EMPLOYMENT TRIBUNALS

Claimant: Mr A Pennington

Respondent: Avensure Limited

HELD AT: Manchester **ON:** 25-29 September 2017

BEFORE: Employment Judge Horne
Mrs C A Titherington
Ms J K Williamson

REPRESENTATION:

Claimant: Miss K Moss, Counsel
Respondent: Mr M West, Consultant

Judgment having been sent to the parties on 9 October 2017 and the claimant having requested written reasons in accordance with rule 73 of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Complaints and issues

1. By a claim form presented on 23 September 2016, the claimant raised the following complaints:

   1.1. Detriment on the ground of protected disclosures, contrary to section 47B Employment Rights Act 1996 ("ERA");

   1.2. "Ordinary" unfair dismissal, contrary to sections 94 and 98 of ERA;

   1.3. Automatically unfair dismissal for making a protected disclosure, contrary to sections 94 and 103A of ERA;

   1.4. Automatically unfair dismissal for asserting a statutory right, contrary to sections 94 and 104 of ERA;

   1.5. A claim for damages for breach of contract by failing to pay the claimant properly for his notice period; and

1.6. A complaint of failure to pay holiday pay.

2. The breach of contract and holiday pay complaints were settled at the start of the hearing, resulting in a judgment by consent for £2,000.

3. The issues to be determined were set out in an agreed list, which was refined during the course of the hearing. By the close of final submissions, these were the issues we had to decide:

Protected disclosure

3.1. Did the claimant disclose information about the failure to include commission in holiday pay during conversations with Mr Santinei in January and/or February 2016?

3.2. Did the claimant believe that this information tended to show the to the respondent had failed and was failing to comply with a legal obligation to which it was subject, namely, the obligation to pay holiday pay in line with the Working Time Regulations 1998 ("WTR") and/or to pay employees of what is properly payable in line with section 13 of ERA?

3.3. Was it reasonable for the claimant to hold that belief?

3.4. Did the claimant believe that he was making these disclosures in the public interest?

3.5. Was it reasonable for the claimant's to hold that belief?

Detriment

3.6. Was the claimant subjected to the following detriments by the respondent:

(a) The respondent resurrected a historic warning on the claimant's file which had previously been acknowledged to be without merit.

(b) The respondent gave the claimant a written warning in March 2016.

(c) The respondent encouraged or permitted others to telephone the claimant's potential clients in order to adversely affect the claimant's performance so as:

(i) Adversely to affect the claimant's prospects of reaching his targets;

(ii) To reduce the claimant's bonus/commission;

(iii) To form the basis of his dismissal.

(d) The respondent stopped the claimant from accessing his most lucrative source of lead generation for the same purposes.

(e) The respondent sent a "letter of concern" on 18 April 2016 after succeeding in making the claimant fall below target in one week.

(f) On 6 May 2016 the respondent called the claimant into a meeting and accused him of misconduct for the above missing of one target.

(g) On 19 May, 2016 the respondent increased the claimant's target and setting out unreasonable target for him to achieve.

(h) On 19 May 2016 and/or 14 June 2016 the respondent attempted to bully the claimant into resigning.

3.7. Was the claimant are subjected to these detriments, or any of them, on the ground that he made a protected disclosure?

Automatically unfair dismissal – protected disclosure (section 103A ERA)

3.8. Was the reason or principal reason for the dismissal that the claimant made a protected disclosure?

Automatically unfair dismissal – assertion of a statutory right (section 104 ERA)

3.9. In his conversations with Mr Santinei in January and/or February 2016 about holiday pay, did the claimant to allege that the respondent had infringed a relevant statutory right (being section 13 ERA or his rights to holiday pay under WTR)?

3.10. Was the reason or principal reason for the dismissal that the claimant had made these allegations?

"Ordinary" unfair dismissal (section 98 ERA)

3.11. Was the real reason for the dismissal potentially fair (the respondent alleges it was for "some other substantial reason")?

3.12. If so, did the respondent act reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant, having regard in particular to the claimant's case that the respondent:

(1) Failed to follow the procedures in relation to issues of alleged capability and/or misconduct set out in the Staff Handbook of the Acas code of practice;

(2) Failed to carry out any or any reasonable investigation of the allegations and/or supports the claimants to improve;

(3) Failed to take account of the fact that the respondent itself had sabotaged the claimant's performance at work;

(4) Failed to provide the claimant with details of the allegations in advance, or at all;

(5) Failed to provide the claimant with any information or evidence prior to the dismissal, or at all;

(6) Failed to hold a hearing or allow the claimant any opportunity to present his case;

(7) Failed to allow the claimants to be accompanied; and

(8) Failed to offer a genuine and meaningful appeal process.

Compensation

3.13. Should there be an uplift in compensation due to the respondent's failure to follow the Acas Code of Practice?

3.14. Would it be just and equitable to reduce the claimant's compensation on the ground that the claimant caused or contributed to his dismissal by his own culpable or blameworthy conduct?

3.15. Would it be just and equitable to reduce any compensatory award on the ground that, had the respondent acted fairly, the claimant would or might have been dismissed in any event, either at the same time or subsequently?

Evidence

4. We considered documents in bundles marked R1 and C1. At the start of the hearing, we had to resolve a dispute about whether certain documents were inadmissible on the ground of litigation privilege. We decided that issue in favour of the claimant, giving our reasons orally at the time. Written reasons for that particular decision will not be provided unless a party makes a request in writing within 14 days of these reasons being sent to the parties.

5. We heard evidence from a number of witnesses for the respondent and from the claimant himself. The respondent's witnesses were:

   5.1. Mr Hennessy,

   5.2. Mr Garner,

   5.3. Mr Santinei,

   5.4. Ms Eusuf-Redman, and

   5.5. Ms Gateley.

6. This is a convenient opportunity for us to record, briefly, our impressions of the various witnesses.

   6.1. We found Mr Hennessy and Mr Garner to be evasive. We found it difficult to rely on their evidence about what happened and when. By way of example, both Mr Hennessy and Mr Garner seemed to find it very difficult to give a straight answer to what seemed to us to be a fairly straightforward question about the cost of including commission in holiday pay. Mr Hennessy's explanation of how he reasoned his decision on appeal was at odds with his written outcome letter.

   6.2. Mr Santinei's evidence we found to be generalised. He seemed to find it difficult to recall the important conversations.

   6.3. We thought that Ms Eusuf-Redman was an impressive witness and we were able to attach more weight to her evidence than that of the other witnesses. Her actions at the time also seemed to us to be consistent with a manager who was trying to be supportive and helpful.

   6.4. Ms Gateley's evidence we thought to be vague and contradicted by contemporaneous documents.

   6.5. With the exception of Ms Eusuf-Redman, we found, in general, that where there was a clash between the evidence of the claimant and that of the respondent's witnesses, we preferred the evidence of the claimant. There were, however, some instances where we resolved the conflict of evidence the other way round. For example, the claimant's evidence about an alleged

threat from Mr Hennessy did not seem to us to be consistent with what the claimant said at a later meeting.

The Facts

7. The respondent is a medium-sized business with approximately 80 employees. Its Managing Director is Mr Garner. The only other director is Mr Andrew Hennessy. They provide advice and assistance to employers in employment law, human resources and health and safety matters.

8. The claimant worked for the respondent as a telemarketing consultant from 17 February 2014 until he was summarily dismissed on 15 June 2016. Prior to his recruitment by the respondent, he worked with Mr Hennessy and Ms Eusuf-Redman and Mr Santinei for a previous employer. The claimant, Mr Hennessy and Mr Santinei were good personal friends.

9. The claimant was recruited to the respondent following an approach by Mr Hennessy in or about December 2013 whilst the claimant was working for a competitor. Over a few weeks Mr Hennessy courted the claimant and persuaded him to join. This is colloquially referred to as "headhunting". Because of the claimant's good performance record with his previous employers and their personal friendship, Mr Hennessy was confident that the claimant would perform well for the respondent.

10. At the time of the claimant's recruitment, there were approximately five telemarketing consultants. The number was increased to between 10 and 12 in the course of his employment.

11. The claimant signed a written statement of terms, confirming his starting salary of £24,000.

12. The claimant was also given a written Disciplinary Procedure. Amongst its rubric was the following:

    12.1. "If we feel that it is necessary to take disciplinary action, we will notify you in writing of our concerns. Where relevant, we will supply you with details of any evidence we will be using in the disciplinary hearing. You will be given a reasonable notice to attend the meeting and to arrange for another member of staff or trade union official to accompany you."

    12.2. "At the meeting, we will outline our concerns and you will be given ample opportunity to explain your version of the situation and to bring any supporting evidence to our attention. You may ask witnesses to deliver their version of events to support you if you so wish."

    12.3. "We will keep a record of warnings issued and appeal details in your personnel file. Whilst such information will normally be kept in your personnel file permanently, it will normally be disregarded for further disciplinary purposes in line with the following… Written warning – after a period of six months. Final warning – after a period of 12 months."

13. Issued at the same time as the Disciplinary Procedure was a written Capability Procedure. The procedure covered not just ill health absence but also "Incapability due to Non-Health Issues". Broadly speaking, the procedure

outlined four stages through which performance concerns could be escalated. A final written warning could be issued following a third stage meeting.

14. As at 17 February 2014 Mr Santinei was being paid a basic salary of £20,000. A colleague, Mr David Langley, had a salary of £22,000. Upon the claimant's recruitment, Messrs Santinei's and Langley's salaries were increased to £24,000 to match that of the claimant. Mr Simon Shakepeare as a manager had his salary increased to £26,000.

15. Each Telemarketing Consultant was paired with a Field Sales Agent. Together, each pair worked on an allocated geographical patch. During the course of his employment the claimant's allocated agent was Mr Russell Smith. The two of them were good friends.

16. Mr Simon Shakespeare was also a friend of the claimant. The claimant would exchange text messages and telephone calls from time to time with his friends at work. He did not often meet them socially. This was because they lived in and around Manchester and the claimant lived in the St Helens area.

17. The claimant's day-to-day work mainly involved making outgoing calls to potential clients in an attempt to arrange an appointment to meet the Field Sales Agent. There were various means (called "revenue streams") by which the claimant would acquire the identities and contact details of potential customers. Revenue streams included:

    17.1. Purchased data. The claimant would make cold calls using the contact details on the purchased list. The intention was that the data should have been screened to ensure that the potential customers on the list had not already been approached by the respondent.

    17.2. The EAB assistance line. Incoming calls were made to the respondent's helpline by potential customers. They would then give their contact details which would then be passed to the Telemarketing Consultant.

    17.3. Seminars given to potential clients. These were either organised directly by the company or co-hosted with other organisations, especially accountancy firms. When a seminar was advertised online people would slick on the link and then be referred to the telemarketing consultant who would then make an outgoing call asking them to confirm attendance. If the potential client was unable or unwilling then the telemarketer might ask them if they wanted an appointment with the field sales agent, but they would have to be sensitive to the wishes of the co-host who might not want the telemarketer to engage in hard selling. Following a seminar there would typically be a spike in appointments.

    17.4. The Field Sales Agent's own contacts. If, for example, Mr Smith learned that a potential client was interested in the respondent's services, Mr Smith would refer that employer back to the claimant to make the practical arrangements. The resulting appointment would be credited to the claimant, even though in this instance, the hard work would have been done by Mr Smith.

    17.5. Employment tribunal lists. Employment tribunals publish their lists on a weekly basis, usually a fortnight ahead of the anticipated hearing date.

These were a particularly valuable revenue stream for the respondent. Many employers facing a tribunal claim would leave it until late in the day before seeking advice and assistance. With the hearing date looming, they would often be receptive to an offer of the respondent's services. Conversion rates for this revenue stream were particularly good, provided that the Telemarketing Consultant and Field Sales Agent could respond quickly. We understood the term, "conversion rate" to mean the proportion of calls resulting in booked appointments and the proportion of appointments resulting in signed contracts. Because of the high conversion rate, only the more experienced telemarketing consultants had access to the tribunal lists.

18. The claimant's general target was two appointments per day, or ten per week. In addition the claimant had a notional target of two hours' telephone talk time per day. In reality, however, the talk-time target never became relevant whilst the appointment target was being achieved. There is a dispute about whether the target was abolished, but we do not need to resolve that dispute. During the latter stages of his employment, the claimant was never questioned about his time on the telephone.

19. In addition to his basic salary, the claimant was entitled to commission under the respondent's commission scheme. His commission broadly equated to a percentage of the contract value of contracts signed following appointments booked by the claimant. That percentage was normally 1%, but if, in a particular month, the claimant achieved revenue over £100,000 the commission was increased to 2%. If the contract value was over £100,000 he would also receive a flat-rate bonus. It will be apparent from those arrangements that the claimant stood to earn considerably more than his basic pay if the appointments that he arranged yielded a high contract value.

20. In the claimant's first year of employment, he almost always achieved his target. It was very rare for him to under-achieve in any particular week. He did regularly over-achieve his target, typically by one or two appointments per week. Sometimes, for example, following a seminar, he would over-achieve by a greater margin.

21. Some time in early 2015, the claimant began to experience regular difficulties in getting to work on time. Because of his childcare requirements, he relied on a train which – if it ran on time - meant he would arrive at the office with little or no time to spare. Unfortunately, the train frequently arrived late. In turn, the claimant often arrived a few minutes late at the office. On each occasion of lateness the claimant would make contact with Mr Santinei. Mr Santinei and the claimant had an agreement that the claimant would make up the time in his lunch break. Late arrival did not have a significant impact on his ability to achieve the appointment target. In his discussions with Mr Santinei the claimant was never told that his slightly late arrival would be discounted for attendance management purposes. Nor, however, was he ever warned of any potential disciplinary action if his punctuality did not improve. Indeed, he was not given any inkling that he would be in any kind of trouble for arriving a few minutes late.

22. During July 2015 Mr Santinei had a concern that the claimant had under-performed against his target. Whether such concerns were genuine or not is a matter of dispute, but we find that they were. In large part our finding is based on

the agenda for the 29 July 2015 meeting (see below) and the questions asked at that meeting. Had the claimant been hitting his target every week, such questions would have been pointless. Rightly or wrongly, Mr Santinei believed that the claimant was not performing to the level he had been when he was first recruited and that the claimant's motivation was starting to slip.

23. On 29 July 2015 the claimant was invited to a meeting scheduled to take place in 96 minutes time. The invitation outlined four "concerns" listed as:

    23.1. "Daily outbound call time requirements not being achieved;

    23.2. Daily/weekly appointment targets not being achieved;

    23.3. Constant lateness;

    23.4. Any underlining issue you may also have." (We take the word "underlining" to mean "underlying".)

24. There was nothing in the invitation that suggested that the claimant could be accompanied at the meeting. It did not make any mention of the meeting being a disciplinary meeting, or make any allegation of misconduct. He was not told on what days he had been late, or on what days or weeks he had missed his target.

25. The claimant attended the meeting without a companion. Notes were taken by Ms Joy Gateley of Human Resources. The meeting was chaired by Mr Santinei.

26. Contrary to the evidence of Mr Santinei, we find that the claimant was not told at the start of the meeting that it was a disciplinary meeting or that he had a right to be accompanied. That was Mr Santinei's usual practice at a disciplinary meeting, but we think it is unlikely that, by the start of the meeting, it had even occurred to Mr Santinei that the meeting he was holding was a disciplinary one. If that is what he believed, we would have expected some reference to it in the invitation e-mail. We also bear in mind that there was nothing in Ms Gateley's notes of the meeting to indicate that the usual formalities at the start of a disciplinary meeting were observed. That said, the claimant must have had some understanding on his arrival at the meeting that Mr Santinei was taking the meeting seriously. The presence of a note-taker from outside the line management chain would have alerted the claimant to that fact.

27. They discussed the claimant's arrival times. The claimant said something to the effect that the situation was "improving": by that time the trains had started running more punctually. The respondent noted his comment as "lateness improving" and interpreted it as being an admission that he had been arriving unacceptably late. We cannot be sure what exactly the claimant said. We are, however, satisfied that the claimant did not make any admission that his timekeeping was unacceptable. The claimant mentioned his childcare difficulties. It was agreed that his existing arrangement with Mr Santinei (by which he attended a few minutes late and worked back the time during his lunch break) would be formalised, so that future lateness would not count against him.

28. The claimant was not given any figures or information about his performance. He not challenge in general terms the assertion that he had missed targets. His explanation was that he had been providing administrative support to Mr Smith. It is hard for us to know how much of this kind of work the claimant was actually doing and how much it interfered with his ability to hit the target. What is clear,

however, is that Mr Santinei did not know about it at the time of the meeting. Mr Santinei asked the claimant to copy him into emails and let him know when he was doing work to support Mr Smith rather than making outgoing calls to potential clients.

29. On 12 August 2015 Mr Santinei handed the claimant a letter dated 7 August 2015. That letter was headed: "First and Final Written Warning". The period of the warning was stated to be 12 months. It provided for a right of appeal to Mr Hennessy. It included a statement of expectations going forward, including two appointments per day and ten appointments per week. It also recorded the formalisation of the arrangement so far as timekeeping was concerned and the agreement to notify Mr Santinei about other demands on his time. It contained this paragraph:

> "You are also informed that a failure to improve or repeat a similar misconduct or any other instance of misconduct of any kind under the company's rules during the period of this warning is likely to lead to the next stage in the disciplinary procedure which may lead to dismissal."

30. The wording of this letter is consistent with a theme that ran through the respondent's decision-making, right up to and including its presentation of its defence at the tribunal hearing. The respondent equated underperformance against target with misconduct.

31. Returning to Mr Santinei's letter, it was not at all clear from the letter what "misconduct" Mr Santinei believed had occurred. The claimant had failed to meet his targets, but hitting the targets was not within the claimant's gift. He could not force a potential client to agree to an appointment. Falling short of the target would only be misconduct if he was deliberately not making calls, deliberately not trying to secure appointments whilst on the telephone, or deliberately occupying his time doing things that were not in the interests of the company. No such suggestion was put to the claimant at the meeting. This, in truth, was a criticism of the claimant's performance in terms of his achievement in hitting targets and nothing to do with his conduct.

32. The claimant, not surprisingly, was shocked to receive a final written warning. He appealed by letter dated 15 August 2015. The grounds of his appeal included that the disciplinary action did not abide by the respondent's disciplinary procedure. He also felt that the decision was incorrect due to his length of service, clean record, previous work record and inconsistency of treatment with his colleagues. He was invited to an appeal meeting to be chaired by Mr Hennessy. The meeting was due to take place on 26 August 2015, but was postponed and rearranged for 1 September 2015. That meeting did not proceed either. It is unclear on whose initiative these meetings were postponed, but we are satisfied that it was not at the instigation of the claimant.

33. On 29 September 2015, Ms Gateley chased Mr Hennessy for the written outcome of the appeal meeting. At this stage she was under the mistaken impression that such a meeting had already taken place. We do not know if Mr Hennessy replied or, if so, when. What we do know is that, in fact, some time in September, an informal conversation took place between the claimant and Mr Hennessy about the appeal. For want of a better word, we would describe it as a

"fudge". The claimant and Mr Hennessy were good friends. Mr Hennessy wanted the claimant to get on with his job and to perform to the best of his ability. Having read the invitation to, and outcome of, the supposed disciplinary meeting, it is likely that Mr Hennessy knew the claimant had some good arguments on appeal. The claimant, for his part, was angry at having been unfairly treated, but would have wanted most of all to know that the warning would not count against him. It suited them both to put the warning behind them. The claimant did not say he was accepting the warning. It is likely that he accepted that he needed to perform against the target. Mr Hennessy may not have used the word "wipe" in connection with the warning, but he did say that nothing further would happen with the appeal and that they should "move on". The claimant was left with the clear impression that the warning would be forgotten.

34. It is very hard for us to tell what happened during the next few months. In particular, it is hard for us to tell how well or badly the claimant performed against his target. Whilst we would not normally rehearse the evidence in detail, we think it helps to explain the rather vague nature of our findings of fact:

    34.1. The payslips that he received are no indication at all of the industry that he was putting in. It could have been entirely due to Mr Smith generating referrals.

    34.2. It is unlikely that there was any sustained period in the autumn of 2015 of the claimant failing to hit his target. This is because there were no letters of concern, no emails and no performance review.

    34.3. We do not accept Mr Hennessy's evidence that he was speaking to the claimant on a daily, weekly or even monthly basis during this time about his failure to hit the target. (We address the three different time intervals because Mr Hennessy kept changing his evidence about the frequency of these conversations). Not only was Mr Hennessy's evidence inconsistent, it was unsupported by documents that would have been relatively easy for the respondent to retrieve. The respondent could have found out how many appointments the claimant had booked during each week. They managed to obtain the same information during the period April through to May of the following year. That is not surprising: the respondent had to keep a record of who had made each appointment within the business so that commission could be appropriately allocated. Conversely it is surprising that the respondent did not think to obtain this data for the period between the claimant's alleged acceptance of his final warning and the re-kindling of disciplinary action.

    34.4. We also find that, during this period, the claimant was not regularly exceeding his target as he had been doing at the start of his employment. If he had been over-achieving during this period, we would have expected him to have told us about it. We would also have expected him to have raised it during the subsequent performance-management process.

35. On Monday 9 November 2015 the claimant took a day's sick leave.

36. Very little more of note happened during the rest of that year.

37. By January 2016, it was well known amongst employment law advisers, and indeed amongst the business community generally, that an important ruling

would soon be given that would affect the calculation of holiday pay. The case was *Lock v British Gas Trading Limited*. An employment tribunal had already ruled that, in principle, holiday pay should include commission where it was part of a worker's normal pay. The Court of Justice of the European Union had held that holiday pay should be calculated on the basis of normal pay, rather than basic pay. The employer's appeal was due to be heard in the Employment Appeal Tribunal on 26 February 2016. Employers with incentivised pay structures, and their advisers, were watching with particular interest. We have no doubt that the respondent was aware of the implications of the appeal, not just for its clients, but for its own payroll costs.

38. In anticipation of his January 2016 pay date, the claimant had a conversation with Mr Santinei about the amount of pay he would be receiving. We find that he specifically mentioned whether there would be any commission element in his holiday pay. It would have been surprising if he had not had such a conversation. This was a hot topic of conversation within the business generally. Mr Santinei was the claimant's manager and friend. We find that the claimant did, on balance, tell Mr Santinei that it would not be "fair or legal" if his January holiday pay was confined to basic pay. He did not at this stage say that he wanted it taken further. He did not say anything about there being any risk of Avensure giving the wrong legal advice to its clients. Mr Santinei replied to the claimant telling him to "leave it".

39. Though it is not admitted by the respondent, we find that, by this time, Mr Santinei had already had a discussion with Mr Hennessy about holiday pay. Mr Hennessy had been adamant that holiday pay would not include any element of commission or bonus. Our finding is based on an inference urged upon us compellingly by Miss Moss in her closing argument. We happen to know that Mr Hennessy and Mr Garner have done everything they can, both during and since the claimant's employment, to avoid paying commission and bonus in their calculation of holiday pay. Despite the Court of Appeal having upheld the Employment Appeal Tribunal's *Lock* decision in October 2016 and the Supreme Court having refused British Gas permission to appeal in February 2017, it was only on the first day of the hearing of this case that any concession was made that holiday pay ought to have included commission. We have also paid regard to the answers that were given by Mr Garner and Mr Hennessy about the financial implications of including commission in holiday pay. These facts lead us to conclude that Mr Hennessy was always adamant that holiday pay should be restricted to basic pay.

40. We agree with Miss Moss that their replies were evasive and we think it is indicative of, in Mr Santinei's words, Mr Hennessy finding this a "touchy subject".

41. The claimant revisited the issue of holiday pay in February 2016. By this time the *Lock* appeal had been decided. Importantly, the claimant by this time had reached the second anniversary of the start of his employment. Coverage of the EAT's decision had reached the national news. It remained a hot topic of conversation within the workplace. The claimant told Mr Santinei that the money was due to him and his colleagues and he was asking for his to be paid, including his back pay. He did not say anything to Mr Santinei about the risk of incorrect legal advice being given to the respondent's clients.

42. There is a dispute of evidence about what Mr Santinei said in reply. We accept that Mr Santinei said, either on this occasion or on the previous one, that it was a "touchy subject" with Mr Hennessy. This description of Mr Hennessy's attitude to the subject is entirely consistent with our own impression. There is, however, another comment that, according to the claimant's evidence, Mr Santinei made at this time. It was the claimant's evidence that Mr Santinei told him that, if the claimant "carried on" or "started letting on to other staff about it", he was going to be down the road". We do not accept the claimant's evidence that Mr Santinei made this comment. We have two reasons for rejecting that particular piece of evidence. First of all, it would have been ridiculous to try and silence the claimant about including commission in holiday pay. The whole sales force, we are quite sure, would have been talking about the subject. There would have been considerable noise about it. Neither Mr Hennessy nor Mr Santinei would have had any hope of being able to silence him. Dismissing him would not have kept him quiet: as Mr Hennessy well knew, the claimant was quite capable of making contact with his work colleagues outside the workplace. The second reason is that the claimant did not mention this alleged threat at a later meeting on 19 May 2016. As will be seen, the claimant at that meeting took the initiative in placing on record his theory as to why he was being forced out of the business. His belief at that time was that the respondent wanted him out because his salary was too high. He had never been threatened with dismissal on that ground. Had he received a threat of dismissal for complaining about holiday pay, we would have expected that to be uppermost in his mind as the reason why the respondent was forcing him out.

43. This is also a convenient opportunity for us to record our findings about what the claimant believed at the time of his conversations with Mr Santinei. We find:

    43.1. The claimant believed that his comments to Mr Santinei tended to show that the respondent was breaching and was likely to continue breaching its legal obligation to include commission as part of holiday pay.

    43.2. The claimant did not believe that he was making his disclosure in the public interest. He thought that he was helping his colleagues get their full entitlement as well as himself. He did not think, however, that he was raising the issue of holiday pay for the benefit of the respondent's clients. He was not concerned, at that time, about ensuring that the respondent gave proper legal or human resources advice. Had he thought he was making his disclosure for that purpose, we would have expected the claimant to have said something to Mr Santinei to that effect. He could, for example, quite easily have said that he thought the respondent was setting the wrong example to its customers. He might have said that litigation consultants, caseworkers or helpline operators should be informed. He might have said that there was a risk that the wrong advice was going to be given. The claimant made no mention of such things. We think the most likely explanation is that the claimant thought that this was a purely private dispute between sales staff (including himself) and management.

44. We turn to the events immediately following the claimant's two conversations with Mr Santinei about holiday pay. We do not have any direct evidence about whether Mr Santinei told Mr Hennessy about either of these two conversations.

Nevertheless we infer that such a conversation took place from the timing of what happened later.

45. On 1 March 2016 Mr Hennessy approached the claimant at his desk. Out of the blue, he told the claimant to expect an email with regard to the appeal against his final written warning. That came as a surprise to the claimant who thought that the issue had gone away. At 4.55 that afternoon, he received an e-mail from Ms Gateley. The email told the claimant that he had accepted the informal warning but wanted to check that the claimant did not want to proceed with his appeal and whether the matter could be considered closed. The claimant immediately replied to say that he had not accepted the final written warning.

46. By the time Ms Gateley sent her e-mail, she must have learned from Mr Hennessy that an informal conversation had taken place about the disposal of his appeal. Otherwise she could not have known that Mr Hennessy had taken the claimant to have accepted his warning. We think it is likely that the conversation between Mr Hennessy and Ms Gateley about the warning was shortly before this email had been written. Had it taken place earlier, we would expect Ms Gately's e-mail to have been sent earlier. We have no evidence of any reason why Ms Gateley would have been proactively checking the claimant's Human Resources file in March 2016. We think it is more likely that Mr Hennessy took the initiative. He did so on, or shortly before, 1 March 2016. That fact is not mentioned by Mr Hennessy in his witness statement, who portrays the claimant as having raised the subject of his appeal of his own volition.

47. We have asked ourselves why it is that Mr Hennessy decided to take that action at that time. Our finding is that Mr Hennessy wanted the claimant to continue to have a live warning hanging over his head. He had decided to re-start a formal process of tackling the claimant's performance. His reason for making that decision was that he had the impression, rightly or wrongly, that the claimant was not committed to his job. We also find, importantly for the purposes of this claim, that Mr Hennessy's perception was reinforced by the claimant complaining about his holiday pay. That the claimant's holiday pay complaints were significant in Mr Hennessy's mind is clear to us from the timing. Mr Hennessy restored the disciplinary process just a few days after the claimant raised holiday pay with Mr Santinei. Nothing else happened during that time that would explain Mr Hennessy's actions.

48. The appeal ran its course. The claimant was invited to an appeal meeting which he attended. Mr Hennessy chaired the meeting. Following the meeting he imposed a written warning in substitution for the final written warning. The outcome letter did not engage with the claimant's criticism that the procedure followed in issuing the final written warning had been flawed.

49. It will be remembered that the respondent's Disciplinary Procedure provided for written warnings (as opposed to final written warnings) to last for no more than six months. Despite the clear wording of the Procedure, Mr Hennessy decided that the written warning should last for 12 months from the date of the original final written warning. To our minds this is powerful evidence that Mr Hennessy wanted a live warning on the claimant's record going forward. Had Mr Hennessy followed the Disciplinary Procedure, the written warning would already be out of date.

50. In February 2016, Yasmin Eusuf-Redman joined the respondent. There was an initial period of overlap where she held the role of Quality and Efficiency Manager. Her initial remit was to listen in to telephone calls and help callers improve their script and telephone manner. During this time there was also a brief period in which she oversaw Mr Santinei's work. After a few weeks, however, Mr Santinei took a role in the Seminar Department and the line management of the claimant was taken over by Mrs Eusuf-Redman.

51. When the claimant received the outcome of the appeal, he was deeply suspicious. As far as he was concerned, the process had been resurrected several months after the informal conversation where he thought it had gone away. We have no doubt that that would have affected his morale at that time.

52. The week commencing 11 April 2016 was a bad week for the claimant. He only made two appointments in the entire week as against his target of ten. Mr Santinei caused a letter of concern to be written to the claimant. We have been given no explanation as to why it was that Mr Santinei chose that particular week to give a letter of concern when, according to Mr Hennessy, there had been previous weeks when he had missed target and no letter had been given. We think that the most likely explanation is that Mr Hennessy had spoken to Mr Santinei expressing his dissatisfaction with the claimant's attitude, that in turn having been reinforced by his having complained about holiday pay. In our view it is more likely than not that the real decision-maker here was Mr Hennessy and that he was materially influenced by the claimant's complaints.

53. In late April or early May 2016, Mrs Eusuf-Redman took over as the claimant's line manager. At some time following the change of manager, the claimant started to notice from time to time that, when he made telephone calls using the data that had been provided to him, the potential customer would complain that somebody from Avensure had already telephoned them. The way the claimant saw it was that another Telemarketing Consultant had been ringing onto the claimant's patch. We have looked for the reason why this was allowed to happen. In our view it had nothing to do with the fact that the claimant had complained about his holiday pay. It was much more likely to have been the result of the respondent having purchased poor quality data. It had not been screened to sift out potential customers who had already rejected the respondent's approaches.

54. In the week commencing either 11 April 2016 or 18 April 2016, the claimant stopped being given access to the tribunal lists. This made it more difficult for him to reach his appointment booking target. We are satisfied that the Tribunal lists were not withdrawn by Mrs Eusuf-Redman. At that stage she was not the claimant's direct line manager. We think, therefore, it is more likely that these Tribunal lists were withdrawn at a time when Mr Santinei was the line manager. One possible explanation could be that there was a mistake on handover and that Mr Santinei forgot to tell Mrs Eusuf-Redman that the claimant was to be given access to the tribunal lists. We do not think that this is the explanation. There is no evidence of such a mistake having occurred. We think it is much more likely than an instruction was given by Mr Hennessy to Mr Santinei to take the claimant off the tribunal lists. This is consistent with Mr Hennessy's own evidence of the reason why the claimant was taken off the lists. It is also

consistent with the explanation given by Mrs Eusuf-Redman in the subsequent meeting on 19 May 2016. The reason why the claimant was no longer given access to the lists was because there was a perception that he was a poorly motivated Telemarketing Consultant who was not to be trusted with such a valuable revenue stream. That impression was formed, in part, because the claimant had been complaining about his holiday pay.

55. With regard to the tribunal lists, we should also add that the claimant was only one of a small number of Telemarketing Consultants who was ever given the lists. New starters, inexperienced telemarketing consultants, were not given access to this information. They were still expected to hit their targets of two appointments per day or ten per week. That did not, however, mean that it had no effect on the claimant's ability to hit his target. Quite the reverse. Just because he ought to have been able to hit his target without the lists does not mean that it was not easier to hit the target if he had the lists.

56. We do not know how the claimant performed in the week commencing 18 April 2016. During the week commencing 25 April 2016 the claimant was off sick with a cold on the Monday, Tuesday and Wednesday. On Thursday he booked two appointments. On Friday he booked one appointment, but, for part of that day, the telephones were not working. The total for his week was therefore three. The week commencing 2 May 2016 was a Bank Holiday week. During the remaining four working days the claimant managed to book seven appointments. He was effectively one appointment below his target.

57. On 6 May 2016 Mrs Eusuf-Redman asked the claimant to attend a meeting to discuss his failure to hit the target. He was given an informal warning, which was confirmed by letter bearing the same date. The letter indicated that “no formal action will be taken on this occasion”, but warned that, “should there be any repeat of this conduct, or indeed any misconduct in general in the future you may be subject to disciplinary action which may result in a formal warning or dismissal.”

58. We are quite satisfied with Mrs Eusuf-Redman’s explanation for giving an informal warning. She believed, correctly, that the claimant was below target. What is more troubling is the fact that Mrs Eusuf-Redman chose the words “conduct” and “misconduct” to describe the claimant’s failure to hit his target. In our view this was a recurrence of the respondent’s misconception that under-performance against target was misconduct. It was not. Nevertheless, we are satisfied that Mrs Eusuf-Redman made this decision independently and free from any instruction or pressure from the directors. She was not motivated in any way by the fact that the claimant had complained about his holiday pay.

59. In the week commencing 9 May 2016 the claimant managed to secure ten appointments.

60. In early May 2016, the claimant requested dependency leave to drop off and collect his children from school. The dependency leave would have been unpaid. A chain of emails shows us that at Ms Gateley’s initiative the claimant was offered a chance to make up that time which would result in his pay being maintained.

61. In the week commencing 16 May 2016, on the Monday and Tuesday the claimant booked one appointment each day. On Wednesday 18 May 2016 he helped with the practical arrangements for a seminar with the result that he did not manage to book any appointments that day. The seminar was jointly hosted and the co-hosting organisation had insisted that the claimant did not try to "hard sell" to potential attendees any appointments with Mr Smith.

62. On Thursday 19 May 2016 the claimant was invited to a performance review meeting which began at 9.25am. The claimant was asked about his performance for that week and previous weeks. His explanation was that Mr Smith's diary was full. He also explained about the difficulties he had experienced on the previous day arranging the seminar. Mrs Eusuf-Redman told the claimant that, if the reason why he was not trying to book appointments was because Mr Smith's diary was full, he should let her know and they could make a plan of action together; they could, if need be, book appointments further ahead. Mrs Eusuf-Redman did not tell the claimant at that meeting that he should have booked appointments into other Field Sales Agents' diaries whilst Mr Smith's diary was full. Still less did she tell him prior to that meeting that that is something that he should have done. Had she given that instruction, we would have expected her to have told the line manager of the Telemarketing Consultant who was paired to the relevant Field Sales Agent and to have remembered that fact. Mrs Eusuf-Redman did tell the claimant that she thought that the claimant was a "great sales consultant" and that she did not want to lose him. This is consistent with the evidence she gave to us which is that she had already informally told the claimant that "what we want is the old Penny [the claimant's nickname] back". When Mrs Eusuf-Redman tried to motivate the claimant in the way that we have described, the claimant replied:

> "I want this recorded. I feel I'm being forced out of the door. I feel this is a witch-hunt and I feel this is due to having a higher basic and I think there's another person this is [sic] happened to and it's the same with having a higher basic. I don't agree with the contents of the letter. It's not four weeks that I haven't hit my targets. I feel this is a witch-hunt and I'm being crucified. I honestly feel that's what's happening here."

63. The claimant did not, during the course of this meeting, mention anything to do with his holiday pay or having complained about it or having been warned that if he continued to complain he would be "down the road".

64. Once the claimant had placed on record his suspicions Mrs Eusuf-Redman asked, "Do you want to be here?". The claimant asked for clarification. Mrs Eusuf-Redman replied, "Do you want to be here at Avensure at this moment in time?". The claimant again asked for clarification of the question: "Are you asking me if I'm handing my resignation in?". Mrs Eusuf-Redman said, "No. I'm not saying that Andy. I want to know do you want to be here at this moment in time?". The claimant replied, "If I'm honest, no. Not with the way it is at the moment".

65. We find that, in asking these questions, Mrs Eusuf-Redman was not trying to bully the claimant. She had started off by trying to support him and motivate him and she was met with the claimant putting on record his suspicions that he was being forced out. The questions that she used to follow up were simply an attempt to establish whether the claimant still wanted to work for the respondent

in the light of his suspicions. That said, we can well understand that by this time the claimant believed that he was being forced out. He also believed that the questions that Mrs Eusuf-Redman was asking him were under instruction from more senior managers as a way of adding to the pressure on him.

66. Towards the end of the meeting, there was a more detailed discussion about the claimant's performance for that week. Mrs Eusuf-Redman told the claimant that she needed six more appointments from him by the close of business the following day, which would bring his total for the week to eight. In practical terms what that would mean would be that his weekly target of ten was being reduced by two, possibly to reflect the difficulties he had experienced on the Wednesday. It took no account, however, of the fact that a considerable part of the Thursday morning had been taken up in attending the meeting itself.

67. The claimant thought that he was being given additional pressure. That was not Mrs Eusuf-Redman's intention. She was reminding him of the reality of the weekly target and giving him an opportunity to restore his performance. The way the claimant saw it was that so much pressure was being piled onto him on the final day of the week that the weekly target was unachievable. Mrs Eusuf-Redman does not appear to have appreciated that the way in which she tried to motivate him might in fact have had the opposite effect. Her reasoning in this regard was, we find, completely unaffected by improper considerations of the claimant's holiday pay complaints.

68. From 20 May 2016 until 8 June 2016 the claimant was absent from work with stress. On 24 May 2016 he was given a GP fit note giving the reason "stress and anxiety". At that time, or at some other point during his sickness absence, he was prescribed medication which we have had described to us. It included diazepam, a beta blocker and it also included an SSRI medication. This was medication that his General Practitioner would not have prescribed unless he or she thought the claimant was genuinely ill.

69. When the claimant submitted his fit note, Ms Gateley emailed Mrs Eusuf-Redman saying, "I knew he would do that". We find that this was illustrative of Ms Gateley's view at that time. She thought that the claimant was hiding behind sick leave to avoid addressing issues relating to his performance. In other words, his sick leave was a mask to try and avoid getting on with his job. We find that that was not just Ms Gateley's view but also the view shared by Mr Hennessy and Mr Garner at that time. There was no attempt to seek Occupational Health advice or ask the claimant about h is illness before coming to that conclusion.

70. When the claimant returned to work on 8 June 2016 Mrs Eusuf-Redman conducted an entirely appropriate return to work interview. She reminded the claimant of the Employee Assistance Programme and asked further questions about his fit notes.

71. On 10 June 2016, Mrs Eusuf-Redman forwarded an email chain to Ms Gateley. The emails suggested that there was an outstanding disagreement about the typed notes of the 19 May meeting. In particular the claimant had made handwritten entries on it, suggesting that he disagreed with particular passages. The e-mail chain also referred to the claimant being on medication for stress and anxiety.

72. On 13 June 2016 Ms Gateley had a conversation with Mr Hennessy and Mr Garner. The main points of the conversation were recorded in an email the following day:

> "…the plan is as follows:
>
> 1. Draft invite to disciplinary hearing…with regards numbers
> 2. …
> 3. I will then have without prejudice conversation with [the claimant] with a view to settlement and send him home to consider
> 4. …
>
> [Mrs Eusuf-Redman and Mr Santinei] say that [the claimant's] figures are no better or worse than others ([X], [Y] and [Z] in particular). If that is the case it will be difficult for any disciplinary to hold ground.
>
> I have asked them both to go away and provide me with [the claimant's figures] that I can work with (forgetting about everyone else's figures) so I can prepare invite to disciplinary hearing based on his failings…"

73. By the time of sending that email, the directors knew that the claimant's figures were no better or worse than those of at least three other people. On the current information they knew that disciplinary action would be hard to sustain. Nevertheless they had made a plan to make a "without prejudice" offer to terminate the claimant's employment, failing which they would pursue disciplinary action based on the figures which they were able to obtain about the claimant alone. They knowingly turned a blind eye to the possibility that the claimant might be treated differently from other employees whose performance figures appeared to be no worse than the claimant's figures.

74. By 13 June 2016, the directors had made up their minds to dismiss the claimant. This we conclude from an email sent by Mr Garner at 15:58 the following day: "If he's back in work then dismiss him on Friday". Very little had changed in between the discussion on 13 June and the sending of the email at 15:58 on 14 June to alter the perception that the claimant ought to be dismissed.

75. On the morning of 14 June 2016, the claimant attended a meeting with Ms Gateley. She told the claimant that the respondent would be offering a settlement agreement that would have the effect of terminating his employment. If he would not sign, she said, the company would take "formal action".

76. We are satisfied that Ms Gateley told the claimant that this was an initiative that had come not just from her, but from the directors. This happens to be true. Whether or not she actually said the directors "don't want you here" is a factual dispute that we did not have to resolve. By this stage there was an advanced plan to commence disciplinary action with a view to terminating the claimant's employment. Whether that fact was explicitly communicated to the claimant or not is unnecessary for us to determine. The claimant said he had been expecting the offer. By saying that the claimant did not make any agreement to terminate his employment.

77. Following the meeting the claimant had the clear impression that, whatever happened, he would not be coming back. He asked Ms Gateley if she could arrange to have his belongings brought to him; to which told him that he would have to collect his own belongings. On his way out of the building he shook hands with Mr Shakespeare and said "goodbye".

78. The respondent's settlement proposal was sent to the claimant by e-mail timed at 3.14pm. It required a response by 9.30 the following morning. That timescale gave him less than two working hours in which to take legal advice. The proposal was for two months' pay without any indication of whether that would include commission or not. The claimant asked for more time to respond to the offer, but his request was refused. An email chain amongst the directors and Ms Gately dealing with his request for time prompted this reply from Mr Garner: "The offer stands until 9.00am tomorrow and then it's off, and he's back in work then dismiss him on Friday. Please make that abundantly clear to him".

79. We have asked ourselves why the claimant was given such a short timescale. Our finding is that the timescale was set by the directors. They wanted to exert the maximum possible pressure on the claimant to leave. Their reason for wanting to do that was because they saw the claimant has having poor motivation; an impression that was partly shaped by his complaint about holiday pay.

80. The claimant responded at 10:53am on 15 June 2016. Rejecting the respondent's offer, he made counter offer of six months' pay. His email was assertive in its tone. It accused the respondent of sending threatening emails and describing it as "bullying tactics". We do not criticise the claimant in this regard. The pressure that was put onto to him could quite reasonably have been perceived by him as bullying. What it did mean, however, was that he did not appear to be conciliatory or looking for his job back. It appeared that he was taking a stand against the respondent, but recognising the fact that a settlement agreement might be the best option.

81. The claimant's offer was rejected by the respondent. In accordance with Mr Garner's instruction the claimant was required by Ms Gateley to return to work at 2.00pm that afternoon. The claimant replied that, owing to his current medical condition, he could not return to work that afternoon but hoped to be in work at 9.00 the next morning.

82. Ms Gateley tried to telephone the claimant without success. She followed up her call with an email, but the claimant emailed in reply and said that he was not comfortable speaking on the telephone. Nothing in that e-mail exchange contradicted the claimant's earlier e-mail expressing the hope to be in work the next morning.

83. Seventeen minutes after receiving the claimant's e-mail, Ms Gateley emailed the directors. Her e-mail reminded the directors of their potential liabilities if they dismissed the claimant. It expressed a doubt that the claimant had any intention of attending work the next day. There was no basis for that doubt. The claimant had not said that he would not be returning to work and had indeed expressed the contrary expectation. The instruction was given by Mr Garner at 14:08 that afternoon to be respectful, but to terminate the claimant's employment that day.

84. Later that afternoon, the claimant received by e-mail a letter from Mr Hennessy terminating his employment with immediate effect.

85. The headline reason given to the claimant was that there had been a breakdown in trust and confidence. The letter set out the history of him being given a warning which was still live, a letter of concern and another letter of concern on 6 May 2016. There were numerous references to the claimant's "actions" and "conduct." For example:

> "As a business we have to separately consider what impact your actions have had on our working relationship. It is essential that we have full confidence in our employees and can trust that they will act in such a way that is in the best interests of the company."

86. The letter did not provide the claimant with any evidence of any conduct or poor performance on his part or any other evidence suggesting that the relationship of trust and confidence had broken down. There was no attempt to ask for the claimant's version of events, either in writing or at a meeting. Prior to dismissing the claimant, the directors did not seek any Occupational Health advice or make any enquiry into the claimant's medical condition before reaching the view that the claimant would not return to work.

87. The letter informed the claimant of his right of appeal, which would be dealt with by Mr Garner.

88. The claimant appealed against his dismissal by a letter dated 17 June 2016. He was invited to an appeal meeting chaired by Mr Garner. Unknown to the claimant, Mr Garner was the director who had given the express instruction to terminate the claimant's employment. The appeal took place on 5 July 2016. It lasted 11 minutes. The claimant asked Mr Garner for the reason for his dismissal. He was told that the reason was on the letter. As we have already explained, there was no reason of which the claimant could make any sense. He asked on which grounds trust and confidence had broken down, and the reply was "is there anything else you want to say?". There was no attempt to explain to the claimant the basis in fact upon which he had been dismissed. The claimant did not make any contrite plea for his job back or promise to work with renewed enthusiasm. Had the claimant thrown himself on the directors' mercy, they might well have given him another chance. But the directors themselves had effectively killed off the prospect of that happening. Because of the way he had been treated by the respondent, the claimant had little goodwill left.

89. On 6 July 2016 the claimant was told the outcome of his appeal. It included him having told Ms Gateley that he did not feel comfortable speaking on the phone, and there were assertions of his unacceptable conduct and his continuous actions and the effect they had had on the working relationship. They suggested that they believed the claimant had done something wrong. They did not say what that was.

90. That concludes out findings of fact, apart from the crucial finding that we will need to record about the reason why the claimant was dismissed.

Relevant law

<u>Protected disclosure</u>

91. Section 43B of ERA provides:

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-
>
> … (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject….

92. The ordinary meaning of "information" is conveying facts. Thus a disclosure of information requires something more than a mere allegation: *Cavendish Munro Risks Management Ltd v Geduld* [2010] ICR 325, EAT. The paradigm example of this distinction was given by Slade J at paragraph 24:

> '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.'

93. Where the worker relies on section 43B(1)(b), the information must identify, albeit not in strict legal language, the breach of legal obligation on which the worker relies: *Fincham v. HM Prison Service* [2003] All ER (D) 211 per Elias J at paragraph 33.

94. The question of reasonable belief involves two stages. The first is subjective: did the worker actually believe that the information tended to show one of the relevant categories of wrongdoing? The second stage is objective: was that belief reasonable? That second question is to be judged according to what a reasonable person in the worker's position would believe: *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4.

95. The requirement of reasonable belief in the public interest has been recently considered by the Court of Appeal in *Chesterton Global Ltd v Nurmohamed [*2017] EWCA Civ 979. Giving the lead judgment, Underhill LJ gave the following guidance on the tribunal's approach:

> 27. First… The tribunal… has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.
>
> 28. Second… element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured.
>
> 29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters

> which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.[4]
>
> 30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it…
>
> 31. Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression. …the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest.

96. A disclosure affecting the private contractual rights of a number of individuals may nevertheless be made in the public interest. An interest that is personal in nature does not change its character merely because it is shared by others. There may, however, be features of the case that means that the disclosure is in the public interest as well as in the private interest of those individuals. Useful factors to take into account may include: (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; and (d) the identity of the alleged wrongdoer. Authority for these propositions is to be found at paragraphs 34 to 38 of *Nurmohamed.*

Protection from detriment

97. Section 47B(1) of ERA relevantly provides:

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

> (a) by another worker of W's employer in the course of that other worker's employment….
>
> on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

98. Section 47B clearly envisages that the "other worker" will be personally liable. It is a defence against such liability for the worker to show that they relied upon a statement by the employer satisfying certain conditions (section 47B(1E).

99. Section 48(1A) of ERA allows a worker to present a complaint to an employment tribunal that she has been subjected to a detriment in contravention of section 47B. On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. Where a complaint is well-founded the tribunal has power to award compensation against the employer. There is no express power to award compensation against any co-worker who has breached section 47B(1A).

100. Subjecting a person to a detriment means putting them under a disadvantage: *Ministry of Defence v. Jeremiah* [1980 ICR 13, CA, per Brandon LJ. A person is subjected to a detriment if she could reasonably understand that that she has been detrimentally treated. A detriment can occur even if it has no physical or economic consequence. An unjustified sense of grievance, however, is not a detriment: *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

101. Whether or not the employer's act (or deliberate failure to act) was done "on the ground that" the worker had made a protected disclosure involves looking at the motivation of the employer. Was the employer influenced to any material extent by the fact that the worker had made a protected disclosure? "Material", in this context, means "more than trivial". The authority for formulating the test in this way is *NHS Manchester v. Fecitt* [2011] EWCA Civ 1190, [2012] IRLR 64.

102. In our view, before examining the motivation of the employer under section 47B(1), or the colleague under section 47B(1A), the tribunal should identify the decision-maker in respect of each act or deliberate failure. Knowledge of a disclosure, or improper motivation, on the part of another person is, in our view, irrelevant except in so far as it plays on the mind of the decision-maker. Where a claimant believes that another colleague has influenced the decision-maker with the proscribed motivation, his remedy is to allege a breach of section 47B(1A) against the colleague for their part in influencing the decision. The employer will be vicariously liable for that breach under section 47B1B). Likewise, in a claim under section 47B(1A) against a colleague, the focus should be on *that colleague's* motivation; if the colleague was influenced by others, the worker should raise a separate complaint against those others. Were the law to be otherwise, an innocent colleague could be held personally liable for a decision tainted by another co-worker's improper motivation.

103. Counsel for the claimant suggested that the tribunal ought to take a composite approach: where the employer had innocently acted on tainted information supplied by an improperly-motivated colleague, the employer should be treated as having had that motivation. As authority for that proposition, Ms Moss cited *Royal Mail Group Ltd v. Jhuti* UKEAT 0020/16. In our view, *Jhuti* was not authority for that proposition. It was confined to complaints of unfair dismissal, as opposed to detriment. In any event, the essential basis for the decision in *Jhuti* (that claimants in detriment cases cannot recover compensation for losses caused by dismissal) was held to be incorrect in *International Petroleum Ltd v. Osipov* UKEAT/0058/17/DA. As regards unfair dismissal, the EAT's deicsion in *Jhuti* has since been overturned by the Court of Appeal: see [2017] EWCA Civ 1632.

Unfair dismissal

104. Section 98 of ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
> (a) the reason (or, if more than one, the principal reason) for the dismissal and
> (b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

105. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

106. Where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out a reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell* [1978] IRLR 379, *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

107. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the

tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

108. The following provisions of *ACAS Code of Practice 1 – Disciplinary and Grievance Procedures (*"COP1") appear to us to be relevant:

> 1. This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace. Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.
>
> …
>
> The Code does not apply to redundancy dismissals or the non-renewal of fixed-term contracts on their expiry.
>
> …
>
> 4. …whenever a disciplinary … process is being followed it is important to deal with issues fairly. There are a number of elements to this:
>
> ...
>
> • Employers should carry out any necessary **investigations**, to establish the facts of the case.
>
> • Employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decisions are made.
>
> …
>
> • Employers should allow an employee to **appeal** against any formal decision made.
>
> …
>
> 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.
>
> 10.The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting.

…

12…The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

.

27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.

109. Section 103A of ERA provides that a dismissal must be treated as being unfair where the sole or principal reason for the dismissal is that the employee made a protected disclosure.

110. In *Kuzel v. Roche Products Ltd* [2008] EWCA Civ 380, the Court of Appeal gave the following guidance concerning the burden of proof in cases where a dismissal was alleged to be unfair under both section 98 and section 103A:

110.1. It is for the respondent to prove the sole or main reason for dismissal.

110.2. If the respondent fails to prove the reason, the dismissal is unfair under section 98(1), but it does not automatically follow that the dismissal was for the reason proscribed by section 103A.

110.3. The claimant must adduce some evidence to raise a case that the dismissal was wholly or mainly because the claimant had made a protected disclosure.

110.4. The respondent must then prove that the sole or principal reason for dismissal was not the proscribed reason. This is still possible even if the tribunal rejects the reason advanced by the respondent.

111. Section 123(1) of ERA provides that, where a tribunal makes a compensatory award, the amount of the award "shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

112. Where an employer has failed to follow procedures, one question the tribunal must *not* ask itself in determining fairness is what would have happened if a fair procedure had been carried out. However, that question is relevant in determining any compensatory award under section 123(1) of ERA: *Polkey v. A E Dayton Services Ltd* [1988] ICR 142. The tribunal is required to speculate as to what would, or might, have happened had the employer acted fairly, unless the evidence in this regard is so scant it can effectively be disregarded: *Software 2000 Ltd v. Andrews* [2007] IRLR 568.

113. A tribunal deciding on the amount of a compensatory award may have regard to the possibility that, had the claimant not been dismissed, the claimant would or might have resigned in any event in circumstances that would not amount to an

unfair dismissal. An intended cessation of the relationship of employment by resignation, which would have occurred in any event, was capable of stopping what otherwise would have been a continuing loss following an unfair dismissal: *Fanstone v. Ros t/a Cherry Tree Day Nursery* [2008] All ER (D) 46.

114. Section 207A of TULRA applies to employment tribunal claims involving (amongst other things) a complaint of unfair dismissal.

115. Subsection 207(2) provides:

> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (*a*) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (*b*) the employer has failed to comply with that Code in relation to that matter, and
>
> (*c*) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

116. ACAS COP1 expressly applies to dismissals for poor performance. It does not apply to ill-health capability dismissals. It does, however, apply to dismissals for SOSR (breakdown in workplace relationships) if the decision involves considering the effect of the employee's conduct: *Lund v. St Edmund's School* UKEAT/0514/12.

Conclusions

Protected disclosure

117. We have found that in January 2016 the claimant disclosed to Mr Santinei information that it would not be fair or legal for the respondent to exclude commission from his holiday pay. In February 2016 he disclosed substantially the same information, adding that he was entitled to his "back pay" and that he was not being paid what was due to him.

118. We have found (paragraph 43.1) that the claimant believed that the information he disclosed tended to show that the respondent was breaching and was likely to continue breaching its legal obligation to include commission in holiday pay. In our view, that belief was reasonable. With the *Lock* appeal looming, the expression "fair or legal" would have been clearly understood within the respondent's organisation to refer to that legal obligation.

119. The claimant's disclosures did not, however, qualify for protection. This is because of our finding at paragraph 43.2. The claimant did not believe that he was making the disclosure in the public interest. To avoid any doubt, just because the claimant thought his disclosure might benefit his colleagues did not mean that the believed that his disclosure was in the public interest. Only a relatively small number of sales staff (about 10-12 Telemarketing Consultants and a similar number of Field Sales Agents) would be affected. The claimant

was not thinking about any factors that altered the essentially private nature of this dispute.

120. If our finding is held to be wrong, and the true position is that the claimant did actually believe that he was making his disclosure in the public interest, we would in any event conclude that it was not reasonable for him to hold that belief. We reach this conclusion for largely the same reasons. There was nothing about what he said or did that could justify a belief that he had any interests at heart other than his own and those of a small number of colleagues.

Detriments

121. We have considered the alleged detriments in case our conclusions about the claimant's protected disclosures are held to be wrong. In doing so we have grouped issues together slightly differently to how they appeared in the agreed list. Issues 3.6 and 3.7 we took together under the heading of each of the alleged detriments (a) to (h).

(a) Resurrecting the disciplinary proceedings and (b) imposing the written warning

122. The claimant could quite reasonably have understood both the resumption of the appeal procedure and the imposition of the written warning to have been to his disadvantage. The fact that the final written warning was downgraded to a written warning did not mean that there was no detriment. He and Mr Hennessy had an informal understanding that no further action would be taken in relation to the warning he had received in August 2015. It was reasonable for the claimant to think that there was no procedure to rekindle and no warning to downgrade. Someone with that understanding would inevitably think that Mr Hennessy's actions had made him worse off.

123. As we have found at paragraph 47, Mr Hennessy's actions both in rekindling the appeal process and in imposing a written warning were motivated in part by the claimant having made his disclosure about holiday pay.

(c) Telephone calls onto the claimant's patch

124. The claimant could reasonably have thought that it was disadvantageous to him to find that others had already telephoned potential customers on his revenue stream. It was likely to be unproductive and dispiriting to make calls to employers who had already rejected the respondent's approaches. The conversion rate would be especially low, which would affect the claimant's chances of (i) hitting his target, (ii) earning commission and, potentially, (iii) avoiding dismissal for poor performance.

125. Our finding at paragraph 53 was that this detriment was not on the ground that the claimant had made a protected disclosure. For completeness, we ought to make clear that, whilst the claimant could reasonably have understood the telephone calls onto his patch as having the *effects* set out at sub-paragraphs (i) to (iii), we are quite satisfied that nobody acted with those *purposes* in mind. The respondent wanted the claimant to book appointments: that is how it generated its business. It is far-fetched to think that the respondent deliberately tried to make the claimant under-perform.

(d) Tribunal lists

126. It was clearly detrimental to the claimant to stop giving him access to the tribunal lists, which were one of the most fruitful revenue streams. The fact that the claimant had other revenue streams available to him is neither here nor there. It was harder for him to make appointments without the lists than with them. This adversely affected (i) his ability to hit targets, (ii) his commission and (iii) potentially, his chances of avoiding dismissal for poor performance.

127. Paragraph 54 records our finding that the decision to withdraw the claimant's access to the lists was materially influenced by the fact the claimant had complained about his holiday pay. For what it is worth, we would not go so far as to conclude that the respondent was deliberately trying to make the claimant underperform. Mr Hennessy did not trust the claimant with the lists because, tainted by his view of the claimant's complaints about holiday pay, he saw the claimant as a poorly-motivated employee.

(e) Letter of concern 18 April 2016

128. It was clearly detrimental to the claimant to give him a letter of concern. Not only was it unpleasant to be told that his employer was dissatisfied with his performance, it was also the first step in a performance management process which could lead to his dismissal. At paragraph 52 we found that the letter was sent, partially, on the ground that the claimant had complained about his holiday pay.

(f) Being accused of misconduct for missing his target

129. No employee wants to be accused of misconduct or warned of the possibility of dismissal. The letter of 6 May 2016 was clearly detrimental to the claimant. As we found at paragraph 58, however, the detrimental act was not done on the ground that the claimant had made the alleged protected disclosure.

(g) Increasing the claimant's target

130. Whether Mrs Eusuf-Redman's modification to the claimant's target was a detriment or not depends on one's point of view. As Mrs Eusuf-Redman saw it, she was decreasing the weekly target from 10 appointments to 8. The claimant saw it differently: his daily target for the Thursday and Friday was being increased from two to three, which was especially difficult because of the lack of time remaining on the Thursday. Both perceptions had a rational basis. For the purpose of deciding whether there was a detriment, it is the claimant's perception that counts.

131. Nevertheless, on the strength of our finding at paragraph 67, we would hold that the detrimental act was not done on the ground that the claimant made his alleged protected disclosure.

(h) Bullying the claimant into resigning

132. Mrs Eusuf-Redman had no intention of bullying the claimant on 19 May 2016 in the questions she asked him. Most employees of reasonable firmness would not have understood her questions, in their context, as bullying. The claimant's perception that she was bullying him stemmed from his mistaken, if understandable, believe that Mrs Eusuf-Redman had been instructed to question him in that way. In view of what had already occurred since 1 March 2016, it was just about reasonable for the claimant to think that those particular questions

were subjecting him to a detriment. We are, however, satisfied that Mrs Eusuf-Redman asked the questions for the reason shown at paragraph 65 and not in any way because the claimant had complained about his holiday pay.

133. Ms Gateley's ultimatum on 14 June 2016 could, in our view, reasonably be seen by the claimant as bullying and detrimental. The extremely short timescale to accept the respondent's offer put unwarranted pressure on the claimant to leave. As recorded at paragraph 79, we found that the directors adopted this tactic partly on the ground that the claimant had made disclosures about holiday pay.

Detriments - conclusion

134. Had the claimant's disclosures been protected, his claim would have succeeded in respect of detriments (a), (b), (d), (e) and, so far as concerned 14 June 2016, (h). The remainder of the detriment complaint would have failed.

Unfair dismissal

135. We now turn to the complaint of unfair dismissal.

The reason for dismissal

136. In our view the respondent has proved the reason for dismissal. We are able to make a positive finding that claimant was dismissed because of the belief held by Mr Hennessy and Mr Garner that the claimant's attitude had changed since they recruited him, his heart was not in the job, and he did not want to work for them anymore. At this stage of the analysis, the question of whether that belief was *correct* or not is beside the point: what is important is that the belief was genuinely held.

No potentially fair reason

137. Did the respondent's belief amount to a potentially fair reason? The reason asserted by the respondent is "some other substantial reason". We must therefore consider whether the respondent's belief was a reason of a kind such as to justify the dismissal of a Telemarketing Consultant. It cannot be reasonable to dismiss somebody just because their morale has deteriorated. The proper action to take for such a person is to try and improve their outlook. Of course, if the employer believes that the employees' lack of motivation makes them incapable of giving adequate performance, the reason would relate to their capability. But this respondent did not think the claimant was incapable. If the employer concludes that the employee is refusing even to try and perform and dismisses for that reason, the reason will be one that relates to the employee's conduct. But that is not the reason asserted by the respondent. Moreover, the respondent did not think that the claimant was altogether refusing to try. It was just that he was not performing as well as they had been used to expect from him. We therefore conclude that the respondent has not satisfied section 98(1)(b) and the dismissal was unfair.

No automatically unfair reason

138. In view of our conclusion that the claimant's disclosures were not protected, we do not, strictly speaking, need to consider whether the claimant was dismissed for the reason mentioned in section 103A of ERA. Nevertheless, in

case our main finding is wrong, and the disclosures were protected, we express our conclusions here.

139. We have made a positive finding that the sole or main reason for dismissal was **not** that the claimant had complained about his holiday pay. Holiday pay was only of a number of contributing factors that reinforced the respondent's view of the claimant. Much more prominent in their minds at the time of dismissal were in our view the following:

139.1. The claimant's performance appeared to be following a gradually deteriorating long-term trend. He was not living up to his early promise. This was a concern in Mr Santinei's mind prior to any disclosure being made. Hence the warning in July 2015, albeit an utterly unfair one.

139.2. The claimant was not agreeing to work harder. He had not, as Mr Hennessy had hoped, gone to him cap-in-hand, begging for his job back and promising renewed enthusiasm. Instead, he was offering explanations for his under-achievement which they wrongly regarded as excuses. They were in fact reasons that could have explained why his performance was below target.

139.3. The claimant challenged their procedures by appealing and not automatically accepting their version of minutes. Mr Hennessy and Mr Garner we find did not take well to the claimant standing up to him.

139.4. The directors wrongly believed that the claimant was hiding behind his sick leave and that he was not facing up to their attempts to manage him.

140. All of those were more powerful factors on the minds of Mr Hennessy and Mr Garner than the fact he had complained about his holiday pay.

141. We cannot conclude improper motivation merely from the respondent's completely unfair procedure followed from April 2016 onwards. This is because they had amply demonstrated their ability to proceed unfairly before he made his disclosure. The final written warning given in August 2015 was procedurally indefensible. Critically, the same thread runs through their treatment of the claimant both before and after his disclosure, which is that they wrongly thought that failure to achieve targets was misconduct.

142. For the same reasons we are satisfied that the sole or main reason for the dismissal was not that the claimant had asserted his statutory right to holiday pay.

Reasonableness

143. If we were wrong about the reason for dismissal, and there was a potentially fair reason, then we would find that the respondent acted completely unreasonably in treating it as a sufficient reason for dismissal. We have already listed the procedural defects at paragraphs 86 and 88. There is a more fundamental reason. The reason given to the claimant for his dismissal was that his failure to hit targets was misconduct. It was not. Meeting his targets was not in the claimant's gift. If they thought he was not trying at all, the respondent should have made that allegation plain to him and given him the opportunity to answer it. For the reasons we have already given in relation to the procedure, the respondent acted hopelessly unreasonably.

144. It was also unreasonable for the respondent to reach the view that the claimant was hiding behind his sick leave. Neither the directors nor Ms Gately made any attempt to explore the claimant's illness with Occupational Health or make any other investigation. It was also unreasonable to conclude from the fact that the claimant had explored the option of a settlement agreement and put forward a counter offer that therefore his employment should be terminated and trust and confidence had completely broken down.

145. The unreasonableness of the respondent's decision was also compounded by their deliberate choice to turn a blind eye to the possibility of treating the claimant inconsistently with colleagues whose performance figures were the same: see paragraph 73.

Section 207A uplift

146. We now turn to whether or not there should be an increase in the claimant's award of compensation owing to the respondent's failure to comply with ACAS COP1.

147. First we consider whether or not COP1 applied to the dismissal. In our view it did. This is despite our finding that the reason for dismissal was not one that related to the claimant's conduct. The reason *given* to the claimant was that he had committed misconduct. There are two good reasons in principle why the employer's outward reason (as opposed to the actual reason) should engage COP1. First, it encourages employers to take care when accusing employees of misconduct. Dismissals for misconduct make it harder for an employee to find another job. The second reason is that it encourages employers to be honest and open about their true reasons for dismissal. An employer should not, in our view, be permitted to rely on the tribunal's rejection of its reason in order to escape the consequences of non-compliance with the code. Even if we were constrained to focus on the respondent's *actual* reason, we would still find that COP1 applied. The respondent's reason for dismissal included the respondent's perception of the claimant's poor performance. That is expressly covered by COP1.

148. The respondent failed to follow numerous important provisions of COP1 as listed at paragraphs 86 and 88. We think that it would have been hard for most employers to argue that it was reasonable to depart from COP1 in this way. It is still harder for this respondent. We have taken into account the nature of respondent's business. It is supposed to know about employment law.

149. We have to decide, therefore, by how much to increase the compensation and we think that it ought to be the maximum uplift of 25%.

Contributory fault

150. The next issue we had to determine is whether there should be any reduction on account of contributory fault. In our view there should not. There was no culpable or blameworthy conduct on the part of the claimant. The claimant had not stopped trying to hit his targets. Just because the claimant was a talented salesman whose performance against target had deteriorated does not mean that he was not trying. He could easily have been "grafting", in the words that he used at the 19 May 2016 meeting: making calls, following the script, but his poor

morale and his health could easily have made him come across as less persuasive than he had been previously.

151. There is no evidence of anything else that he was doing or not making calls or anything that he was doing that was not in the interests of the respondent. Making a counter offer was not culpable or blameworthy. He did not refuse to return to work or hide behind his sickness absence. It was not his fault that he took sick leave. There is simply no culpable or blameworthy conduct that gave rise to his dismissal for which we could find it just and equitable to reduce compensation.

The *Polkey* issue

152. We now turn to what would, or might, have happened had a fair procedure been carried out. We do not have any positive evidence that the claimant would have continued on any kind of downward trajectory had the respondent tried to motivate him instead of dismissing him. It is hard to draw any conclusions from the claimant's assertive attitude from April onwards. It is likely that his stance was conditioned by unfair treatment at the hands of the respondent, starting with his final written warning in August 2015 and continuing with the imposition of the written warning in March 2015, letter of concern. We do not have any evidence that we can accept of any informal attempts other than by Mrs Eusuf-Redman late in the day to try and motivate the claimant informally. In the language of *Software 2000,* the evidence adduced by the respondent about what would have happened had it acted fairly is so scant it can effectively be disregarded.

153. We are, however, in a position to rely on our own experience of cases where an employer takes steps to manage an underperforming employee. It is a notoriously difficult situation for an employer to try and handle. Very few employees like to be told that they must improve or face potential consequences for the future of their employment. Many employers successfully turn the underachieving employee's work around. Others do not. In our experience, any kind of formal performance management process carries with it an inherent risk of causing a deterioration, rather than improvement, in the employee's performance.

154. The respondent's Capability Procedure would have required it to hold at least four meetings before it could fairly dismiss the claimant. He would have had to be given an opportunity to improve his performance in the meantime.

155. Doing the best we can, we find that, had the respondent acted fairly, it would have attempted informally to address the claimant's morale and motivation. It would placed the claimant on a performance management process no earlier than May 2016. We find it inevitable that that would not have run its conclusion through to dismissal any time in the following six months. To put it another way, dismissal would not have occurred before 15 December 2016 if the respondent had acted fairly. Beyond that, it is more difficult to tell what the outcome would have been.

156. Drawing on our experience, we find that there is a 20% chance that a fair performance management process would have resulted in the claimant's termination on or around 15 December 2016. Conversely there is an 80% chance that his employment would have continued indefinitely.

157. All other issues relating to remedy will be determined at a separate remedy hearing.

_____

Employment Judge Horne

Date: 16 November 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 November 2017

FOR THE TRIBUNAL OFFICE