THE EMPLOYMENT TRIBUNALS

Claimant **Mr J Banerjee**

Respondent **Royal Bank of Canada**

HELD AT: **London Central**

ON: **23 April – 10 May 2018**

Employment Judge: **Mr J Tayler**

Appearances

For Claimant: **Ms C D'Souza, Counsel**
For Respondent: **Ms J Mulcahy, Queen's Counsel**

JUDGMENT

1. The Claimant was unfairly dismissed. The principal reason for the Claimant's dismissal was the making of a protected disclosure.

2. The Claimant contributed to his dismissal by 25%.

3. The award of compensation is to be subject to an uplift of 25% because of the Respondent's failure to comply with the ACAS Code of Practice.

REASONS

Summary

1. During an address, in which staff were encouraged to report wrongdoing, they were told "don't ask don't tell will not be tolerated". The Claimant did "tell" the bank[1] that staff were taking a couple of minutes to attest that they had read policies vital for regulatory compliance when they had not read them carefully, or at all; and did "ask" the bank to investigate. The bank's actions thereafter were the opposite of their fine, but empty, words. Using his late arrival at work as a pretext, the bank sacked the Claimant. The main reason for his dismissal was his public interest disclosure.

The Proceedings

2. The Claimant submitted a Claim Form to the Employment Tribunal on 2 March 2017. The Claimant brought complaints of unfair dismissal, on the ground that the dismissal was automatically unfair because the reason, or principal reason, for dismissal was that he had made protected disclosures. The Claimant also alleged that he was subject to detriments done on the ground that he had made protected disclosures.

3. The whistleblowing detriment claim was withdrawn on 14 August 2017.

4. On the second day of the hearing, 24 April 2018, I made an Order for specific disclosure against the Respondent. Reasons were given orally. No request has been made for written reasons.

Issues

5. The parties agreed a List of Issues (Pleadings Bundle p76-81). I have decided those issues necessary to determine the case.

Evidence

6. The Claimant gave evidence on his own behalf.

7. The Claimant called:

   7.1 Paul Adamson, formerly an FX trader with the Respondent

8. The Respondents called:

   8.1 Edmond Monaghan, former Global Head of Foreign Exchange

   8.2 Alexander Waldegrave Price, Head of FX Sales, Europe

   8.3 Soo Chin Tan, Currency Trader

   8.4 Adrian Palmer, Head of Internal Audit

[1] By which I refer to managers employed by the bank

8.5 Sian Hurrell, Head of Fixed Income Currencies and Commodities ("FICC"), Europe, Head of FICC Sales Europe, and Global Head of FX

8.6 Urmilla Devitt, Head of Employee Relations

8.7 Stephen Rosenstjerne Krag, Chief Financial Officer, Europe

Approach adopted

9. In analysing this claim I considered the totality the factual evidence and applicable law before determining which matters required specific findings of fact.

10. It is regrettable that in cases of this nature it appears that documentation must always be delivered by the van-full. The agreed bundle is 6,166 pages long. The Claimant's bundle added another 497. The pleadings bundle is 153 pages. There are 304 pages of witness statements. The transcript of the hearing ran to 1,562 pages. Necessarily, if focus is to be maintained on the real issues, it is impossible to make findings of fact on every issue in dispute. There is a tendency in whistleblowing claims to identify the largest possible number of disclosures rather than focusing on those that are likely have been causative of adverse treatment. I have tried to take the time to make these reasons shorter than they might have been.

The Law

11. A "protected disclosure" is defined in section 43A of the Employment Rights Act 1996 ("ERA") as a "qualifying disclosure", as defined in section 43B ERA, which is made in accordance with any of sections 43C to 43H of the ERA.

12. Qualifying disclosures are defined by section 43B ERA, so far as is relevant:

> "(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed.
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,…
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

13. There must be a disclosure of information. There can be a disclosure of information even if the information is already known to the recipient. There is a distinction between the mere making of an allegation, or statement of position, such as "you are not complying with Health and Safety requirements" and a

disclosure of information, in the sense of “conveying facts”, such as “the wards of the Hospital have not been cleaned for two weeks”, which gives rise to the allegation: **Cavendish Munro Professional Risk Management v Geduld** [2010] ICR 325 applied in **Goode v Marks and Spencer Plc** [2010] All ER (D) 63 (Sep).

14. In **Western Union Payment Services UK Ltd v Anastasiou** UKEAT/0135/13 the EAT cautioned that the distinction between fact and allegation can be a fine one. In **Kilraine v London Borough of Wandsworth** [2016] IRLR 422*, EAT,* Langstaff J note at paragraph 30:

> ''I would caution some care in the application of the principle arising out of **Cavendish Munro** … The dichotomy between “information” and “allegation” is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. … The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point'.'

15. An allegation without information cannot be a qualifying disclosure. However, information supporting an allegation can be a qualifying disclosure.

16. An alleged disclosure must be sufficiently specific to constitute information: **Kilraine v London Borough of Wandsworth** UKEAT/0260/15 at paragraph 32.

17. More than one communication can be read together to constitute a qualifying disclosure, when taken separately each would not: **Norbrook Laboratories (GB) Ltd v Shaw** [2014] ICR 540, EAT).

18. Other than in obvious cases, where an employee relies on having believed that a disclosure of information tended to show an actual or prospective breach of a legal obligation under section 43B(1)(b) ERA, he should identify the source of the legal obligation that he believed was being, or was likely to be, breached: **Blackbay Ventures Ltd t/a Chemistree v Gahir** [2014] ICR 747. However, the obligation need not be identified 'in strict legal language'. The requirement is also met if the breach complained of is obvious.

19. The employee must hold a reasonable belief that the information tends to show the relevant breach of legal obligation. The belief need not be correct, but it must be reasonable for the employee to hold it: **Babula v Waltham Forrest College** [2007] IRLR 346. The Court of Appeal set out four useful tools for determining whether a disclosure was in the public interest:

    19.1 The numbers in the group whose interests the disclosure served, although Tribunals should be cautious about finding the public interest test satisfied purely based on the number of affected employees since the broad intent of the legislators was that private workplace disputes should not attract whistleblowing protection.

19.2 The nature of the interests affected and the extent to which they are affected by the alleged wrongdoing disclosed

19.3 The nature of the alleged wrongdoing disclosed. Disclosure of deliberate wrongdoing is more likely to be in the public interest than something done inadvertently.

19.4 The identity of the alleged wrongdoer.

20. The EAT held in **Parsons v Airplus International Limited**, UKEAT/0111/17 that a compliance officer did not make a protected disclosure when she raised concerns about compliance issues purely out of concern for her own potential liability: self-interest was not sufficient.

21. The employee must also subjectively believe that the disclosure is in the public interest and that belief must be objectively reasonable: **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed** [2017] EWCA Civ 979.

22. The burden of proving the above two elements is on the Claimant: **Western Union Payment Services UK Ltd v Anastasiou** (UKEAT/0135/13, 21 February 2014, unreported) at paragraphs 44 to 45.

23. In considering whether the employer is likely to fail to comply with a legal obligation, the term “likely” requires that it is more probable than not that the employer will fail to comply with the relevant legal obligation: **Kraus v Penna plc** [2004] IRLR 260.

24. A qualifying disclosure is rendered a protected disclosure if it is made to the employer: s 43C ERA.

25. Pursuant to Section 94 of the Employment Rights Act 1996 (“ERA”) an employee has the right not to be unfairly dismissed. Pursuant to Section 103A ERA a dismissal is automatically unfair if it is done for the reason or principal reason that the Claimant has made a protected disclosure.

26. If, as in this case, the employee was not employed for two years, and so does have qualifying service to claim “ordinary” unfair dismissal, he bears the burden of proving on the balance of probabilities that he made the alleged protected disclosures and that it was the reason, or principal reason, for his dismissal: **Ross v Eddie Stobart Ltd**, EAT, unreported, 08 August 2013, applying **Smith v Hayle Town Council** [1978] IRLR 413.

27. Determining the reason, or principal reason, for dismissal requires an enquiry into what facts or beliefs caused the decision maker to dismiss: **Abernethy v Mott** [1974] ICR 323. The person taking the decision to dismiss must be aware of the protected disclosures and it must be the reason, or principal reason, for the decision to dismiss: **Royal Mail Ltd v Jhuti** [2017] EWCA Civ 1632.

28. In a case where an employee has made multiple disclosures section 103A does not require the contributions of each of them to be considered separately. When a tribunal finds that they operated cumulatively, the question is whether the cumulative impact was the reason, or principal reason, for the dismissal:

El-Megrisi v Azad University, UKEAT/0448/08. Accordingly where there are a number of disclosure the tribunal might conclude that all, or some, of them cumulatively were the principal reason for dismissal. Alternatively, out of a number of protected disclosures, one alone might be the principal reason for dismissal, so that the others, although being subsidiary cause of the dismissal, need not be relied upon to satisfy section 103A ERA.

29. It is rare for there to be direct evidence that an employee was dismissed because of making a protected disclosure. It will often be necessary to draw inferences from primary facts: **Kuzel v Roche Products Ltd** [2008] IRLR 530. There may be circumstances in which the Employment Tribunal is fully persuaded on the evidence what the reason for the dismissal was, and that it was unrelated to the making of any disclosure. It is generally prudent for the Employment Tribunal to decide the reason for dismissal even if it decides that the making of protected disclosures was not the reason, and so, the determination is not strictly necessary to decide the claim: see **Malik v Cenkos Securities**, UKEAT/0100/17.

30. A tribunal is not bound to accept at face value a statement by the employer as to his reasons for dismissal. Cairns LJ held in **Abernethy v. Mott** [1974] ICR 323:-

> ''If at the time of the dismissal the employer gives a reason for it, that is no doubt evidence, at any rate against him as to the real reason, but it does not necessarily constitute the real reason."

31. In **ASLEF v. Brady,** [2006] IRLR 576, EAT, it was alleged that misconduct was used as a pretext for dismissal:

> "78. We would agree that in principle there is indeed a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. ([Counsel for the employer] in fact drew a distinction between reason and motive, but we do not think that the analysis in this case is assisted by referring to the elusive concept of motive.) An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords. For example, it may be that someone perceived by management to be a difficult union official is perfectly properly dismissed for drunkenness. The fact that the employers are glad to see the back of him does not render the dismissal unfair. What causes the dismissal is still the misconduct; but for that, the employee would not have been dismissed.
>
> 79. It does not follow, however, that whenever there is misconduct which could justify the dismissal a tribunal is bound to find that this is indeed the operative reason. The Thomson case [Times Corporation v Thomson [1981] IRLR 522] shows that even a potentially fair reason may be the pretext for a dismissal for other reasons. To take an obvious example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then in our view the reason for dismissal – the operative cause – will not be the misconduct at all. On this analysis, that is not what has brought about the dismissal. The reason why the employer then dismisses is not

> the misconduct itself. Even if that in fact merited dismissal, if the employee is treated differently to the way others would have been treated, being dismissed when they would not have been, then in our judgment a tribunal would be fully entitled to conclude that the misconduct is not the true reason or cause of the dismissal. The true reason is then the antipathy which the employer displays towards the employee."

32. This approach was expressly approved by the Court of Appeal in **Co-op v. Baddeley** [2014] EWCA Civ 658 (per Underhill LJ, at paragraph 43) -

> "The correct approach was clearly explained by the EAT, Elias J presiding, in ASLEF v Brady [2006] IRLR 576 , at paras. 78-79 (p. 584) …
>
> Distinguishing between cases falling on either side of the line may not be straightforward and will often require careful consideration of the decision-makers' mental processes."

33. If an employee who has made protected disclosures is guilty of misconduct that, but for the making of the protected disclosures, would have resulted in a sanction short of dismissal, but, because of the making of protected disclosures, results in dismissal, the principal reason for the dismissal is the making of the protected disclosures.

34. It is not possible to infer that the reason for treatment was the making a protected disclosure merely from the fact that an employer has acted unreasonably: see by analogy in the context of discrimination claims **Glasgow City Council v Zafar** [1998] ICR 120. However, unexplained unfair treatment might found the drawing of an inference.

35. Section 122(2) ERA provides for a reduction of the basic award where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce it.

36. There are two stages at which the Tribunal has regard to justice and equity in considering the compensatory award. Pursuant to Section 123(1) ERA the Tribunal should award compensation of such an 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, insofar as the loss is attributable to the action taken by the employer. Section 123(6) ERA provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion that it considers just and equitable, having regard to that finding.

37. The predecessor to Section 123(1) ERA founds what is referred to as a **Polkey** reduction where it is decided that there is a chance that had a fair procedure been operated the employee would have been dismissed in any event. This may result in it being appropriate to reduce compensation because the loss has not been sustained by the employee entirely by reason of the action of the employer.

38. In a case where the conduct of the employee occurred prior to the dismissal, and was causally connected to the dismissal, the compensatory award may be reduced under Section 123(6). If the unfairness had a causal effect on the dismissal a finding of 100% contribution may not be made. The causal connection between the conduct and the dismissal is not required under Section 122(2) or 123(1).

39. In considering **Polkey**, contribution and just and equitable compensation the Tribunal has to make its own factual findings about what would have happened had a fair procedure been applied and/or whether the misconduct did in fact take place.

40. The concept of contributory fault can be applied even to cases of automatic unfair dismissal: see the approach of the authors of Harvey on Industrial Relations and Employment Law, CIII [127]; DI [1967]–[2350].

41. Where there has been a breach in the ACAS Code of Practice on Disciplinary and Grievance Procedures an uplift may be awarded of up to 25% of any financial compensation that is awarded.

Findings of Fact

42. The Respondent is part of a financial services group providing personal and commercial banking, wealth management, insurance, investor services and capital markets products services. The Respondent employs approximately 1,900 people in the UK.

43. The Claimant has worked in banking since 1990. In 1995 he joined Citibank as a senior trader in European currency trading. While working at Citibank the Claimant first met Paul Adamson, whom he managed for a period, and subsequently was managed by at the Respondent. The Claimant moved to work in emerging markets currency trading. The Claimant has been very successful as a currency trader. He measures that success in terms of the money that he has earnt, noting in paragraph 6 of his witness statement that when he moved to Barclays he was for the first time paid more than £1 million a year.

44. The regulatory regime for banking has changed significantly since the financial crisis and the foreign exchange trading scandal. The Claimant's activities are regulated by the Financial Conduct Authority. The Claimant, as a person performing controlled functions, must be approved by the FCA. He is required to operate in accordance with the Principles for Business. These provision place legal binding requirements on banks staff.

45. This stricter regulatory regime has been mirrored by a growth in internal compliance procedures designed to ensure that bankers conduct themselves appropriately. This became a cause of concern to the Claimant during his employment by the Respondent for two principal reasons. First, he considered that there was a tendency for compliance to over regulate in a manner that would make it much more difficult for him to carry out his primary function of making money. Second, he considered that such extensive regulation could lead to a box ticking culture in which his colleagues attested to having read the

procedures without having done so, or having only read them briefly. Extensive and voluminous procedures can, paradoxically, result in failures to comply with fundamental regulatory requirements because the procedures are so detailed and extensive that few employees read them properly. This became an increasing concern for the Claimant as his employment with the Respondent progressed.

46. The Claimant was also concerned about a "new world order" in which a desire for greater diversity in the workforce could lead to unlawful positive discrimination in favour of women. He also felt that criticism from a female colleague, particularly of being aggressive, could result in a stain on his employment record, and so must be vigorously counted.

47. The Claimant describes himself as dealing with his concerns in a "forthright" manner. That is an understatement. The Claimant was unrelenting in raising his concerns and rarely sought to win friends or influence people. However, he often made good points which, at least in the early stages of his employment, were taken on board, even if there was some exasperation at the manner in which he made them.

48. By letter dated 22 April 2015 the Claimant was offered employment as Emerging Markets FX Trader within Fixed Income Currencies and Commodities ("FICC") with the corporate title of Director. The Claimant signed the offer letter on 5 May 2015. His hours of work were stated to be 35 per week, Monday to Friday, with one hour for lunch, with a requirement to work additional hours because of business and client requirements without additional remuneration. In reality the Claimant worked greatly in excess of 35 hours per week and would attend the office at unsociable hours when was necessary.

49. The Claimant's first day of employment was 15 June 2015.

50. The start time for the office was 7am. The Claimant saw this as an aspiration rather than a rule. This was to become an increasing source of friction with his manager, Mr Adamson. While I accept that the Respondent's witnesses placed excessive emphasis on the need for Claimant to be in at 7am so that the trading book could be passed from Hong Kong and inaccurately suggested this allowed the Hong Kong traders to leave work (this contention failing to take into account the time difference which means that Hong Kong traders would not be about to leave work at 7am UK time) and on the requirement for the Claimant to be at the morning meeting with other currency traders (a point that was not raised in his appraisals at the time), I do accept that the Respondent considered that the Claimant should attend work on time, even if he was working unsocial hours, and that this was a genuine cause of dispute with Mr Adamson.

51. In August 2015 a draft Global FX policy was circulated to manager. This was designed to meet tightening regulatory requirements.

52. On 21 September 2015 Mr Adamson told the Claimant in a Bloomberg chat that he needed to be at the office at 7am. The Claimant responded "I know. I am so sorry. I will be coming in ahead of 7am by bike from now on"

53. On 23 October 2015 Mr Monaghan circulated a copy of Global FX policy.

54. On 27 October 2015 Mr Monaghan was in Canada and heard a rumour that the Claimant had been contacted at home and woken up the previous Friday (23 October 2015) and told to get into work. In an email to his team that day Mr Adamson stated "hours of work are 7am to 5pm and we will kindly stick to such".

55. On 28 October 2015 Mr Monaghan said to Mr Adamson in a Bloomberg chat about the Claimant "also one more late arrival after night out and he can expect a written warning". Mr Adamson responded "dealt with". It is notable that the criticism of the Claimant for arriving late to work and the possibility of a written warning was raised before the Claimant had made any of his alleged protected disclosures. I accept that it was a genuine concern.

56. That day Mr Adamson, in a Bloomberg chat with the Claimant, stated "your 9am start got noticed fyi". The Claimant replied "it was 8.06am according to the receipt btw but I hear you". In fact the Uber receipt shows that the Claimant left home at 8.06am and arrived at 8.37am. The Claimant ended the chat by stating "legend will have at noon by the weekend". This was prescient as subsequently a rumour arrose that the Claimant had to be woken up and dragged into work in the afternoon.

57. On 30 October 2015 the Claimant raised various concerns about the Global FX policy by email and Bloomberg chat. His main concern was that parts of the policy seemed unworkable and could prevent him trading successfully. He was also concerned that breach of what he saw as unworkable policy could result in disciplinary action. He was not alone in raising these concerns. He continued to challenge the policy by email on 2 November 2015 noting that the scope for litigation and regulatory action was significant and growing. In a conversation with Mr Monaghan he raised his concern that colleagues in London, Hong Kong and Toronto had not read the policy. In an email on 3 November 2015 he stated "I have concluded that it is not possible to comply with the policy as written and operate as we currently do. I look forward to what comes back." In a Bloomberg chat that day he stated that in a forthcoming meeting he would state that the Global FX policy would make it "impossible to deal at mid, especially in illiquid markets". This was a reference to his trading in emerging market currencies which are illiquid in comparison with G10 currencies.

58. That day Mr Adamson sent an email to Martin Carbin, Director, Compliance, RBC Capital Markets stating "As a heads up before the training starts, the problem we are going to have in the sessions is that the manual is stuck in the middle of descriptive and definitive and allowing traders some leeway … Just a heads up because I can see the session becoming a little heated and tedious!". Mr Adamson's particular concern was that the Claimant was steadily becoming more dogged in his criticisms of the policy. Later that day the Claimant sent an email to a wide range of recipients, including senior managers, stating "I think it VITAL that we have a meeting with all the affected parties".

59. On 5 November 2015 the Claimant sent a further email, again with a wide circulation list, stating "I am gravely concerned that the level of understanding of the implications an effect of the Policy as written are not close to being fully

understood by the Business." He referred to there being "a degree of cognitive dissonance" and stated that regulators were under increasing pressure to raise revenue from fines, produce bankers' "heads on spikes" and adopted an approach of "guilty until proven innocent". He attached a photograph of an Audi with a registration plate "FCA 1" stating "who is going to pay for the upgrade to an R8[2]? Let's make sure it isn't us!".

60. Mr Adamson became concerned that the Claimant was expressing himself in excessively forceful language and displaying antagonism to regulators.

61. Shortly after the Claimant's email was sent, Mr Monaghan sent an email to those who had been party to, or copied into, the discussions, stating "let's take this off-line at 9am please."

62. Sian Hurrell, Head of FICC Europe and Head of FICC Sales Europe replied to Mr Monaghan alone stating "can we discuss?" to which Mr Monaghan replied "nightmare". I accept that this was a reference to the excessively flamboyant manner in which the Claimant was expressing his concerns.

63. On 12 November 2015, Mr Adamson said in an email to Mr Carbin "please don't think a war us agst you guys regardless of John! :). Were nearly there!". Managers were under pressure to get a policy in place that would be consistent with its regulatory obligations.

64. The Respondent operates an annual computerised attestation process in which employees have to state that they have read applicable policies, have abided by them and will abide by them in the future. While carrying out this process in November 2015 the Claimant took many hours to read all of the policies and noted that a hyperlink to the Capital Markets Policy on Personal Trading did not work. He raised this concern to various in the compliance team by email on 18 November 2015 and then completed the attestation process subject to the proviso that he had read a document he had been provided with that had a slightly different title to that on the broken link.

65. A period of half an hour is set aside for each employee to conclude the attestation process. The Claimant adopted an excessively literal approach in argunig that it was necessary to read every policy from beginning to end in order to be able to complete the attestation. Many employees would have read the relevant policies during the course of the year and would need only to satisfy themselves that there had been no significant amendment that was relevant to their work before being able to attest. However, even where the majority of policies had previously been read, checking for new policies and significant amendments would be bound to take a significant period of time; likely to be at least the half hour set aside.

66. On 19 November 2015 Mr Adamson sent an email to the Claimant stating "it's 7:30am - I hope everything is okay … Assuming such - you are putting me in a really difficult position. We start at 7am."

[2] an expensive sports car

67. That day in a Bloomberg chat the Claimant sent some policy documents from JP Morgan to which Mr Adamson stated "JB just leave it … It's being done and you don't need the attention … let Compliance comply". The Claimant stated "the fact that I was in a minority of 1 of people who read the Global Policy, ought to scare the daylights out of everyone". While I accept that the Claimant genuinely believed that many people had not fully read the current draft of the policy it was hyperbole to suggest, as he did by implication, that he was the only person who would read it at all. In the exchange the Claimant was reminded of the 7am start time. I do not accept that this was being done because the Claimant was raising concerns about the Global FX policy. By this stage the Claimant's failure to attend work on time was a long standing cause of friction.

68. At about this time Mr Adamson told the Claimant that he was putting people's noses out of joint. I accept that at this stage this was a reference to forcefulness with which the Claimant was raising his concerns; more than with their content.

69. The Claimant got into a dispute with one of the compliance team who he felt did not properly understand the distinction between "may" and "will" in the context of breaches of the policy leading to disciplinary action.

70. On 23 November 2015 the Claimant sent to usual wide range of recipients further comments on the draft policy stating "Alex price and I have been through the latest draft. Barring obvious typos, our material comments are as follows." In response on 23 November 2015 Mr Carbin stated "in the spirit of what we are trying to achieve here, can we please keep the feedback comments to a limited audience. Further, comments such as "barring obvious typos" are not helpful. I'm sure you'll appreciate we are getting a little "word blind on this policy" …. and I'd be grateful if you could highlight any obvious or not so obvious ones we may miss. Shortly thereafter Thomas Blodgett, Business Manager, FX sent an email stating "let's discuss this tomorrow as a group. Until then I'd asked that the emails stop".

71. Under cross examination the Respondents' witnesses involved in this exchange accepted that there Mr Monaghan Mr Palmer was nothing rude about the Claimant stating "save for obvious typos". However, I consider that at the time they felt he was beginning to antagonise the compliance team by the tone he was adopting. That day Mr Adamson stated in a Bloomberg chat to the Claimant "regardless of your intention do yourself a favour and write the emails with a little bit of respect … be constructive and collaborate with them or do nothing". The Claimant responded "he won't accept major points and wants me to proof read his typos!" That demonstrates the antagonistic approach the Claimant was taking.

72. In a Bloomberg exchange between Mr Monaghan and Mr Adamson on 25 November 2015, referring to a forthcoming meeting about the Global FX policy, Mr Monaghan stated "we need this 3pm to go smoothly… some high-level people interested … we are behind 95% of the street on this". The final comment was a reference to the fact that the Respondent was beginning to lag behind other banks in getting policies in place. Mr Monaghan and Mr Adamson were becoming exasperated by the Claimant's approach. However, Mr

Adamson went on to state in the chat "on the plus side John has sharpened the document up a lot and in hindsight the original versions were terribly loose" to which Mr Monaghan replied "100% agree". I accept that this demonstrates that, at the time, the concern was about the tone rather than the content of the Claimant's contributions to the discussions about the new policy. That day an email was sent stating that the meeting was to be postponed, whereas a meeting went ahead with a smaller group of attendees, excluding the Claimant. This was because it was thought that he would not assist in getting the policy finalised. The Claimant realised the meeting had gone ahead and asked for a meeting with Mrs Hurrell which took place on 26 November 2015. The Claimant continued to raise his concerns about the policy and that people were not reading policies before signing their attestations. At the meeting the Claimant referred to "soul-searching" and said that he felt that he had lost the "passion" he had from making money.

73. On 27 November 2015 Mr Adamson sent an email to the Claimant stating "below are two previous emails both stating the hours of work… its currently 8.13am and you aren't here … We're covering your order books and watching your position is for you… this is fast becoming a problem". Shortly thereafter in a Bloomberg chat Mr Adamson stated "I've asked you at least three times to be in on time – I've told you it gets noticed". The Claimant responded "I'm not trying to take the p. I am truly sorry and last warning noted." To which Mr Adamson stated "well you are and its bolx". The Claimant replied "I am very very sorry and it will not happen again". I do not accept the suggestion that timekeeping was only being raised because the Claimant was raising concerns about the Global FX policy. His timekeeping was a genuine concern and he accepted it as such at the time.

74. Many of the concerns raised by the Claimant and his colleagues were taken into account in the final draft. In a Bloomberg chat of 27 November 2015 the Claimant felt able to state "I think from our perspective, the document is now safe." In cross-examination the Claimant stated "I felt that the concerns had been dealt with, yes, but in truth I had some support from Ms Hurrell in this but Mr Monaghan was being very obstructive along the process. He just wanted it completed so that it didn't matter what the policy said at all." Despite this negativity about Mr Monaghan I consider the Claimant was satisfied with the amended policy.

75. The final version of the Global FX policy was circulated on 1 December 2015.

76. On 3 December 2015 Mr Adamson sent an email to the Claimant at 7.44am Stating "Where are you?". He forwarded the email to Mr Monaghan stating "any suggestions where we go from here?". Mr Monaghan replied in a Bloomberg chat "we will extend probation for three months and if it happens again it will be a formal disciplinary". A meeting was held that day and the Claimant was informed of the extension of his probationary period. In a Bloomberg chat Mr Adamson stated that the Claimant had been apologetic after the meeting. I accept that his poor timekeeping was the genuine reason for the extension of the Claimant's probation. The Claimant did not challenge the extension at the time. I also consider that Mr Monaghan and Mr Adamson considered that if his timekeeping did not improve formal disciplinary action would be required.

77. On Sunday, 13 December 2015, Paul Green, FX Trader, in Hong Kong, who was covering the desk alone in the very early hours of the morning, failed to action call and stop loss orders for Zimbabwean dollars for the Claimant. Initially, Mr Green claimed that he did not see the call order on the system. This was because it had been accidentally removed when the Claimant cancelled some other call orders. The Claimant considered that Mr Green had been incompetent and wished to recover the losses that had been occasioned to his book because of a sudden decrease in the value of the Zimbabwean dollar after a change of finance minister. In comments that the Claimant added to an email on 22 December 2015 he seemed to accept that it was a myth to suggest that there were not enough staff on the desk at the time and that it was essentially a matter of human error.

78. After an off-site meeting in January 2016, Mr Blodgett recorded on 11 January 2016 "to address the gender and minority gaps all new hires will only be approved if they are women, diverse and the right candidate and fit for our clients and RBC". He may have been somewhat overstating an attempt by the Respondent to increase the diversity of their workforce. The Claimant was concerned that it suggested that unlawful positive discrimination in favour of women would take place. However, I do not accept he made any significant disclosure about this issue or that that it had any effect on his eventual dismissal.

79. On 12 January 2016 Al-Karim Ramji, Director, Treasury Management, complained to Mrs Hurrell about the way in which the Claimant had spoken to Cilline Bain, an Analyst in FX Sales. When Mrs Hurrell raised the matter with the Claimant he became annoyed and jabbed his finger at her. Mrs Hurrell told him to stop doing so but, being a robust character, did not take the matter any further. Mrs Hurrell investigated the incident with Mr Bain and concluded that the Claimant had been loud and assertive; but no-one with whom she had discussed the matter felt that he had crossed a line in terms of appropriateness. On 14 January 2016, the Claimant alleged that Mr Ramji had bullied him by making the allegation.

80. In a meeting with Mr Monaghan on 15 January 2016 the Claimant continued to complain about the incident with Mr Bain. The meeting became heated and was overheard colleagues of the Claimant who speculated in Bloomberg chat about the Claimant's future and whether he might "quit".

81. In an email of 15 January 2016 Mrs Hurrell suggested that the fact that she had decided that the Claimant had become heated, although he had not crossed the line, supported Mr Ramji's decision to escalate the matter. The Claimant, wisely, stated that he wished to draw a line under the matter, as a result of which his complaint was not progressed.

82. In a Bloomberg chat with Mr Adamson on 15 January 2016 the Claimant referred to having a conversation "after you fill me in on whatever it is that you have to fill me with re. my ZAR money". This demonstrates that the key concern of the Claimant was that the loss incurred to his book from the Zimbabwean dollar trade should be made good.

83. On 18 January 2016 the Claimant met again with Mr Monaghan and discussed the Hong Kong incident. Mr Monaghan felt the matter was no more than an error in exceptional trading circumstances and felt that the Claimant was making far too much fuss about it. He said words to the effect "do you want me to cut you a cheque?" by which he meant transfer the trading loss from the Claimant's book. He felt that it was irrelevant where the loss was recorded. He made the comment out of exasperation as he was trying to understand what was causing the Claimant to continue to argue. I do not consider that it can be properly said that Mr Monaghan offered the Claimant a "bribe". Mr Monaghan did hope that what he considered to be a genuine trading loss would not be escalated. However, during the meeting it became clear that the Claimant was not going to let the matter lie and on 19 January 2016 Mr Monaghan sent an email to Mr Blodgett stating that the matter should be referred to Operational Risk.

84. The Claimant met with Mrs Hurrell on 18 January 2016 and asked whether there might be an opportunity to move to another trading group. He was very unhappy about the meeting he had attended with Mr Monaghan. Mrs Hurrell was not able to find an alternative role for the Claimant.

85. On 17 February 2016 Mr Adamson asked the Claimant in a Bloomberg chat "can we go back to the closer to arrivals pls … closer to 7. The Claimant responded "Sure. Apologies. I had an Uber cancel on me this mng". At this time Mr Adamson was adopting a relatively soft touch to the Claimant's timekeeping. There are further messages that suggest that it was noticed that the Claimant was late on 19 and 22 February 2016 without action being taken against him.

86. On 26 February 2016, a draft Operational Risk report was circulated. The Claimant made a number of comments alleging that the criticisms that he had raised had not been sufficiently recorded and raised a concern that a client had been caused loss as a result of the incident.

87. The Claimant's extended probationary period ended on 9 March 2016. On 18 March 2016 Mr Adamson sent an email to Mr Monaghan attaching a performance review form with the Claimant's performance against Key Behaviours stating "happy for me to proceed? I am happy". Mr Monaghan approved the decision of Mr Adamson to confirm the Claimant's employment at the end of the extended probationary period. The Claimant accepted in cross examination that the Respondent could, if they had been as upset as he contends by the disclosures he alleges had been made by this stage, have simply decided not to confirm his employment. They did not do so. I do not consider that any disclosures made by the Claimant prior to this date had a significant impact on the eventual decision to dismiss him.

88. On 22 March 2016 Vanessa Gibson, Vice President, European FX Sales made a pricing error leading to a loss on the Claimant's book. The Claimant complained to Mr Monaghan who told him that he should send an email to Alex Price, Managing Director, Head of FX Sales, Europe. Ms Gibson heard about the complaint and came over to the Claimant's desk, and alleged that the Claimant had been "extremely aggressive to her all day". The next day the Claimant met with Mr Adamson and Ms Gibson, who retracted the accusation

of him “being aggressive all day” but said she felt he was “being underlyingly aggressive to her all morning”. The Claimant was extremely upset by the complaint. By 23 March 2016 Ms Gibson had sent the Claimant an email stating “I take back my comments from yesterday evening and this morning referring to your “aggressive tone” and hope that we can bury this to move on and work together”. The Claimant responded that the retraction was not sufficient. Ms Gibson responded that she took back: “yesterday’s comment accusing you of being aggressive all day, this morning comment of an aggressive underlying tone”.

89. On 23 March 2016 the Claimant met with Urmilla Devitt, Head of Employee Relations, British Isles, Europe and Asia Pacific. Mrs Devitt suggested that the matter would best be dealt with informally. She suggested that the Claimant meet with Ms Gibson and Mr Price so that the apology could be reiterated. In a text exchange on 24 March 2016 Mr Adamson noted that Mrs Devitt had said that she felt that the Claimant was “aggressive and extremely condescending” towards her in the meeting.

90. The Claimant met with Ms Gibson and Mr Price on 24 March 2016. Ms Gibson reiterated her apology. She said that she felt that the Claimant could be abrupt to which the Claimant responded that he could be abrupt “in the face of incompetence”. Mr Price brought the meeting to an end to avoid further argument.

91. After the meeting the Claimant stated that he required written confirmation that he did not act unprofessionally and that Ms Gibson would not make further allegations against him. Ms Gibson was advised by HR not to respond further in writing. On 29 March 2016 the Claimant raised a formal grievance. Mr Adamson, Mr Monaghan and Mrs Devitt understandably considered that the Claimant’s response was disproportionate. His refusal to accept the retractions made by Ms Gibson and the forceful approach he took in meetings and correspondence resulted in Mrs Devitt forming a very negative opinion of him that continued for the remainder of his employment. He lost the goodwill of the HR and ER teams.

92. The Claimant submitted a formal grievance against Ms Gibson on 29 March 2016.

93. On 30 March 2016, Michael Flood FICC Compliance Advisor sent an email to staff asking that they sign a declaration in respect of the US provision ,SEC 15a-6, dealing with trading securities. The Claimant challenged whether it was appropriate for him to sign as he did not trade securities. In a text exchange on 1 April 2016 Mr Adamson said of the Claimant “he’s not wrong on this compliance thing either… usual abrasive manner not wrong”. Mr Monaghan replied “I must agree. I will take that one up when back”. On April 1 2016 an agreement was reached that FX staff would not be required to sign the document. Both Mr Adamson and Mr Monaghan thought that the Claimant had made a good point. His raising of the SEC 15a-6 issue had nothing whatsoever to do with his eventual dismissal

94. On 31 March 2016 Mr Adamson sent an email to the Claimant stating "you are the only person in FX that doesn't live to the 7am start. It's 7.26 now. Please can we keep some sort of formal timekeeping." Mr Adamson continue to adopt a relatively light touch to monitoring the Claimant's timekeeping.

95. On 4 April 2016 the Claimant sent an email to Mr Adamson stating "apologies. I have been finding the pillow magnet turned up pretty strong recently… I will make more of an effort, to physically turn up earlier in the office." It is clear that at this stage the Claimant's late attendance was an irritant to Mr Adamson, rather than a matter of fundamental importance.

96. On 5 April 2016 the Claimant attended a grievance hearing about the Gibson incident with Sean Taor, Head of Europe Debt Capital Markets and Syndicate who was supported by Sophie Constable, Employee Relations Specialist. The record of the meeting shows that Ms Constable felt that the Claimant was not listening to her and she had to tell him to stop raising his hand.

97. On 6 April 2016 Mr Adamson sent an email to the Claimant at 7.33 stating "there is no ONE rule for you and ONE for the rest of us. This is crap John…. Get to work on time and stop taking the piss". This indicates that Mr Adamson was now beginning to lose patience with the Claimant. In fact, the Claimant had been to client meeting and it was agreed that the email should be ignored

98. On 7 April 2016, Jonathan Hunter, Global Head of FICC, held a town hall meeting that staff could attend remotely from their desks. Mr Hunter stated that it was not acceptable to know that something was wrong and to say nothing. He stated "don't ask, don't tell will not be tolerated".

99. On 11 April 2016 the Claimant sent an email to Mr Hunter, copied to Mr Monaghan and Mrs Hurrell ("the DADT email"). He stated:

> **From:** Banerjee, John
> **Sent:** 11 April 2016 07:27
> **To:** Hunter, Jonathan
> **Cc:** Monaghan, Ed; Hurrell, Sian
> **Subject:** "Don't ask, don't tell, will not be tolerated."
>
> Dear Jonathan,
>
> During the Town Hall meeting on Thursday, you implored us to speak up, specifically saying that it is not acceptable to know something is wrong and say nothing. "Don't ask, don't tell, will not be tolerated." However, there wasn't so much as a single question at the end of your speech.
>
> You subsequently asked us to write to you. I am taking you at your word to write this mail regarding the box-ticking culture across the Bank and to explain why it is dangerous for the Bank's shareholders, the Bank's Employees and indeed not just the Bank's Clients but the wider financial system.
>
> **What is the nature of the problem?**

There seems to be a widespread belief within RBC that so long as the motions appear to have been gone through and appropriate boxes are ticked, that this reduces risks. It doesn't. In fact, all it does it create a false sense of security. Many behaviours from Compliance are the epitome of this.

I'll give one example of how, as a Firm, we appear to be doing the right thing from a Regulatory point of view, but almost every single person across the Firm is not doing the right thing - and the Compliance Department knows this and through its actions and inaction, condones it. Consider the Annual Compliance Attestation. In the online My Learning website, the course accounts for 1/2 hour of learning credit (i.e. the process is not meant to take more than 30 minutes). This is a compulsory course where the task is to attest that the employee has read and understood a number of policies, has adhered to the policies and will adhere to them in the future. There are 8 questions and approximately 3 policies per question. Some of the policies are less than 10 pages; Some are well over 100 pages. In any case, the idea that anyone could read well over 20 policies in 30 minutes is obviously ridiculous. When I speak to my colleagues, the average time taken to do the Annual Attestation is somewhere significantly less than 3 minutes (most of this time being spent logging in etc). My colleagues tell me that they view the Annual Attestation very similarly to the Terms and Conditions on an Apple iPhone software upgrade: Do I agree with the T&C's straight away and retain use of my phone, or do I spend a very long time reading the T&C's and then choose either to agree to them anyway or turn my phone in to a brick? Most everyone just cuts out the long (dull) read and presses 'Agree'. My colleagues (including some very senior ones) are of the opinion that the Annual Attestation is very much the same as Apple T&C's - 'Answer all the questions in the Affirmative, or lose your job at RBC' - 'What is the point of wasting one's time: Just click YES and get on with things'.

Do I have any evidence to support my assertions?

Yes I do. I was a little later than I was anticipating in completing my 2015 Annual Compliance Attestation, as it wasn't the 30 min exercise it was advertised as being. It took me a number of days to read all the policies. When it came to the second policy in Question 4, I clicked on the link but it gave me an Error 404 Page not Found. I looked for the Policy on the intranet and found a guide to the Policy. I read this guide, but it also clearly stated that this guide should be read in conjunction with the full Policy and it gave a hyperlink to the full Policy, which also did not work. I had read a paper copy of the Policy before joining the Bank in June, but if there had been any changes to the Policy, obviously I would be unaware of them. So, I wrote a disclosure to the Compliance Department on 18NOV2015 stating that I hadn't read the actual Policy, but detailing the steps I had gone to in order to try to comply.

A few days later I was thanked for pointing out the broken link by Compliance (they were going to have it fixed). I called them to ask how many employees globally had pointed out the broken link; I was the only one. I asked if Compliance Staff are required to complete the Annual Attestation (they are) and how many Compliance staff pointed out the broken link. The answer was, I was still the only person to inform them about the broken links. We can reasonably conclude that no one read the latest version (apart from possibly new joiners who have read printed copies of the latest version of the Policy, and the Compliance Officers who wrote the Policy), across the Firm. If this is the case with the policy with the broken link, is it unreasonable to think the position would be substantially different with all the other policies?

Why is this a bad thing?

When you have a false sense of security, you are invariably headed for trouble. In a survey conducted by Professor Carl Ettinger* (a leading American authority on snow sports injuries), he found that 35% of ski and snowboard fatalities, as well as the same proportion of those suffering serious head injuries, were wearing helmets. Conversely, at the time of the survey, only 15% of of injured skiers overall were using a helmet. From this, Prof. Ettinger concludes not that helmets cause bad injuries, but that the sense of safety they may engender may lead to behaviour that leads to more serious accidents. A 'box-ticking' culture which merely pays lip-service to values or Regulations, does the same thing in the Financial Services industry. If we merely pay lip-service to regulations, or create a Compliance burden which is

impossible to shoulder, by shifting unnecessary risks to Employees, we are not 'covering the Firm' or in any way making the Firm or the system safer. The reality is the inverse; We are creating the same conditions which caused the Global Financial Crisis in the first place. This is not good for the Shareholders, it is not good for the Employees, its not good for our Clients and it is not even, ultimately good for Officers in the Compliance Department. It is bad for every stakeholder in the Bank, including the communities we live in.

100. The Claimant then gave three specific examples; the Global FX policy, the Hong Kong Operational Risk investigation and the SEC 15a-16 issue. The Claimant concluded:

> **How can we fix these issues?**
>
> The proliferation of policies is to some degree inevitable given the Regulatory backdrop. However, if we change our approach to Compliance, we can at least make sure that the policies people are asked to read and understand are applicable to them.
>
> I note the 2016 Annual Compliance Attestation is also a very similar format to the 2015 Attestation, and is also considered as a 30 minute exercise. This is to my knowledge, the minimum time unit for any course on the Bank's My Learning website. Clearly nothing has been learned from last year.
>
> Regulators will be looking for new 'customers' and the FCA for one has a policy that they will increase fines for institutions that commit similar offences to ones that they have already fined other institutions for.
>
> What is needed is a root and branch change in attitude to Compliance. I have some ideas as to how to do this and would love to discuss them.

101. The Claimant's primary contention was that there was a box ticking culture as a result of which it was likely that a significant number of employees were attesting to having read policies that they had not read carefully, or at all, as a result of which there was likelihood that the bank would fail to comply with fundamental FCA and other legally binding regulatory requirements, of the type introduced to prevent a recurrence of the financial crisis.

102. Shortly after receiving the DADT email Mr Monaghan forwarded it to Mrs Devitt. When asked why he did this in cross examination Mr Monaghan said: "It had the tinge of whistle-blowing and I wanted to make sure it was not just stopped".

103. Mrs Devitt organised a discussion with Mr Monaghan and Mrs Hurrell. Mrs Devitt forwarded the DADT email to Richard Sheldon, Chief Compliance Officer, Europe and Asia and Jeremy Thomas, Head, Capital Markets Compliance Europe, whom she met with that day.

104. Mr Hunter forwarded the DADT email to Howard Plotkin, Head of US Compliance and David Lang, Managing Director, Global Compliance, RBC Capital Markets, Investor & Treasury Services and Wealth Management, Canada and Australia. Mr Sheldon confirmed to Mr Hunter, copied to David Thomas, that he and Mrs Devitt had decided to appoint Adrian Palmer, Head of Internal Audit, UK, as investigator and to treat the matter as a formal WB complaint.

105. Francine Blackburn, then Executive Vice President & Chief Compliance Officer, noted that the email appeared to be a criticism of both UK and Canadian Compliance and asked to meet Mr Lang and Mr Sheldon.

106. The DADT email was circulated to some of the most senior managers at the Respondent almost immediately after its receipt. There was a hive of activity. However, there are no notes of the meetings and discussions. A central issue is whether the activity was focused on genuinely investigating a whistleblowing complaint; or shutting it down.

107. Later that day Mr Hunter responded to the Claimant “thx very much for your email. I will do some digging on this point and revert to you. John, I really appreciate you bringing this to my attention and will revert in due course.” Again, much turns on how genuine this response was.

108. On 14 April 2016 Mr Palmer had a number of discussions about the Claimant’s DADT email with senior managers including his manager, Gladys Griffiths, Global Head of Capital Markets Audit, Mr Hunter, Robert Guignard, Chief Audit Executive, Michael Percy-Robb, Vice President, Internal Audit, Canada, David Thomas, Chief Executive Officer, RBC Europe. Mr Palmer made notes of his conversations on a printout of an email exchange about the DADT email. The notes start with comments from Mr Hunter who is recorded as stating:

> “"Used Town Hall. I don't know this guy. A bit of a blowhard. Been with us a year, no performance issues. Doing an okay job but some question about long-term producer."

109. The Chambers Dictionary defines a “blowhard” as a “boastful or loudmouthed person”. This pejorative description of the Claimant does not fit well Mr Hunter’s apparently positive response to the DADT email.

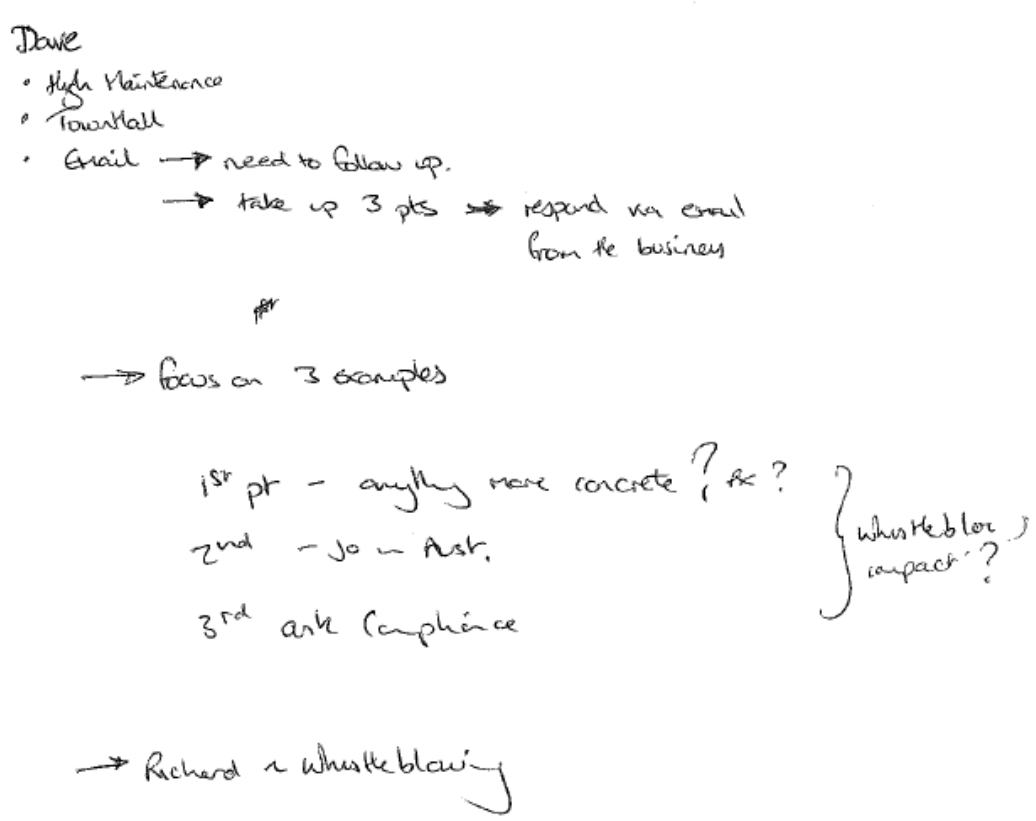
110. There is a note referring to “whistleblowing” and to the board and regulator. Mr Palmer said in cross examination:

> “I think that was notes from the meeting I had with the internal audit people, Griffiths, Guignard and Percy-Robb, from memory. And it was a question they were asking me, what the process is. You know, what is the policy, procedure? Does the whistleblowing get reported to the board? Does it get reported to the regulator?”

111. It is apparent that from the outset there was a concern that the matter might have to be reported to the board and, possibly the regulator.

112. There is a note “Who in EL looking at court possibility?”. Mr Palmer suggested that EL was an abbreviation for RBC Europe Limited. I accept the suggestion put to Mr Palmer in cross examination that EL was a reference to external legal. There was a note "court possibility". Mr Palmer stated “I think it was a question, and I'm guessing it was from Percy-Robb because that's the sort of thing he would ask, about who within the London business would be considering how far this would go. So he was just thinking forward.” Mr Palmer "How do we structure 'review' given future possibilities?" When Mr Palmer was asked why he used inverted commas around the word review he stated “Yeah, well, there is no reason”. I reject his evidence and hold that the use of the inverted commas around the word review suggested that it would be a full review in name only. A further note recorded “court possibility”. When asked whether there was an anticipation of litigation Mr Palmer said “Well, I -- I guess so”. I find that litigation was at the forefront of the minds of Mr Palmer and the senior managers he discussed the matter with. This was the context of the comments “"Don't know what dealing with" and “Who is involved, Legal?”.

113. There is a separate set of notes of Mr Palmer's discussion with his manager Mr David Thomas:



114. This shows a decision being taken to limit the investigation to 3 specific examples given by the Claimant rather the general, and most important, complaint that the Claimant made of a box ticking culture that was likely to lead to failures in regulatory compliance.

115. Mr Palmer states at paragraphs 15 and 16 of his witness statement:

> "My initial thought from reviewing the 11 April Email was that it would be difficult for me to investigate Mr Banerjee's general proposition that RBC had a "box-ticking culture", as that was too broad and subjective an issue. Therefore, I considered that it would be better to focus on addressing three of the examples Mr Banerjee had given in the 11 April Email. In particular, I decided to focus my investigations on the FX Policy Review, the Hong Kong Incident and the US Questionnaire.
>
> I did not consider that it would be possible to properly investigate Mr Banerjee's example which related to the Annual Attestation process. I could have checked the length of time that individuals were logged on to undertake the Annual Attestation. However, I did not believe checking this would really evidence anything as the length of time a screen was open would not necessarily correlate to the time taken to complete the attestation. I also considered that interviewing a sample of employees would not be conclusive as their responses to an Internal Audit officer may not necessarily be reflective of the actual position. I therefore considered that this example could not be investigated in a way that I would be able to draw firm conclusions."

116. Mr Palmer's first decision, led by Mr David Thomas, was not to investigate the Claimant's primary concern. When asked in cross-examination whether he had told the Claimant that he was limiting his investigation, he said "I didn't think it was particularly necessary at that point in time, and I had only just started the investigation. So that was my thinking at that time. And it may well have changed. It didn't, but it could have done" . I do not consider that was any realistic chance on this approach changing. The decision was to shut down the complaint. There were numerous ways in which the allegation of a box ticking culture could have been investigated. While the time taken to complete attestation only gives some indication of the extent to which policies have been read, as they might have been read previously, if analysis of the data showed, as the Claimant was contesting, that many members of staff only took a couple of minutes to complete attestation, this would strongly suggest that they could not have even checked whether they had previously read the policies or whether they had been updated. A sample of employees could have been selected for interview. They could have been asked how they went about ensuring that they were up to date with the bank's policies and were meeting regulatory requirements. The Claimant's statement that he had been told that attestation could be treated like ticking the box to accept terms when upgrading mobile phone software could have been investigated. When asked whether this could have been investigated Mr Palmer stated "In hindsight, yes, I could have done that." I hold that the bank wanted to avoid any investigation of a complaint that suggested that there was a systemic failure to ensure that policies had been fully read and understood.

117. In the meantime, on 12 April 2016, Mr Taor handed the Claimant the Gibson grievance outcome. The Claimant had antagonised Ms Constable and Ms Devitt during the Gibson grievance. Mrs Devitt stated in a text that Mr Taor had said the Claimant was "a particularly odious character". Ms Constable referred to him as a "horrid man". I do not consider those descriptions arose from the DADT email but were a result of how they felt the Claimant had progressed the Gibson grievance. However, it did have the consequence that HR and ER viewed him in a negative light and were in no hurry to suggest that the bank need comply with its policies when dealing with him.

118. On 13 April 2016 Mr Adamson sent a text to Mr Monaghan stating that the Claimant had engaged in a transaction that could have resulted in a loss of "180k". Mr Adamson sent an email to the team that day stating that exposure to loss should be limited to "100k".

119. On 18 April 2016 the Claimant appealed the Gibson grievance outcome.

120. On 19 April 2016 Mr Palmer sent an email to Mrs Devitt referring to having spoken to Mr David Thomas and Mr Sheldon and stating that "our initial approach" was to look at three examples. In rspect of the first example he stated "I will discuss the list of questions with Dave". This shows that Mr Palmer was not acting independently.

121. On 19 April 2016 Mr Hunt sent an email to the Claimant stating that the matters he had raised would be investigated by an independent party and concluding, disingenuously, "thank you once again for bringing your concerns to my attention".

122. On 22 April 2016 Mr Adamson sent the Claimant an email stating “7.40 arrival this mrng,.,. you’re putting me in a difficult situation… we start at 7am.”

123. On 22 April 2016 Mr Monaghan decided to issue a written warning to Mr Green in respect of the Hong Kong stoploss incident.

124. On 25 April 2000 in a Bloomberg chat the Claimant stated that he had been invited to a meeting with the head of internal audit; to which Mr Adamson responded “humility and professionalism would be my advice for a starting block and go from there. Constructive assistance … However don’t forget Joe Pesci assumed he was going to be made up”. This was a reference to the film Goodfellas in which Mr Pesci’s character, Tommy DeVito, believes he is attending a meeting to be made up in the Mafia, but is murdered. Mr Adamson was well aware that the Claimant was putting himself in harm’s way. The Claimant, by contrast, naïvely believed his concerns were being taken seriously and stated “It seems to me that the points made are finding an audience (at last)”.

125. On 27 April 2016 the Claimant attended his first meeting with Mr Palmer. He reiterated his concerns about the box ticking culture. Mr Palmer did not take the opportunity to tell the Claimant that he was only going to investigate the specific examples that the Claimant had given.

126. On 28 April 2016 the Claimant attended the appeal hearing of the Gibson grievance with Mr David Thomas. In a text exchange after the meeting Ms Constable referred to the Claimant as a “creep”.

127. The Claimant underwent midyear appraisal in May 2016. There was no reference to his timekeeping. This is because although it was considered to be a significant irritant it was not thought to be of fundamental importance at the time.

128. On 5 May 2016 the Claimant was provided with the Gibson grievance outcome. His appeal was dismissed.

129. In a text exchange on 10 May 2016, Mr Monaghan wrote “he was late again today? Documented? to which Mr Adamson responded “7.10”. Mr Monaghan asked “Is that late?” to which Mr Adamson replied “Yes, by 10 mins”. Mr Monaghan replied “Document”. The exchanges are telling. Had Mr Monaghan previously thought that the Claimant’s late attendance was of fundamental importance he would have known his start time. I consider that he was instructing Mr Adamson to document the Claimant’s late attendance as he was beginning to think that it might provide an opportunity to deal with the Claimant, whose DADT complaint was making waves.

130. Mr Adamson wrote to the team by email that day stating “can we please make sure going forward we are all in work by 7am as a rule”.

131. The final Operational Risk Report into the Hong Kong stop loss event was produced on 10 May 2016. Mr Monaghan treated it as bringing the matter to an end.

132. On 11 May 2016 Mr Adamson sent an email to the Claimant stating “are you kidding me? It’s 7.25 now.”

133. On 12 May 2016 the Claimant attended a second meeting with Mr Palmer about DADT. The Claimant spent most of the meeting complaining about the Operational Risk report.

134. On 13 May 2016 Mr Adamson sent an email to the Claimant stating “why are you doing this? You’re making things very difficult for me.” Mr Adamson forwarded the recent timekeeping emails to Mr Monaghan. Mr Monaghan then forwarded the emails to Emma Dunlop, Senior HR Business Partner, Capital Markets, Mrs Devitt, Mrs Hurrell and David Thomas. He was clearly thinking of using the emails to instigate action against the Claimant. Mr Adamson exchanged texts with Mr Monaghan stating “sent you two email strings. I think enough rope has been let out especially after Mondays email.” At 8.46am the Claimant’s partner sent an email stating “John will not be attending work today as he has been coughing blood and has gone back to the hospital”. Mr Adamson entered into a further exchange with Mr Monaghan stating “when I think most of the cynics amongst us think he had a late Thursday night and he hasn’t replied to any of my emails asking how hospital went etc”. This cynical response to the Claimant’s illness does reflect the fact that Mr Adamson was genuinely getting very irritated by the Claimant’s late attendance. He accepted in his evidence that the Claimant had, in fact, been unwell.

135. The Claimant met with Myriam Meyer, Head of Human Resources, EMEA, on 16 May 2016. She asked whether there was any underlying cause for the Claimant’s late attendance and about his ill health. The Claimant said there was no underlying cause. Nonetheless, Miss Meyer suggested that Mr Adamson should go easy on the Claimant with timekeeping emails.

136. During the Claimant’s appraisal process in 2016 Mr Monaghan asked Mr Adamson to tone down the superlatives; which he did. In the Claimant’s comments in the appraisal form he repeated many of his complaints made in the DADT email. In the final version he referred to the alleged bribery on the part of Mr Monaghan. However this final version was not seen by Mr Monaghan.

137. On 23 June 2016, the night of the Brexit vote, the Claimant had a discussion with Mr Monaghan in which Mr Monaghan questioned his trading and the risks that might be involved because of the large currency fluctuations taking place.

138. On 28 June 2016 Mr Palmer provided his report into the DADT investigation to Mr Hunter; summarised in the covering email:

> Please find attached the report of our investigation in to the concerns raised by the London FX trader. We have discussed the relevant sections with Compliance and OR&G, and the memo has been reviewed within Internal Audit.
>
> Our overall conclusion is that there is no evidence that strongly points to any conduct that would support the FX trader's assertion of a "tick box" culture. We also found that, for the examples provided by the FX trader to support this assertion, the controls were in place and were generally effective.

139. By focusing on three specific examples, which had previously been investigated, Mr Palmer was able to suggest that those examples did not support the general allegation of a box ticking culture. In reality, he had done nothing to investigate the Claimant's principal and general allegation of a box ticking culture demonstrated by the way in which annual attestation was dealt with.

140. On 28 June 2016 Mrs Devitt drafted a short email to be sent to the Claimant, who was not provided with a copy of the investigation report. Mr Hunter sent the Claimant the anodyne email she produced:

> John,
>
> I wanted to revert on your below email. Again, thank you for taking the time to raise your concerns to us.
>
> The issues raised in your email have been thoroughly investigated by an independent third party and the review into your concerns is now concluded. As part of that review, opportunities were identified to further strengthen processes and related communications
>
> Thank you once again for your time in bringing these matters to our attention.

141. On 7 July 2016 the Claimant was late for work again. In conjunction with Garrett Clinton, Global Head of FX Options, Mr Adamson wrote the following email to the Claimant:

> John
>
> Please note this email is a final warning before further more formal action is taken regarding persistent tardiness.
>
> On countless occasions I have asked you to be at work for a 7am start. You continually disregard such requests usually appearing around 7.15/7.20 am. On occasion this arrival is much later and it is currently 8.05am and we await your arrival or some contact to let us know your whereabouts. You have been asked countless times to let the desk know if you are delayed so we can arrange cover for your desk – to no avail.
>
> Whilst I appreciate the EM franchise generally has little in the way or orderbook and voice flow, possibly giving the impression your attendance is not important there is no way you will know this whilst not in attendance. I would point out the FX morning meeting takes place at 7.00 daily where no EM input is provided. I find it utterly disrespectful of my wishes and the hours an fx dealer is expected to work. I also find your disregard for hours of work disrespectful to your colleagues who arrive punctually, or make the effort to let others know their whereabouts, and in some cases have to cover for your inattendance.
>
> Your work over the referendum was exceptional and your input across many assets is regarded highly however your lack of reliability and the disregard shown to others nullifies this.
>
> Paul

142. The email was suggested it was a final warning before commencing formal disciplinary action; rather than before dismissal.

143. On 8 July 2016, in a Bloomberg chat, the Claimant referred to Mr Adamson's email of the previous day stating "I read your email and get it. I'm still thinking through the question you posed yesterday TBH… I will think on it or properly… I think I do need to make some changes….can we go out for an hour when I'm back." To which Mr Adamson responded "sure can". This did not suggest that the Claimant was at imminent risk of dismissal.

144. The Claimant was on holiday from 11 to 15 July 2016.

145. On 14 July 2016 Mr Monaghan asked Mr Adamson to come to his office and asked for the material he had in respect of the Claimant. I do not accept Mr Monaghan's evidence that his request was limited to timekeeping. Mr Adamson sent to Mr Monaghan a series of emails with attachments that day about timekeeping, the Gibson saga and SEC 15a-6. The main focus was on timekeeping.

146. On 27 July 2016 the Claimant was late again. This led to a series of emails, in which Mr Adamson challenged him by about his lateness. The Claimant sent an email stating "I wake up pretty early. I need to leave earlier, that's the issue…(and not go round the park just because it's fun on the occasions I do leave early…). Mr Adamson thought that the Claimant was saying that he had been riding round the park on his motorbike that day; although he accepted in evidence that the email suggested it was something he had done in the past. Mr Adamson forwarded the email to Mr Monaghan stating "this is pointless he doesn't care". Mr Adamson then sent the following email to Mr Monaghan:

From: Adamson, Paul
Sent: 27 July 2016 08:52
To: Monaghan, Ed
Subject: RE: Persistent Tardiness

HI
Just to make my position perfectly clear from a desk perspective.

I highly value John's academic and market input and to date his revenue generation from the EM side is good especially in relation to previous chair incumbents .

His disregard/lack of respect for any form of authority as demonstrated many times over the last year, often accompanied by erratic behavior, but particularly evident in requests to arrive at work on time

concerns me especially when transposed to a risk taking environment where risk limits have been imposed. His apparent lack of care as to any action being taken and the perception of being 'above the law' or one rule for some , another for me, continues to undermine both my position and the desk. Furthermore it utterly negates any positive impact from what he does bring to the table.

EG – 'be at work for 7am' but he goes driving round the park instead because its fun. I feel I am having to watch every his every move because I lack trust and I am concerned when I am away next week on annual leave despite it being perfectly plausible he may generate a lot of revenue. I have spoken separately to Garrett to monitor his trading.

Much that it thoroughly disappoints me and I feel the Bank will lose valuable intellectual capital the position has fast become untenable. His lack of care has led to a breakdown of trust.

147. Mr Adamson accepted in evidence that he sent this email of his own behest. He did not allege that he was asked to write the email by anyone else.

148. This email led to email chains in which Mrs Devitt, Ms Meyer, Mrs Hurrell and Mr Monaghan were all of the view that a written warning and/or a disciplinary process was in order. Mrs Devitt raised some concern about such a process stating that "it's more what he will throw in at the hearing" and "just worried where this will go" which she accepted in cross examination was a reference to the possibility of the Claimant raising matters such as DADT.

149. The lights then go out. While this is largely because the protagonists were away from work, by 8 August 2016 Mrs Devitt stated to Kerry Morris, Senior HR Business Partner, Capital Markets by email “things have moved on since this trail”. Mrs Devitt could not explain how things had moved on. When I asked her about this she stated “I really don't know, sir. I don't know what I was referring to other than there was possibly discussions around a disciplinary hearing that didn't happen”.

150. On 10 August 2016 Mr Monaghan and Mr Adamson exchanged texts about the Claimant. Mr Monaghan told Mr Adamson “I will remove you from the conversation when the time comes”. Mr Monaghan was referring to is the dismissal of the Claimant.

151. The Respondent contends that the decision to dismiss the Claimant, without going through any procedure, was taken at a meeting between Mr Monaghan, Mrs Hurrell, Ms Morris and Mrs Devitt on 16 August 2017. There is no record of the meeting. Ms Morris’ note book for this period has been destroyed. Mrs Devitt’s work mobile telephone was wiped in 2017 and only a limited number of messages could be recovered. Mrs Devitt’s personal phone in use at the time was given to her son and was destroyed.

152. Mrs Hurrell and Mrs Devitt in their witness statement rely on the Claimant having breached his loss limit shortly before the meeting being a significant factor in their decision, whereas the Claimant’s dogged pursuit of disclosure has resulted in the provision of records that establish that the breach of the loss limit occurred after the meeting. In the ET3 it was stated that the decision to dismiss the Claimant was taken by Mrs Hurrell; whereas it is now said to have been a decision taken jointly by Mr Monaghan and Mrs Hurrell. Neither Mr Monaghan, Mrs Hurrell or Mrs Devitt could state who first suggested that rather than giving the Claimant a written warning and/or going through a disciplinary process they should move to dismissal without any process. All three have sought to bolster their reason for dismissal by suggesting that the Claimant would be a risk if he remained on the desk. At the time the script for dismissal, record of dismissal meeting and dismissal letter were produced they suggested that the only reason for dismissal was timekeeping. They could not explain why they did not await the return of the Claimant’s line manager, Mr Adamson, before making the decision.

153. Later on 16 August 2016 there was an incident when the Claimant exceeded his loss limit. Mr Monaghan sent him an email reminding him that the loss limit was “100K”. He did not suggest the breach was a disciplinary matter.

154. On 17 August 2016 Ms Morris typed a document designed, falsely, to appear as if had been sent by Mrs Hurrell to her and Mrs Devitt. It was headed Solicitor Client Privileged, Litigation Privileged, Confidential. Mrs Hurrell gave evidence that no lawyers were involved. She could not explain the heading. The document suggested that timekeeping was the reason for dismissal. There was no reference to a breach of the Claimant’s loss limit. A script was produced for a dismissal meeting that again stated that the reason for dismissal was timekeeping.

155. On 18 August 2017 the Claimant attended a meeting with Ms Meyer and Ms Morris. The Claimant was given notice of dismissal and placed on garden leave. The Claimant was given a letter in the following terms:

> **Strictly Private and Confidential**
>
> John Banerjee
> By Hand
>
> 18 August 2016
>
> Dear John
>
> Further to your meeting today, I write to confirm the decision that your employment with RBC be terminated as a result of poor time keeping.
>
> As discussed, your contractual notice period is three months. Notice is being served to you today. You are not required to work your notice period but will be placed on garden leave and will continue to receive your salary and benefits as normal during this time. Your last day as an RBC employee (the Termination Date) will be 18 November 2016.
>
> You have the right to appeal against the decision to terminate your employment. Please submit any appeal to Myriam Meyer, Head of Human Resources Capital Markets within three working days of the date of this letter.

156. There is a record of a Bloomberg chat between colleagues of the Claimant, Harley Farovitch and Stuart Davies, on 19 August 2018, in which Mr Davies stated "'can't say I'm scratching my head – when u basically make so much noise u walk a fine line – as Ed said last night …. he didn't know when to ease off". When Mr Monaghan was asked why Mr Davies said he made such a comment if he did not, Mr Monaghan said "I don't know, you'd have to ask Stuart. That might have been Stuart's view. I can't speak for Stuart". I hold that Mr Monaghan did say that the Claimant had made noise and implied that was the reason he had been dismissed.

157. The Claimant appealed against his dismissal. Mrs Devitt was obstructive when the Claimant sought documents for use in the appeal. Stephen Krag, Chief Financial Officer, Europe, who chaired the appeal, did not interest himself in Claimant's request for disclosure, taking the view that they documentation could only be provided if HR said so. He delegated the investigation to Mrs Devitt who ask a limited number of short questions of Mr Monaghan and Mr Adamson. Mr Adamson stated that he believed the sole reason for the dismissal was the Claimant's timekeeping. He stated in evidence that was his belief at the time. During the investigation Gareth Hughes, Managing Director, Head of Regulatory Compensation. Formerly Head of HR, sent an email to Mrs Devitt on 12 October 2016 asking "what was the trigger for firing him at that time on that day" to which Mrs Devitt replied:

> "there was no specific reason as to why the business decided to pull the trigger the day they did. They had been looking to dismiss for some time and I recall the driving round the park email being the tipping point. They did discuss with MM and ER whether he should be disciplined for

> tardiness, but the view was that he had been informally warned so many times a disciplinary warning would make no difference to his general conduct"

158. When asked about this Mrs Devitt replied obscurely "I'd formed a general view that there was a sequence of events that was driving an increasing view that the situation was becoming untenable."

159. Mr Hughes did not trouble to tell Mr Krag that the bank, while he was head of HR, had been castigated by the Employment Tribunal and Employment Appeal Tribunal in **King v RBC Europe Ltd** [2012] IRLR for its wholly unacceptable practice of dismissing employees without going through any reasonable procedure. Its actions had been described as "unfair and brutal". It does not appear that Mr Hughes had reflected on these criticisms or concluded that it might be a good idea for the bank to change its ways.

160. Unsurprisingly, the Claimant's appeal was dismissed on 10 November 2016.

Analysis

161. I have first considered what was the principle reason for the dismissal of the Claimant. I accept that Mr Adamson had long-standing concerns about the Claimant's failure to attend work on time. By the middle of 2016 he was becoming increasingly impatient with the Claimant. I accept that he wrote the warning email of 7 July 2016 and his email of 27 July 2016 because he was genuinely infuriated by the Claimant's tardiness.

162. However, I do not consider that the Claimant's tardiness was the principal reason for his dismissal. It was after the Claimant's DADT email that Mr Monaghan became interested in the Claimant's late arrival and instructed Mr Adamson to monitor him. The Respondent was beginning to look for a way of dismissing the Claimant.

163. Had it not been for the DADT email the Claimant's late arrival on 27 July 2017 would have been likely to result in a disciplinary process leading to a written warning. What changed this to dismissal, without process, was the Claimant sending the DADT email. I consider that was the principal reason for his dismissal.

164. After the Claimant sent the DADT email the Respondent looked for an opportunity to be rid of him. I consider this inference is clearly to be drawn on analysis of the evidence. The Respondent's disingenuous attempts to explain their decision making process, and their deliberate decision not to properly record it, makes it clear that tardiness was not the real reason for dismissal. Mr Monaghan gave the game away the day after the dismissal, telling the Claimant's colleagues that he had "made too much noise". The Claimant "made noise" by sending the DADT email.

165. The Respondent's witnesses sought to bolster their inadequate reason for dismissal by suggesting that the Claimant had exceeded his loss limit just before the decision to dismiss was taken; whereas the evidence shows that the loss occurred after the decision had been taken.

166. Mrs Devitt told no more than the truth when she said that the business had been looking to dismiss the Claimant for some time.

167. What was it about the DADT email that resulted in the Claimant's dismissal? I consider that the Claimant's suggestion that the attestation records showed that many employees were only spending a few moments completing the form rang alarm bells. While I accept that staff might read policies during the course of the year and could relatively swiftly check whether there were any new, or significantly, amended policies, this would not take a couple of minutes, but at least the half hour set aside for attestation. Rather than undertaking a proper investigation the Respondent shut the complaint down and deliberately failed to tell the Claimant that they were doing so.

168. The Claimant's is dogged in the extreme and, on occasions, chose the wrong battles to fight. No doubt, he was a thorn in the side of his management. Most people choose to stay silent when something is wrong, as they want a quiet life. Those who blow the whistle must have remarkable and, at times, exhausting determination. Employers should take that into account when looking at whistle blowing complaints and ensure that they protect genuine whistle-blowers, even if they find them somewhat enervating.

169. In telling the Respondent that staff had said that they were completing annual attestation in about 3 minutes, the Claimant was making a disclosure of information. I consider that was information that in his reasonable belief tended to show a breach of a legal obligation; in that he reasonably believed that if staff were not properly reading the company's policy they were likely to breach legally binding FCA regulatory requirements and their own contractual obligations to read and abide by the bank's policies. To make that disclosure was clearly in the public interest. If bankers are not reading important policies, and so may breach regulatory requirements, that is of the utmost public interest. The public have the greatest interest in banks avoiding a further financial crisis in which the general public would suffer, as they did in the last.

170. I consider that there is a clear inference to be drawn that the Claimant was dismissed for making a public interest disclosure.

171. I accept that, unusually, the Claimant, notwithstanding the bank's egregious actions, bears an element of responsibility for his dismissal, because of his persistent failure to attend work on time, despite his repeated protestations that he would do so. I consider that he contributed to his dismissal by 25%.

172. Absent the protected disclosure I consider it is likely that the Respondent would have entered into a disciplinary process that might have resulted in a written warning. However, I do not consider that it would have led to dismissal and do not consider it appropriate to reduce the Claimant's compensation on the basis that he would, or might have been, dismissed, absent his protected disclosure.

173. The Respondent dismissed the Claimant without the slightest attempt to adopt a fair process in circumstances where they have been told by the Employment Tribunal and the Employment Appeal Tribunal that to do so is totally unacceptable. This is a case that manifestly warrants an uplift for failure to comply with the ACAS Code of Conduct of the maximum 25%.

Employment Judge Tayler

16 May 2018

.