overruled by more senior managers. The ratio was 11:1 of those attending the Calibration Meeting on 3 December 2015 (the "one" being the claimant).

229. We have found above that the claimant was wrong in her interpretation of the Calibration Guidelines at page 1569. She had interpreted them to suit herself. She was not the team leader referred to in those guidelines. This was Mr Shelmerdine. The respondent was not in breach of the guidelines. Even if the respondent was in breach of the guidelines, they are no more than that – namely guidelines. They are not contractual terms and have no contractual force.

230. Our finding above was that it was particularly important that the claimant's grading decision had some further objective consideration when she had a pending grievance complaint against Ms Vijay. In our view a comprehensive calibration process is good practice in any organisation with multiple teams.

231. We have considered whose interests this disclosure served. This was a disclosure in relation to the grading of one person. It concerned an employee's performance rating for the year being one grade higher than the claimant thought it should be. It may have resulted in a payment to Ms Vijay of £600. It is for the respondent to decide how it wishes to pay bonuses and it was not a criminal offence or a breach of contract to have regarded Ms Vijay as performing to a satisfactory level during the year rather than underperforming. The purpose of the Calibration meeting was to ensure consistency across individuals and teams and it was therefore vital to the fairness of the process. The purpose of the Calibration meeting was to mitigate against exactly the sort of matters that the claimant complained about. The claimant at her grade did not see the wider picture.

232. We are at a loss to see how the claimant could reasonably believe this to amount to a "fraud on the Revenue". Ms Vijay would pay tax on any bonus via the respondent's PAYE system as would any other employee receiving a bonus which in the opinion of the claimant was too high. We find that it was not reasonable for the claimant to believe that this was a fraud on the Revenue or a criminal matter or that anyone from the respondent was seeking to conceal such matters.

233. The point of the amendment to the relevant legislation in 2013 was reverse the effect of the decision of the EAT in ***Parkins v Sodhexo 2002 IRLR 109*** where the employee was able to rely on a disclosure of a breach of his own contract of employment and make disclosures in the worker's private or personal interests as opposed to the public interest. This disclosure was very much in the claimant's personal interest, the furtherance of her own dispute that managers more senior to her might overrule her grading of her junior report, against whom she had a pending grievance complaint and to postpone and deflect her disciplinary

proceedings. We take account of the fact that the requirement for "good faith" was removed with the amendment to the legislation in June 2013 and is no longer relevant other than in relation to remedy. There must however be a reasonable belief that the disclosure was in the public interest and tended to show one or more of the categories of information set out in section 43B(1) ERA.

234. We have considered in particular the comments of Underhill LJ when he sounded his note of caution (judgment paragraph 36) stating that the public interest test did not lend itself to absolute rules. He said that the broad intent behind the amendment to the law in 2013 introducing the public interest test, was that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved – although he was not prepared to say that this could never happen.

235. Our conclusion is that the claimant did not have a reasonable belief in her disclosures being in the public interest. There is no reasonable basis for considering that the disclosures tended to show fraud or a criminal offence or the concealment of those matters.

236. We find that the public interest test is not satisfied on the issue of reasonable belief and therefore the disclosures made by the claimant were not protected disclosures within the meaning of section 43B ERA 1996.

Did the claimant suffer detriment on the ground that she made the disclosures?

237. Even if we are wrong in our findings that these were not protected disclosures we have made findings above as to the reasons for the treatment of the claimant and we set these out below in relation to the detriment claim.

238. The detriments mirror matters relied upon for the claims of direct discrimination and victimisation.

239. We have found above that Mr Shelmerdine had a reasonable basis for suspending the claimant on 26 January 2016.

240. On the issue of the suspension, we repeat our findings and conclusions in relation to direct race discrimination and victimisation.

241. On the issue of failing to address the claimant's concerns about race discrimination adequately or at all from 3 December 2015 to submission of tribunal complaint – we again repeat our findings and conclusions in relation to direct race discrimination and victimisation.

242. On the issue failing to conclude the claimant's grievance complaints dated 11 February 2016, 16 March 2016, and 29 March 2016, we repeat

our findings and conclusions in relation to direct race discrimination and victimisation.

243. On the detriments which go to the redundancy process we rely on our conclusions above in relation to direct race discrimination and victimisation. Our finding is that there was a fair and reasonable redundancy process and a proper consideration of alternative employment. There was no detriment to the claimant within that process because of any disclosure she made.

244. The claim for whistleblowing detriment therefore also fails on the issue of causation.

_____

Employment Judge Elliott
Date: 12 September 2017