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EMPLOYMENT TRIBUNALS

Claimant: **Mr V Zuevsky**

Respondent: **Sky UK Ltd**

Heard at: **East London Hearing Centre**

On: **25-29 September & (in chambers) on 16 October and 11 December 2017**

Before: **Employment Judge C Hyde**

Members: **Mr T Burrows**
Mrs B K Saund

Representation

Claimant: In person

Respondent: Mr B Gray (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1 The complaint alleging whistle-blowing detriments under the Employment Rights Act 1996 was not well founded and was dismissed.

2 The complaint alleging race discrimination under the Equality Act 2010 was not well founded and was dismissed.

3 The complaint alleging victimisation under the Equality Act 2010 in that the Claimant was suspended on 5 August 2016 was dismissed on withdrawal.

4 The complaint alleging victimisation under the Equality Act 2010 in that the Respondent commenced a disciplinary process against the Claimant on 5 August 2016 was dismissed on withdrawal.

5 The complaint alleging victimisation under the Equality Act 2010 in that
(a) he was suspended on 5 August 2016 and the Respondent commenced disciplinary action against him, was dismissed on withdrawal; and
(b) the Respondent continued a disciplinary process against the Claimant after 10 August 2016 and then dismissed him, was not well founded and was dismissed.

6. The complaint alleging that the Claimant was wrongfully dismissed was not well founded and was dismissed.

7 The complaint alleging that the Respondent had made unlawful deductions from the Claimant's wages, or that the failure to pay constituted a breach of contract was dismissed on withdrawal.

8 The claim for payment of interest in respect of the late reimbursement of the sums claimed in paragraph 7 above was dismissed.

REASONS

1 Reasons are provided in writing for the above judgment as the judgment was reserved. The reasons are set out only to the extent that it is necessary to do so in order for the parties to know why they have won or lost and only to the extent that it is proportionate to do so. The Tribunal heard a considerable amount of technical information but did not consider that it was necessary for the most part to repeat it in these reasons.

2 All findings of fact and conclusions were reached on the balance of probabilities.

3 The Tribunal had initially planned to meet in Chambers for a second day on 6 November 2017, but was unable to do so. The reconvened second day in chambers took place instead on 11 December 2017.

Preliminaries

4 By a claim form presented on 20 March 2017 the Claimant alleged that he had been subjected to detriments by reason of having 'blown the whistle'; that he was automatically unfairly dismissed by reason of having blown the whistle or made protected disclosures; that he was wrongfully dismissed (summarily dismissed without notice); that he was subjected to unlawful deduction of wages in respect of five days' pay; alternatively that the Respondent was in breach of contract for not having paid him for five days; and finally, that he was subjected to victimisation under the Equality Act 2010 in three respects.

5 In the grounds of resistance which were dated 20 April 2017, the Respondent

indicated that they intended to resist the complaints and they set out the basis on which they proposed to do so. A Preliminary Hearing (Closed) took place before Employment Judge Goodrich on 22 May 2017. Following that hearing a list of issues was agreed and this was in the bundle at pages 38-43. However, the issues which the Tribunal was asked to determine at the final hearing were fewer than the issues set out in that document. Thus, at the commencement of the hearing the Tribunal clarified with the parties that the Claimant had been paid the five days' net pay which had been identified at the Preliminary Hearing as owing and therefore there was no substantive complaint in relation to that issue. The Tribunal was asked however by the Claimant to make an order for interest which he had lost by reason of the delayed payment. It was not in dispute that the Claimant was entitled to this money when his employment terminated but he was not then paid until shortly after the Preliminary Hearing.

6 In relation to the victimisation complaint, as the Claimant relied on a protected act which occurred on 10 August 2016, namely a grievance he sent to Mr Chew, the two detriments which he complained of, namely the suspension and commencement of the disciplinary action both of which had taken place on 5 August 2016, could not proceed. However, he argued that the outcome was made worse as a result of his having done the protected act. In essence therefore, the complaint in paragraph 5a of the list of issues was withdrawn and paragraph 5b was amended to indicate that the commencement of the disciplinary action it was accepted could not be because of the protected act. Complaint 5c, namely summary dismissal was said to be an act of victimisation.

7 Although it was initially unclear as to the who the correct Respondent was, by the date of the Preliminary Hearing it was settled that the appropriate Respondent was Sky UK Ltd.

8 It was also agreed at the commencement of the hearing that the hearing in September would be restricted to determination of liability issues only.

Claimant's list of issues

9 The Claimant sent a further list of issues to the Tribunal after the hearing on 22 May 2017. Having reviewed this document, the Tribunal considered that it was not an accurate reflection of the issues which were to be determined either legally or factually. Having discussed this with the Claimant Mr Zuevsky accepted this and the hearing proceeded along the lines of the Issues referred to above. The Tribunal noted however that in his closing submissions Mr Zuevsky reverted to addressing the issue of fairness as if it arose under section 98(4) of the 1996 Act.

Documents and evidence adduced

10 The parties had agreed on a bundle of documents for the hearing which consisted of three lever arch files containing approximately 1,021 pages. The Tribunal marked that bundle [R1]. In addition, Mr Gray on behalf of the Respondent prepared an opening note [R2] and a glossary and cast list [R3].

11 The Claimant gave evidence first and relied on a witness statement [C1]. In addition, he produced a bundle of bank statements on 28 September 2017 at the

beginning of the hearing which the Tribunal marked [C2]. Finally, his closing submissions were set out in two documents. The first [C3] dealt with liability and the second [C4] with detriment.

12 Each party was given the opportunity to present written submissions and to supplement them orally.

13 A number of witnesses gave evidence on behalf of the Respondent as follows: -

1. Mr Amit Khopkar [witness statement R5];
2. Mr Trevor Legg [witness statement R4];
3. Mr Tim Arnold [witness statement R6];
4. Mr Laurent Lavallée [witness statement R9]; and
5. Mr Tim Gebbett [witness statement R7 and supplementary witness statement R8].

14 In addition, Mr Gray relied on a written closing submission which the Tribunal marked [R10]. Mr Gray produced three authorities for the Tribunal which were the cases of *Eiger Securities LLP v Korshunova* [UKEAT/0149/16] [2017] IRLR 115; *Fincham v HM Prison Service* [2002] UKEAT/0925/01 and *Blackbay Ventures Ltd (trading as Chemistree) v Hahir* [2014] IRLR 416. The *Eiger* and *Blackbay* cases were photocopies of the reports in the Industrial Relations Law Reports and the *Fincham* report was a printout from the Bailii website.

15 In addition to his written submissions Mr Zuevsky produced for the Tribunal two authorities, namely *Abbey National plc v Chagger*, Court of Appeal [2009] EWCA Civ. 1202 and *University of Nottingham v Fishel* [2000] ICR 1462. The formal citations of the cases are set out above but the Claimant produced printouts from the Westlaw UK website.

Disclosure

16 The Claimant made a written presentation to the Tribunal at the commencement of the hearing objecting to issues relating to disclosure by the Respondent. Having considered the matter and discussed it with the Claimant, the Tribunal indicated that it was proportionate to press on with the hearing with the documents that were available to us and that consistent with the overriding objective, the Tribunal needed to do the best that it could in the circumstances.

17 The Tribunal made it absolutely clear that although it took a pragmatic approach to the issue given that the hearing was about to commence, we did not in any way condone or excuse late disclosure if that had occurred.

The issues

18 The Issues at the Hearing are set out below. The numbering in the List below is identical to that used in the List of Issues used during the Hearing, and only minor changes, such as to the tense used, have been made to the wording.

HEADS OF CLAIM

1. Unlawful deduction of wages/breach of contract;
2. Wrongful dismissal;
3. Victimisation;
4. Automatic unfair dismissal (protected disclosure);
5. Detriment (protected disclosure).

LIABILITY

Unlawful deduction of wages/breach of contract

1. The Respondent had accepted that it owed the Claimant 5 days' net pay and by the commencement of the hearing this had been paid.

Wrongful dismissal

2. It was accepted that the Claimant had a contractual entitlement to 3 months' notice, and was dismissed summarily.

3. The Respondent contended that it was entitled to dismiss the Claimant without notice because he committed an act or acts of gross misconduct. The Respondent alleged that the Claimant was dismissed because:-

    a. He had published information on his consultancy website containing the Respondent's confidential and proprietary material which was produced during company hours;

    b. He owned, updated and operated a website offering Content Delivery Network ("CDN") solutions and consultancy services without having obtained permission to operate such consultancy services, in breach of the Claimant's contract of employment;

    c. The Claimant had had a large percentage of business days where his attendance had not matched authorised sickness or holiday absence.

Victimisation

4. Did the Claimant do a protected act? The Claimant contended that on 10 August 2016 he sent a written grievance to Mr Chew complaining that he was being treated less favourably because of his cultural heritage. The Respondent did not admit that this was a protected act.

5. The Claimant contended that he suffered the following detriments, namely the Respondent's decision to:-

    a. Suspend the Claimant;

    b. Commence disciplinary action;

    c. Dismiss the Claimant summarily.

6. The Respondent denied that the above actions took place because the Claimant had carried out any protected acts upon which he relied.

Protected disclosures

<u>General</u>

7. The Claimant contended that he had made the following disclosures:-

   a. In September 2015, he emailed a presentation email to Laurent Lavallée, Head of Network Architecture and Strategy, in which he contended that he identified concerns about Velocix, a Content Delivery Network ("CDN") that the Respondent was proposing to change to from Akamai;

   b. On 25 November 2015, the Claimant asked Raul Landa why a data science consultant, David López, had been asked to "spin" and "fiddle" data about the performance of Nokia-Velocix;

   c. In February 2016 the Claimant 'verbally reiterated his concerns with Velocix and the lack of testing that had taken place' to Tim Arnold;

   d. In March 2016 the Claimant raised concerns about Nokia-Velocix's CDN failing to store content but merely passing it through: -

      i. In an email to David Groves, Tim Arnold and Nokia-Velocix; and

      ii. In follow-up conversation with Tim Arnold within the next few days;

   e. In April 2016 the Claimant told Tim Gebbett that he had seen occasions when the Velocix CDN had stopped working or was working to an unacceptable standard, and that he had concerns about insufficient testing of the equipment;

   f. On 5 April 2016 the Claimant sent an email to Tim Gebbett containing: -

      i. The presentation identified at 7.a. above (which may have been updated);

      ii. Comparison data of the Akamai and Nokia-Velocix CDNs' performance prior to being allegedly "fiddled" by Paul Lavallée (as referred to at 7.b. above); and

      iii. The email chain referred to at paragraph 7.d.i above;

   g. During a telephone conference call at the beginning of May 2016 the Claimant orally described the functioning of Nokia-Velocix's CDN as inadequate to the Respondent's Customer Information Systems division (and to representatives of Time Warner Cable (US), whom the Claimant says had reported decommissioning Velocix due to similar reasons during that telephone conference call);

   h. In May 2016 the Claimant told Tim Gebbett about his concerns that the Respondent had engaged in malpractice in respect of the performance of the Velocix CDN and that the same was underperforming and likely to cause serious issues for the Respondent's customers; and

   i. On 22 September 2016 the Claimant told the Respondent's Customer Information Systems division that he had concerns about malpractice and issues surrounding Velocix.

8. Did these disclosures happen as alleged or at all?

9. Did they disclose information?

10. Did the Claimant reasonably believe that any such disclosures: -

    a. Were in the public interest; and

    b. Tended to show: -

i. That the Respondent had failed, was failing or was likely to fail to comply with a legal obligation to which it was subject, namely section 8(e) of 'Sky's contract with its customers' and sections 34 - 35 of the Consumer Rights Act 2015; or

ii. That the Respondent had been, or was likely to be, deliberately concealing information which tended to show that the Respondent would be breaching its contractual obligations to customers?

Automatic unfair dismissal

11. Was the reason or principal reason for the Claimant's dismissal because he made Protected Disclosures? It was agreed that the Claimant did not have 2 years' service and there was no claim for "ordinary" unfair dismissal.

Detriment

12. The Claimant complained that he was subject to the following detriments:

a. Being overlooked for the role of Head of Content Delivery Platform;

b. Being unfairly criticised by Mr Gebbett in that he dismissed the Claimant's proposed questions to Time Warner Cable (US) in a patronising manner in an email from him to the Claimant;

c. Tim Gebbett telling the Claimant in May 2016 that he neither liked nor trusted him;

d. Being 'set up by Mr Gebbett to look unprofessional in front of colleagues'. The Claimant says that in a conference call with the team the Claimant worked in, Mr Gebbett pretended that the Claimant was tasked with a particular job when he was not;

e. Being 'excluded from duties stipulated in the job description', namely drafting a document for design of a mid-tier project;

f. Being accused of misconduct, suspended and disciplined;

g. Being denied the opportunity to appeal against his dismissal.

13. Did these matters happen as alleged or at all?

14. If so, were they detriments?

15. If so, were they because the Claimant had made any of the above Protected Disclosures?

REMEDY

16. Loss of earnings, mitigation etc;

17. Injury to Feelings;

18. Whether there has been an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance proceedings by either side;

19. Whether any award in respect of a claim for Protected Disclosures should be reduced on the basis that any disclosure was not made in good faith;

20. Interest.

Findings of Fact and Conclusions

Claim for five days' pay and interest in respect thereof

21. This was the unlawful deduction of wages/breach of contract claim. It was not in dispute that the Claimant was entitled to five days net pay which had not been paid to him by the time he presented his claim and indeed had still not been paid by the date of the Preliminary Hearing on 22 May 2017 even though the Respondent had accepted that it owed the Claimant that sum of money. The money was paid to the Claimant shortly thereafter. He therefore did not pursue a claim for that sum in the Tribunal. He asked the Tribunal however to order a payment of interest to reflect the fact that he had been deprived of the benefit of his money for some months.

22. The Tribunal considered the claim for interest.

23. There is no statutory provision which allows a Tribunal to order a Respondent in such circumstances to pay interest. An award of interest can only be made under section 139 of the Equality Act 2010 where a claim of discrimination has been upheld or where a Tribunal award has not been paid within a prescribed time period under Article 3 of the Employment Tribunal's (Interest) Order 1990 SI1990/479 as amended.

24. In the current case there had been no prior Tribunal Judgment for the payment of any sums, therefore there was no power to order that the Respondent should pay interest. There was thus no power to award interest for the late payment of unlawfully deducted wages.

25. The Tribunal considered whether it could compensate the Claimant under section 24(2) of the Employment Rights Act 1996 ("the 1996 Act").

26. When the Claimant first raised this matter, the Tribunal put the Respondent on notice that it would be assisted by some research into whether the Tribunal had the power to order such a payment. This led to the submission in Mr Gray's closing submissions that there was no power to make an award of interest.

27. The Respondent's estimate was that interest on the late payment would be below £5. However as set out above they indicated that interest could not be awarded. Mr Gray relied on text from the Employment Law textbook *Harvey* at 380.01 which covered this issue. The Tribunal expressed some concern that the time taken up in addressing and researching this issue was not proportionate and confirmed with the Respondent that they would not be prepared to pay the Tribunal's costs of deciding the interest issue. (The Tribunal has no power to make such a costs order.)

28. The Tribunal raised the question whether its powers under section 24(2) of the 1996 Act were engaged in these circumstances. That section provides that where a Tribunal makes a declaration under section 24(1) i.e. finds the complaint of unlawful deduction of wages under section 23 well-founded, the Tribunal may order the employer to pay to the worker (in addition to any amounts ordered to be paid under that subsection) such amount as the Tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which

is attributable to the matter complained of.

29. The Tribunal considered that it was necessary to make a determination on this issue as it was disputed.

30. Mr Zuevsky made no submissions on this point, save to ask the Tribunal for the relief sought.

31. We concluded that we did not have the power to make an order for the payment of interest as the Respondent submitted. Further it was not appropriate to make an order to compensate the Claimant for financial loss sustained by him albeit that payment was late because the Claimant had not put forward any evidence of financial loss sustained by him. The Tribunal considered however that it was a matter of regret that in all the circumstances, this request by the Claimant had not been susceptible to some other, informal, resolution.

32. In conclusion therefore, the unlawful deduction of wages claim was dismissed on withdrawal by the Claimant. The further application for interest was also dismissed for the reasons set out above. The claim for five days' pay was also brought in the alternative as a breach of contract claim. That claim was also dismissed on withdrawal.

33. Quite separately, the claim of wrongful dismissal is also a breach of contract claim and is dealt with below.

The disciplinary action and dismissal

34. Given that the unfair dismissal complaint was a complaint in relation to an automatically unfair dismissal, the ACAS code and procedural issues were not relevant to the question of whether or not it was a fair dismissal. The Tribunal accepted that they may however be relevant to the assessment of the Respondent's motivation. However, they did not have the same prominence as they would have done had the complaint been brought under section 98(4) of the Employment Rights Act 1996.

35. The Claimant commenced employment with the Respondent on 18 May 2015 as an IP Network Development Engineer reporting to the Head of Content Delivery Platform. The Head of Content Delivery Platform was Mr Khopkar who was his line manager until April 2016. Thereafter his line manager was Mr Tim Gebbett. The Claimant was dismissed from his employment on 9 January 2017. At the date of his dismissal the Claimant earned £69,190 per annum gross and worked a minimum of 37.5 hours a week.

36. The Respondent is a private limited company and is part of the Sky Group (Sky) which specialises in television programme production and video content selling activities. The Respondent is the largest pay – TV broadcaster in the United Kingdom employing over 25,000 people with over 12 million customers across the UK and Ireland.

37. The Claimant was of Russian origin and worked with the Respondent who had taken out a certificate of sponsorship to permit him to work in this country.

38. The Claimant was originally based at the Respondent's Braham Street premises (p.54).

39. There was no evidence of any interpersonal difficulties between the Claimant and Mr Khopkar while Mr Khopkar managed him, and none was complained about by the Claimant in these proceedings. As part of the Respondent's processes the manager was required to carry out a mid-year performance review and in the Claimant's case this took place in about November/December 2015. Thus, Mr Khopkar sought the views of people who had worked with the Claimant about his performance. This led to the feedback from Mr Arnold, Senior Project Manager (p.235), in which he gave a broadly favourable review of his interaction with the Claimant but he raised certain concerns. The first was that, as was the case with the other member of staff who was also being fed back on, Mr Arnold considered that the Claimant needed his priorities to be visible to the project managers and reviewed on a weekly/daily basis as the Claimant was often working on projects outside recognised programmes and prioritised this work over key work. Further he commented that his only major criticism of the Claimant was that it was not often clear where he was, that he was often not in Braham Street and there was no notification on email or LYNC (the Respondent's digital teleconferencing system), with the result that the Claimant was not able to respond to queries.

40. Another more senior member of the Respondent's staff who had also worked with the Claimant, Mr Robert Moore, also gave feedback which included both positives and negatives. One of the negatives that he raised was that he believed that the Claimant could improve the way he presented things to people as the Claimant could sometimes come across as if he knew best and others knew nothing (p.237). He also believed that the Claimant could be a bit more vocal in calls and meetings.

41. That latter comment was relevant particularly in view of a subsequent matter which arose with Mr Gebbett. He looked to the Claimant to give his expertise and expert views on certain issues. It was not disputed that this was part of the Claimant's job.

42. Mr Lavallée's feedback for the midyear review in about December 2015 (p.237, last paragraph) was that he was:

> "still trying to work out what we have with Vitaly. The exercise to evaluate Velocix was not a success and left us ponderous. Sorry this is not helpful. Probably will have to test him…"

Mr Lavallée confirmed that by his use of the word 'ponderous, he had meant 'pondering'.

43. Thereafter Mr Khopkar met with the Claimant to discuss the various concerns and to provide feedback about his performance. Following the meeting which took place in late February 2016, Mr Khopkar wrote to the Claimant confirming in an email dated 29 February 2016 (p.240) that among other matters that were discussed it was agreed: -

a. That the Claimant would install the Lync app on his laptop and be available on the mobile.

b. That the Claimant should escalate any technical issues or disagreements to either Mr Khopkar or Mr Lavallée.

c. That they would agree on clear deliverables and dates with PMO (Project Management Office).

d. That the Claimant should engage with wider stakeholders to understand the business requirements, product proposition and suggest appropriate solutions.

e. That the Claimant should understand the entire OTT ecosystem – one service at a time (On-Demand, SKYGo and NowTV services).

44. The Tribunal considered that it was important to note these communications because many of these concerns were similar to matters which arose subsequently under Mr Gebbett's management.

45. It was not part of the Claimant's case that Mr Khopkar had any ill-intentions towards him or failed to deal fairly with him.

46. In assessing the unfair dismissal complaint, it was instructive to see what evidence there was of concerns about the Claimant's performance both before and after the making of the alleged protected disclosures.

47. The Tribunal first addressed the facts and matters relating to the attendance issue which subsequently formed part of the disciplinary case and of the reason for dismissal relied on by the Respondent.

48. On 21 July 2015, the Claimant underwent a complex shoulder operation involving a repair of his rotator cuff and reattachment of ligaments with titanium screws into the bone (pp.729 and 727).

49. By the time of an examination by consultant orthopaedic surgeon Mr Sforza, on 9 November 2015, the Claimant was observed to have a pretty good range of motion, was considered to be doing well and not using any painkillers. He was noted to have been working hard with the physiotherapist but that despite this he had felt some twinges now and then and restriction at the end of the range of motion. The Claimant's view was that his shoulder was progressing well. The orthopaedic surgeon showed the Claimant some exercises to stabilise his scapular blade and told him that it would take some time to fully recover his full strength and that the Claimant should concentrate on endurance and mobilisation more than strengthening. The surgeon's advice was that physiotherapy sessions should now be done every couple of weeks just to check the Claimant was working well on his exercises and adding what might be needed and that he should then gradually increase the amount of physical activities in the gym. Mr Sforza planned to review the Claimant's progress in three months time.

50. When the Claimant was reviewed in early February 2016 by Mr Sforza he

reported that the Claimant was gradually improving and that the shoulder was by now "almost completely pain free". There was no tenderness around the joint and rotator cuff strength was pretty good. Mr Sforza's view was that he was quite pleased with the progression the Claimant had made and that he believed that the Claimant should improve over the next six months as expected. He planned to review the Claimant again in six months time for the last follow-up.

51. The Tribunal considered that it was clear that in the earlier stages of his recovery the Claimant was required to undergo physiotherapy at a gym as described by Mr Sforza under the auspices or direction of a physiotherapist. There was no evidence that Mr Khopkar kept track of the Claimant's attendance for this purpose at the gym. Mr Khopkar appears to have simply trusted the Claimant to take the time that he needed. It was apparent however from the reports referred to above that by November 2015 the need for the Claimant to work with a physiotherapist had reduced and the surgeon considered that such sessions were only needed fortnightly.

52. The Tribunal has already referred above to the fact that Mr Khopkar took steps to put in place more accountability from the Claimant in terms of the Claimant informing his team where he was and being able to participate in the team's work regardless of his physical location.

53. When Mr Gebbett came on board this was one of the issues that he raised with the Claimant at an early stage. He instructed the Claimant to attend the Respondent's premises during office hours and to seek permission to work from home.

54. The Tribunal accepted that Mr Gebbett was entitled to do this as the contract provides that employees: '*are expected to meet the required standards of attendance and timekeeping as determined by your Manager*' (p.57). It appeared to the Tribunal that this conversation had taken place sometime during the first week of April 2016 (p.547).

55. Although there was no contemporaneous note of the meeting both Mr Gebbett and the Claimant (para 34 of C1) agreed that this instruction was given. Indeed the Claimant believed that Mr Gebbett was behaving unreasonably in imposing this requirement.

56. The Tribunal considered that the feedback which had been received and described above amply justified and explained the need for Mr Gebbett to have taken a more structured approach to the Claimant's attendance than had been the position during most of the time the Claimant was managed by Mr Khopkar. Also as the Claimant was clearly recovering well from his shoulder injury, the need for attendance at the gym and physiotherapy had diminished.

57. The position was that over the months from late April to the beginning of August 2016 which involved 67 business days, (i) there were 15 half days when the Claimant had not been present in the building and the Respondent presumed that his absence was due to unauthorised "private rehabilitation/therapy" due to the shoulder injury which was operated on in July 2015; (ii) nine short days i.e. less than six hours in the building; (iii) 15 days unauthorised "working from Russia" due to the Claimant's need to go back to Russia to renew his visa but during which the Claimant was often

unavailable during the business day; and (iv) 12 unauthorised absences when the Respondent could only presume he had been working from home. (The documents in relation to these were at pages 438 - 9 and 356.)

58. The Tribunal considered that the evidence indicated that the Claimant had been somewhat disingenuous with his employer in representing that he was attending physiotherapy at times when he had absented himself among other things to attend the gym during the working day. The Claimant accepted in cross-examination that he had said he was attending physiotherapy because he thought this explanation was more likely to be accepted by management. He did not dispute, and it was not true to say that he was attending physiotherapy sessions on many of those occasions. He was, one assumes, carrying out the exercises which his doctor and physiotherapist had recommended. However as seen from the medical reports earlier on, by November 2015 there was no need for daily or even weekly oversight by the physiotherapist.

59. We found on the balance of probabilities that the Claimant had misled his employers implicitly by creating the impression that he had formal sessions of physiotherapy at fixed times. We accepted Mr Gebbett's evidence (para 19 of his witness statement) that the Claimant first gave the impression that this was every Tuesday and Thursday, then that it was every Monday, Wednesday and Friday from 10am to 12pm. Page 940 is also relevant in relation to what the Claimant originally told Tim Gebbett about the need for rehabilitation work on his shoulder being twice a week for two hours on Tuesday and Thursday. The Claimant accepted in cross-examination that this was not true.

60. We also considered that the Claimant implicitly misled his employer by using the word "rehabilitation". This attempt to give a false impression as to the status and nature of the exercise and whether it was required by the doctor and/or his physiotherapist continued in the Claimant's witness statement (para 6) and in his oral evidence to the Tribunal. The Claimant's accounts on this issue were not credible.

61. Mr Zuevsky also explicitly misled his employer by telling Mr Khopkar in May 2016 that 'Tim knew I was in physiotherapy in the morning' (p.299); and suggesting to Mr Lavallée in his disciplinary hearing that 'a private specialist was hired'; and failing to correct Mr Lavallée when he referred to it as physiotherapy (p.627). Mr Zuevsky's evidence was that the physiotherapy had stopped in February 2016. This is consistent with the medical evidence referred to above and therefore undermines the Claimant's evidence in relation to his conversation with Mr Khopkar about this in May 2016.

62. Importantly in relation to the physiotherapy there was no evidence produced by the Claimant directly from the physiotherapist to support any of these contentions. The only relevant medical evidence was that referred to above.

63. The Claimant's absence from the country in order to secure the renewal of his visa also led to difficulties in terms of his fulfilling his work duties. The Tribunal accepted the evidence of Mr Arnold about the particular difficulties which had arisen in terms of obtaining the Claimant's attendance at a meeting which Mr Arnold had set up having, he believed, secured Mr Zuevsky's agreement to attend by telephone but finding that the Claimant did not in the event attend. The meeting was due to have involved up to about 20 people and the Claimant's failure to participate in it caused

considerable inconvenience to a large number of people. In relation to the June attendance page 312 was also relevant.

64. The Tribunal also accepted the evidence of Mr Gebbett set out at paragraph 21 of his witness statement about a conversation with the Claimant when Mr Gebbett had tried to check up on the Claimant's progress with a piece of work. Mr Gebbett had indicated its urgency to the Claimant and the Claimant responded with the comment "you can pray" and terminated the call.

65. The various difficulties caused by the Claimant's lack of visibility and transparency in terms of his whereabouts caused the members of his team and his managers to lose trust and confidence in him.

66. This was one of the grounds for dismissing the Claimant. On its face, the Tribunal considered that the Respondent had legitimate grounds for concern.

67. The process of investigation of all the disciplinary issues is set out below.

68. The Claimant was also disciplined in relation to the allegation that he had published information on his consultancy website containing Sky confidential and propriety material, produced during company hours, in breach of clause 11 of his employment contract: pp.545-546. The material supporting this disciplinary charge was the graph showing "egress traffic" (p.568) and other graphs in the document which was on the Claimant's website which were generated from the information which the Claimant came across as part of his employment, namely Akamai logs which were 'absolutely' confidential to Sky (pp.934-935). The description of the logs as 'absolutely' confidential was a description which the Claimant himself used.

69. Further, in his disciplinary interview, when Mr Gebbett asked him whether he understood why he had a problem with the Claimant having used this data which Mr Gebbett also described as plagiarism, and whether the Claimant understood why this breached trust because if he was working on any sensitive or commercial or secret or private information this could be seen as him potentially leaking something, the Claimant said that he understood why that would be a matter of concern to his line manager. However, the Claimant's case in essence was that although there were elements of the document which appeared similar to documents prepared by him for Sky, this was not in fact confidential data because it was inaccurate. He indicated that he had made a mistake in the graphs and therefore this meant that he had not disclosed confidential information.

70. It did not appear to the Tribunal that this was a satisfactory answer to the point. The Claimant clearly believed this to be a document which was confidential at the time of publication in February 2016. The following month he created a presentation (p.264-12) in which used the same graph under its original title "*Traffic at Liverpool Region, December 2015*" and presented it as an "*Example of traffic hitting Akamai edge cluster*" (p.264-16). There was no indication in the document that it contained a mistake. Mr Zuevsky then passed the presentation on to Mr Gebbett in April 2016 when Mr Gebbett asked for samples of his work, again with no indication or identification of any mistake in the data (p.264-11).

71. The Claimant's responses when questioned about this in cross-examination did not assist him. He readily accepted that in certain respects he was "lying" and he argued that he could have used the generic image from Google. It was quite clear on the briefest of comparisons that there were considerable similarities between the layout of the Sky document and the document on the Claimant's website.

72. In essence the Tribunal accepted the Respondent's submissions as set out in paragraphs 8 to 14 in relation to the similarity of the content and the appearance of the material put forward by the Claimant on his own Introspec website when compared to the material that was produced for Sky.

73. The third matter which led to the Claimant being invited to a disciplinary interview was the allegation that the Claimant appeared to own, update and operate a website offering CDN solutions and consultancy services, based on research at Companies House and comparison with content produced during the employee's business hours at Sky. It was said that no permission had been sought or submitted to operate such a consultancy and that this was in breach of clause 12 of the employee's employment contract. In short it was said that the Claimant had outside business interests which presented a conflict of interest in terms of his work for the Respondent.

74. It was not in dispute that the Claimant had set up a website prior to the commencement of his employment with the Respondent. It was also not in dispute that prior to his employment with the Respondent he offered consultancy services. It was also not in dispute that the Claimant did not shut down the website when he started employment with the Respondent. Further there was clear evidence that the Claimant had a company called Introspec which was registered at Companies House. That company had a website at all material times. It was not in dispute that Mr Zuevsky did not shut the company down when he started employment with the Respondent. Indeed, he updated matters with Companies House as required such as his address when he moved. Importantly the Claimant posted material on the website of the company as already referred to above which was based on information that he had obtained working for the Respondent.

75. Mr Gebbett was concerned about the contents of the website. It was his case that in the first meeting that he had with the Claimant after starting as his line manager at Sky in April 2016, the Claimant indicated that he could offer consultancy services to the Respondent in relation to a particular matter. Whilst the Claimant disputed this to a certain extent in the course of the second investigation meeting with Mr Gebbett (p.932) it was certainly his case at the Tribunal hearing that he had not offered consultancy services to the Respondent during that meeting. The Tribunal considered however that the note of his responses in the investigatory meeting tended to support Mr Gebbett's impression. The Tribunal considered that the manager would have been entitled in all the circumstances given the existence of the company and of the website and the content of the website to have some considerable concerns about conflict of interest.

76. Further it was not disputed that during the course of the Claimant's employment the Introspec website contained marketing phrases, and the information about the company in Companies House confirmed that the nature of the business included information technology consultancy activities (p.562). The Tribunal considered that the

Respondent was fully entitled to view this company with some caution given that the nature of the business of Introspec considerably overlapped with the Claimant's responsibilities for the Respondent. Further, based on the information that was made available to the Respondent by the Claimant up to and including the termination of his employment, the Respondent was fully entitled to consider this an issue of conflict of interest. Thus, for example the Claimant produced no evidence to the Respondent or indeed to the Tribunal that Introspec had been made dormant during the time that he was employed by the Respondent.

77. In this context the Claimant complained that what he had done did not warrant criticism and was similar to what another member of staff had done. He compared his treatment to that of a former colleague Alberto Reggiori (who the Tribunal found disclosed his website to the Respondent at interview (p.985)). The Tribunal further distinguished the Claimant's case from that of Mr Reggiori in the sense that there was no evidence of Mr Reggiori having carried out business of a sort which conflicted with his employment in the way that there was with the Claimant i.e. the presence on the Claimant's websites of documents which bore a very striking resemblance to documents which he had produced in the course of his work for the Respondent.

78. Further, when the Claimant was asked in his first investigatory meeting on 5 August 2016 about whether he had obtained the permission of his Sky line management at any time to continue to conduct or potentially conduct business with his company while employed at Sky, the Claimant's response was that he did not conduct any business with his company while being employed at Sky and that he could prove it. When he was asked the question again he indicated that he was not aware that such permission was required (p.450).

79. The contractual basis for the Respondent's concern was based on clause 12 of the contract which provided under the heading: "Other Work outside the Company & Conflicting Interest" as follows:

> "You are expected to devote your employment and energy and time exclusively to the best interests of the Company. Permission to hold any outside employment or business interests, including carrying on business with the Company's suppliers, or dealers, must be secured from the Company in writing. Failure to secure advance permission may result in summary dismissal.
>
> You will not while employed by the Company, without the prior consent of the Board either solely or jointly, directly or indirectly, carry on or be engaged or interested (whether as shareholder or otherwise) in any other business. This shall not prevent you from holding up to 3% of the shares in any other company whose shares are quoted on any recognised investment exchange."

There were some further provisions in this context which were not directly relevant to this case.

80. The Claimant also disclosed correspondence with his accountant in July and August 2016 in which he indicated to his accountant that he was not planning to resume company operations until the end of 2016 "at least" and he asked if there was a possibility of putting the company into a dormant state. His accountant responded in

an email sent on 1 August 2016 (p.1018) to the effect that in order to make his company completely dormant he had to remove all the money from the company as a dividend and just leave the share capital in the account. She continued that this was not tax efficient if he was planning to use the company again at the end of the year.

81. The Claimant then took no steps to make to put the company in a dormant state until after the disciplinary hearing and the grievance appeal outcome of 4 and 11 November 2016 respectively. Thus, on 15 November 2016 he filed the dormancy confirmation statement (p.709); and he paid himself the dividend to reduce the company's assets to the amount of share capital on 16 November 2016 (p.659). It was clear from contemporaneous documentation that on 16 November 2016 the Claimant was contemplating taking the Respondent to the Tribunal.

82. Thus the Claimant's actions following his accountant's advice about putting the company into a dormant state were consistent with him planning to use the company again at the end of the year. This plan appears to have been changed only once the Claimant was involved in the disciplinary proceedings.

83. The Tribunal was satisfied that Mr Gebbett understood during his conversation with the Claimant in early April 2016 that the Claimant was offering to sell a CDN solution to the Respondent via his business; the Tribunal was unable to find on the balance of probabilities that the Claimant had indeed said this. In particular the notes of the way in which this was dealt with in the second investigation meeting and also the Claimant's own account in his witness statement about this issue raised sufficient doubt in the Tribunal's mind that the Tribunal did not make a finding that the Claimant had made this offer as such. However, as the Claimant set out in his witness statement he told Mr Gebbett about the fact that he had a company which offered consultancy services: paragraph 29 of the Claimant's witness statement.

84. Certainly thereafter Mr Gebbett made some enquiries of his own into the company and the website and also he subsequently came back to the Claimant and questioned him about whether he was fully committed to Sky as a result of what he believed the Claimant had said to him about his involvement with the company. This is referred to in paragraph 35 of the Claimant's witness statement. This also confirms that the Claimant was aware that this was a matter which was of concern to Mr Gebbett. The Claimant reports that Mr Gebbett said he was concerned about the Claimant's communication with Sky stakeholders outside "our team" because the Claimant could give the impression of internal disagreement on CDN matters and that Mr Gebbett would therefore prefer the Claimant to stream all the communication through himself.

85. The Tribunal considered that even removing from consideration the question of whether the Claimant had actually said to Mr Gebbett that he would sell solutions via his business to the company in the April 2016 conversation, there were ample grounds for the Respondent to be concerned about there being a conflict of interest in breach of clause 12 of the contract.

86. The Tribunal's above findings therefore painted a picture of concerns which were genuine about the matters which the Claimant was eventually disciplined for. Against that the Claimant contended that the real reason for dismissal was because of

having made the protected disclosures. It is fair to say also that the Claimant struggled somewhat in attributing a motive to the Respondent for taking the actions which they did which was other than the motives which they described. Thus, for example at one point he seemed to suggest that action had been taken against him because he was seen as some sort of "Russian spy". At another point he suggested some sort of 'unholy alliance' between three senior managers who all had a French background. These and other themes raised by the Claimant were not however developed and were in any event inconsistent with his case that the reason for his dismissal and for being subjected to the various detriments was because he had blown the whistle.

Wrongful Dismissal

87. The Tribunal reviewed the issues relied upon by the Claimant to allege that he had been wrongfully dismissed. These are set out at paragraphs 2 and 3 of the agreed list of issues. Having made findings above about all the matters set out in issue paragraph 3, the Tribunal concluded that on the balance of probabilities the Claimant was indeed guilty of the misconduct found, and that taken together, it amounted to gross misconduct. In the circumstances, the Claimant had not been wrongfully dismissed.

Whistleblowing Complaints

88. The disclosures relied on by the Claimant were set out in paragraph 7 of the List of Issues. The first was that on 15 September 2015, the Claimant emailed a presentation to Mr Lavallée, Head of Network Architecture and Strategy, in which the Claimant contended that he identified concerns about Velocix, a content delivery network that the Respondent was proposing to change to from Akamai. It was not in dispute that the presentation was also copied to Mr Khopkar and others (p144).

89. The Claimant accepted in cross-examination that this was sent by him prior to his having purportedly done legal research about the issue. He said: "It's purely technical". In the circumstances the Tribunal accepted the Respondent's submission that Mr Zuevsky therefore can have had no reasonable belief that there was a relevant failure. This matter therefore could not constitute a protected disclosure.

90. In considering whether the matters relied on by the Claimant as protected disclosures were indeed such, the Tribunal had very much in mind what the Claimant was contending that these alleged disclosures amounted to. Thus in paragraph 10(b) of the list of issues he was effectively saying that they tended to show that the Respondent was breaching their contractual duties in relation to their customers or concealing information which would show that the Respondent would be breaching their contractual obligations to their customers.

91. The second alleged protected disclosure was that the Claimant asked Raul Landa (Data Scientist) why a Data Science Consultant, David López had been asked to "spin" and "fiddle" data about the performance of Nokia-Velocix (p.210). The context of this correspondence was that the Claimant was asking Mr Landa about the application of a 30MBps filter.

92. As with the previous purported protected disclosure, this also occurred before

the Claimant's purported legal research. The evidence did not point to an attempt at falsification by the Respondent. A filter had been legitimately applied and declared as such at the time (p.221) and presented alongside other graphs, so it clearly identified the relative comparison of Akamai and Velocix. Further, the Claimant's response at the time was that he was 'ok' with this, thus indicating that he had no concerns at the time. There was certainly no evidence of the Claimant escalating this matter at any time or indicating a cover up. This was inconsistent with his later contention that he believed this to be falsification of information.

93. Finally, the Tribunal accepted the Respondent's submission that this was not a disclosure of information but that it was a query and nothing more.

94. The third alleged protected disclosure was that in February 2016, the Claimant 'verbally reiterated his concerns with Velocix and the lack of testing that had taken place' to Tim Arnold. There was no contemporaneous evidence that the Claimant indicated a level of concern with Velocix which could constitute a belief that the Respondent was likely to fail to comply with a legal obligation. The Claimant relied here on an oral conversation and there was in any event no written contemporaneous confirmation of such a conversation or reference to it in any contemporaneous documents.

95. The Respondent denied that any conversations had amounted to protected disclosures. Their case was that the contents of the disclosure were not about or believed to be about legal obligations. There was no evidence before the Tribunal on which we could properly reach a contrary view.

96. The fourth alleged protected disclosure was that on 15 March 2016 the Claimant raised concerns about Nokia-Velocix's content delivery network failing to store content but merely passing it through:-

98.1 In an email to David Groves, Tim Arnold and Nokia-Velocix (p.249); and

98.2 In follow-up conversation with Tim Arnold within the next few days.

The relevant pages were 249-253 and 258-1. The reference to page 258-1 was to the top email on that page sent on 16 March 2016 by the Claimant to various colleagues.

97. The emails all referred in a casual way to the matter the Claimant refers to as the protected disclosure, namely Velocix not caching content. The Tribunal considered that it was important to review the way in which these matters were put by the Claimant at the time in those emails. In the email of 15 March 2016, the Claimant observed that this issue 'might be problematic' (p.249). At the end of some three to four pages of technical information he concluded the communication with a single conclusion in a single line as follows: "we would like to better understand no-caching behaviour under load" (p.253). He further queried whether this could be caused by 'protective algo[rithms]' (p258-1). He went on to speculate in that email whether it was caused by something that was not known.

98. Nokia explained the position and confirmed that it was indeed (p.259 email sent 17 March 2016) the effect of protective algorithms.

99. In reply to the explanation from a representative of Nokia, the Claimant wrote that he had suspected as much (p.261). The Claimant did not then go on to identify any greater concerns than this. The Tribunal concluded therefore that he did not believe that there was a failure by the Respondent to comply with a legal obligation.

100. The fifth matter alleged to constitute to a protected disclosure was that in April 2016 Mr Zuevsky told Mr Gebbett that he had seen occasions when the Velocix CDN had stopped working or was working to an unacceptable standard, and had concerns about insufficient testing of the equipment (C1 para 30).

101. The Tribunal accepted Mr Gebbett's account that the Claimant did not indicate concern about breaching the Consumer Rights Act in any discussions, emails or documents. He understood at the time that the Claimant was concerned about the relative performance of Velocix against Akamai with the violin graphs as a reference. There was no evidence that Mr Gebbett was aware at the time of any reported incidents, customer or internal, that indicated that Velocix' performance was an issue, so he prioritised the Claimant's points, for future reading.

102. Mr Gebbett's evidence was accepted because it was consistent with the way in which the Claimant himself put the matter in the contemporaneous document as referred to in the context of the other alleged protected disclosures also. In all the circumstances therefore the Tribunal found that the Claimant did not indicate a level of concern approaching a belief that the Respondent was likely to fail to comply with a legal obligation. In all the circumstances he had failed to establish that there were protected disclosures in this respect.

103. The sixth alleged protected disclosure was that on 5 April 2016, the Claimant sent an email to Tim Gebbett (p.261) containing the following:-

105.1 The presentation referred to in the first alleged protected disclosure above, (which may have been updated);

105.2 Comparison data of the Akamai and Nokia-Velocix CDN's performance prior to being allegedly "fiddled" by Paul Lavallée (as referred to in the second alleged protected disclosure above);

105.3 The email chain referred to as the fourth alleged protected disclosure above. The only new issue raised by this alleged protected disclosure was the email to Mr Gebbett at page 261. The Tribunal adopts its findings above in relation to the other matters. This email was a continuation of the correspondence already referred to above about whether the cause of the issue the Claimant had identified was the protective algorithms.

104. By the email of 5 April 2016, the Claimant forwarded on to Mr Gebbett the email chains already referred to above, involving correspondence with Nokia and other parties about the question of the protected algorithms. Mr Gebbett was not included in that correspondence. He described it to Mr Gebbett as:

> "an example of discussion I started with Velocix and never got anywhere. This kind of questions I normally explore, and I have all the answers from Akamai and less willingly from level (3). I also attach violin graph comparison between Akamai and Velocix".

He then attached the presentation that he had given in September 2015 for Mr Gebbett's reference.

105. The Tribunal considered that there were no grounds for finding on the basis of the text referred to above that the Claimant was identifying or even hinting at any concerns about legal compliance. There was no reason therefore to reach any different conclusion in relation to this alleged protected disclosure than that reached in relation to the earlier matters referred to above.

106. The seventh alleged protected disclosure was that during a telephone conference call at the beginning of May 2016 the Claimant orally described the functioning of Nokia-Velocix's CDN as inadequate to the Respondent's Customer Information System Division (and to representatives of Time Warner Cable (US), who the Claimant says had reported decommissioning Velocix due to similar reasons during that telephone conference call) (para 19 of ET1).

107. Once again the contemporaneous evidence did not support the case put by the Claimant in relation to his having made a protected disclosure. There was an email sent by the Claimant to various colleagues and copied to Mr Gebbett and Mr Lavallée dated 9 May 2016 (p.298).

108. Following a conference call with, among other people, the managing/principal architect at Time Warner Cable Mr Panagos. The meeting had apparently taken place on 4 May 2016. Mr Gebbett was unable to attend and Mr Zuevsky summarised in the email of 9 May 2016 what had been discussed. Thus Mr Zuevsky informed his colleagues that Time Warner's use of Velocix was discussed as was its relative performance within TWC's network to its subscribers. Time Warner had prepared a paper which was authored by Mr Panagos entitled: "Scaling v IP Video CDN". In that paper, which was publically available and on the internet, they set out that their major goal was to deliver "as good or better performance at a lower cost" than Velocix. The Tribunal accepted Mr Gebbett's evidence that after reading the report he understood that the CDN that Time Warner were looking to replace was Velocix.

109. The Tribunal drew from this documentary evidence that there was clearly a technical discussion to be had as to the respective attributes and benefits of the Velocix method but that what was not being said at the time by the Claimant was that there was any illegality. Further, there was no support for that suggestion in his own contemporaneous report of the conversation (p.298). Indeed at the end of the Claimant's one page report (p.298) to the six recipients and two further colleagues who were copied in, the Claimant made this statement: "I believe this information will be beneficial for architectural decision-making process".

110. The next matter relied upon as a protected disclosure was that in May 2016 the Claimant told Tim Gebbett about his concerns that the Respondent had engaged in malpractice in respect of the performance of the Velocix CDN and that the same was

under-performing and likely to cause serious issues for the Respondent's customers (para 7(h) of agreed list of issues). This was not a matter which was verified or confirmed in any contemporaneous documentation. As the Tribunal has noted, there were no contemporaneous documents in support of this allegation of a protected disclosure,. The only reference to conversations between the Claimant and Mr Gebbett in May 2016 which could be referable to this alleged protected disclosure was set out in paragraph 41 of the Claimant's witness statement. Even there however the Claimant did not make the allegation set out in this alleged protected disclosure. He simply stated that Mr Gebbett had informed him that he did not trust him, that as his manager he knew better what to do, and that the Claimant should finally realise that he was on probation in a new job under his management and should start impressing Mr Gebbett. The Claimant continued that he responded that he did not like Mr Gebbett's approach and that Mr Gebbett retorted that he did not like the Claimant either. These allegations were disputed on their facts but the Tribunal concluded that this did not constitute relevant evidence in support of the protected disclosure alleged. In all those circumstances therefore as far as this alleged protected disclosure is concerned the Claimant had in any event failed to establish the facts alleged.

111. The Claimant was then suspended on 5 August 2016. That agreed date was relevant in terms of whether the suspension could have been caused by the last protected disclosure relied on. Thus at paragraph 7(i) the Claimant alleged that on 22 September 2016 he told the Respondent's Customer Information Systems Division again about the concerns about malpractice and issues surrounding Velocix. The Claimant here refers to matters set out in paragraph 27 of the claim form. He also amended the way in which this issue was put as compared to in the list of agreed issues. He confirmed that his case was that what he was contending had happened on 22 September 2016 was a repetition of something he had previously stated to the CIS division. The Claimant appeared to acknowledge the point made by the Respondent in closing that this matter was in any event irrelevant as it post-dated the Claimant's suspension. It was not a matter that was referred to in evidence. The Tribunal therefore considered that it was appropriate in any event to disregard this matter. There was no evidence to support the facts alleged.

112. Having concluded that the Claimant had either not established the facts relied upon in support of his alleged protected disclosures and/or that they did not amount to protected disclosures it was unnecessary for the Tribunal to address the alleged detriments. Also there could not have been an automatically unfair dismissal if the Claimant had not made protected disclosures. The whistleblowing claims were thus not well founded and were dismissed.

113. The final issue to be considered therefore was the allegation of victimisation. The Tribunal repeats for the avoidance of doubt that the Claimant withdrew the contention that his suspension on 5 August 2016 and the commencement of disciplinary action could have constituted acts of victimisation because the protected act relied on post-dated those events. The protected act relied on was a written grievance sent to Mr Chew on 10 August 2016. The Claimant contended that he alleged he was being treated less favourably because of his culture or heritage (para 4 of agreed list of issues). The Respondent did not admit that this was a protected act.

114. The remaining allegations of victimisation were that the Claimant contended that

the continuation of the disciplinary action (variation of the allegation in 5.b.) and the summary dismissal of the Claimant were the acts of victimisation complained about.

115. It was first necessary to consider if the grievance relied upon by the claimant as constituting the protected act under the Equality Act 2010, amounted to such.

116. The alleged protected act was an email sent on 10 August 2016, addressed to Mr Chew and not copied to anyone else, in which the Claimant raised a grievance. He described it as a grievance "about the present situation". He directed it to Mr Chew who was the manager of his manager, Mr Gebbett. The first matter he raised was the fact that he had raised informal concerns about the situation with his hiring manager on May 14th. The Tribunal considered that the Claimant's reference to the "present situation" was the fact that the Claimant had just recently been suspended. It appeared that the Claimant was referring to a difficult conversation between himself and Mr Gebbett in May. However, the Tribunal noted that the Claimant himself characterised this in the email as a "clash of personalities with Tim Gebbett in May". He then continued that he believed as of 10 August 2016 that Mr Gebbett wished to get rid of him as soon as possible: "due to my critical thinking and cultural background that he personally does not like". He then referred to the fact that Mr Gebbett had initiated an internal investigation into a number of matters and he indicated that he was determined to establish his innocence. He then raised various issues in which he indicated that he believed that the procedure had not been properly followed in relation to the suspension such as not having been given a reason.

117. Mr Zuevsky attached the email which he had sent to Mr Khopkar dated 14 May 2016 in which he had set out various concerns about line management by Tim Gebbett. The nub of the issue was that he reported that Mr Gebbett had said to him that he did not trust him and that he had made the points about the probation period and impressing him. In the email the Claimant covered ground which has already been addressed in the Tribunal's findings above. Crucially however the issues he raised were all about his criticisms of Mr Gebbett's management of him and failing to accept technical points that the Claimant made to Mr Gebbett. He did not directly allege (p.468) racial discrimination. Indeed the full text of this email appeared at p.299 as part of a chain of emails. Once again the Tribunal considered that we could do no better than to quote from the way Mr Zuevsky himself characterised this at the time. He concluded the email of 14 May 2016 to Mr Khopkar by saying:

> "I don't really know what we can do to resolve this – I could potentially work in parallel with Tim or out of CDN space at all, I just think it is not fair that one person makes me leave the company I consciously chose to contribute to and build industry leading caches for."

118. It appeared therefore that the most that he was complaining of at the time was that Mr Gebbett's treatment of him had been unfair.

119. When these matters were then encapsulated in the grievance to Mr Chew, the only new matter that had occurred was the suspension. He further stated that he believed that the suspension was based on "lack of trust leading to prejudice" and was not otherwise justified: para 2.B, p468. Given the wide statutory definition of a protected act under the Equality Act 2010, the Tribunal considered that the reference to

cultural background and a concern about prejudice in the grievance of 10 August 2016 meant that this document contained a protected act.

120. The Tribunal next considered whether the continuation of the disciplinary process after the date of this grievance/protected act and/or the decision to dismiss the Claimant was caused or contributed to by the fact of this protected act having been done.

121. The Tribunal has already set out above in the context of considering both the automatic unfair dismissal and the wrongful dismissal complaints that the Respondent had substantial grounds for deciding to take disciplinary action and then to dismiss the Claimant, and that the Claimant committed acts of misconduct which warranted summary dismissal. Further, the Respondent had already started on the trajectory of considering disciplinary action of a serious nature against the Claimant before the Claimant did the protected act on 10 August 2016. This was most clearly seen by the fact that the Respondent had already suspended the Claimant. The Tribunal took into account that the Respondent would not have suspended the Claimant unless they were considering a matter that they believed could constitute serious misconduct such as could justify a dismissal. The Respondent was therefore on the trajectory of investigating and taking disciplinary action in relation to matters which could support a dismissal prior to the doing of the protected act by the Claimant.

122. Further, there was nothing which was put forward in the evidence thereafter which suggested that the Respondent continued with the disciplinary investigation because of the protected act. On the contrary, the Respondent subsequently decided that the case was not proven in relation to one of the disciplinary matters in respect of which the Claimant was suspended. This was the allegation about the Claimant having breached the Respondent's security policy (p.481, para 5). This was fully consistent with the Respondent having examined the evidence and the disciplinary charges critically, and reached different conclusions on their merits.

123. The written confirmation of the suspension on 5 August 2016 was not sent out until 19 August 2016, but there was an earlier letter to the Claimant confirming the suspension (p.483 refers) sent on about 9 August. The Claimant did not raise any issue about having been notified prior to 19 August 2016 that he had been suspended. Indeed the Respondent sent a letter to the Claimant on 15 August 2016 (p.472-473) from Mr Gebbett setting out the grounds on which the Respondent would be proposing to hold a conduct meeting (which is the Respondent's term of art for a disciplinary investigation meeting) on 19 August 2016 at 3:30pm. Thus the security breach issue was something the Respondent addressed with the Claimant at the initial investigatory meeting but it did not subsequently constitute one of the disciplinary issues that he was dismissed for.

124. There was a first investigatory meeting between Mr Gebbett and the Claimant held on 5 August 2016 (notes pp.449-454). At the end of that meeting the Claimant was then suspended. Then the second investigatory meeting took place on 19 August 2016 as mentioned above. A transcript of that meeting was before the Tribunal (pp.928-955). When the Respondent invited the Claimant to the disciplinary hearing they informed him of the documents that they would be relying on. This included the

investigation summary prepared by Mr Gebbett arising out of the two investigatory meetings referred to above. It also included the notes of those meetings.

125. The Claimant was invited to a disciplinary meeting on 4 November 2016 by letter dated 1 November 2016 (pp.545-6). The letter inviting the Claimant to a disciplinary hearing also confirmed that the Respondent would have a note-taker present or would record the meeting using audio recording equipment.

126. Mr Lavallée conducted the disciplinary hearing on 4 November 2016 (notes pp.624-628). In a letter running to some three pages (p.671) dated 5 December 2016 Mr Lavallée wrote to the Claimant informing him of the outcome of the conduct (disciplinary) meeting. He found the three allegations proven but did not consider that there was sufficient evidence in relation to the security breach disciplinary charge. He found that the Respondent was not in a position to dispute the Claimant's contention that he had never been briefed about Sky IS security standards. He made the point that this contention on the Claimant's part meant that the Claimant in any event fell quite short of the Respondent's expectations of someone filling the role of a CDN Design Engineer.

127. The Tribunal has already set out its findings above in relation to each of the disciplinary matters that the Claimant faced. Mr Lavallée found that there were sufficient grounds to justify a belief that the Claimant was guilty of the misconduct alleged and the Tribunal has made findings above in relation to the wrongful dismissal complaint that on the balance of probabilities the Claimant was indeed guilty of such misconduct. In all those circumstances therefore, the victimisation allegations were not well-founded and were dismissed.

128. The Tribunal took into account also that the Claimant lodged an appeal dated 12 January 2017 (pp. 687-689). He withdrew this appeal by email sent on 20 February 2017 on the basis that the Respondent had delayed too long in addressing the issue. The Tribunal did not consider that there were any matters put forward in the appeal which undermined the findings already set out above as to the Respondent having good grounds for bringing disciplinary proceedings and then taking the decision to dismiss and further the Tribunal was satisfied on the balance of probabilities that the Claimant was guilty of the misconduct found.

Employment Judge Hyde

23 January 2018